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FIRST PART

OF THE

Institutes of the Laws of England;

OR, A

COMMENTARY UPON LITTLETON.

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D. B. Bruce
1824

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NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF.

Part 1, (Vol. 2)

Quid te vana juvánt miseræ ludibria chartæ?
Hoc lege, quod possis dicere jure,—meum est. MART.

Major hæreditas venit unicuique nostrum à jure et legibus, quàm à parentibus. CICERO.

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR,

AUTHORE EDWARDO COKE, MILITE.

REVISED AND CORRECTED

With Additions of NOTES, REFERENCES, and PROPER TABLES,

By FRANCIS HARGRAVE and CHARLES BUTLER, Esqrs. of *Lincoln's Inn*,

INCLUDING ALSO

The NOTES of Lord Chief Justice HALE and Lord Chancellor NOTTINGHAM;

AND

An ANALYSIS of LITTLETON, written by an unknown Hand in 1658-9.

BY CHARLES BUTLER, ESQ.

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THE

FIRST PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND. (1)

THE THIRD BOOK.

Chap. 1. Of Parceners. Sect. 241.

PARCENERS are of two sorts, to wit; parceners according to the course of the common law, and parceners according to the custome. Parceners after the course of the common law are, where a man, or woman, seised of certaine lands or tenements in fee simple or in taile, hath no issue but

(1) In the vellum MSS. of Littleton, belonging to the public library at Cambridge, there is the following argument or introduction to this third book: "En cest tierce liver ascun chose sera dit a toy, mon fitz, de parceners, " de jointenantez, de tenantez in comen, de estatez de terrez et tenementez " sur condition, de discentez que tollount entrez, de continuell clayme, de " releissez et confirmationz, de garrantiez liniall et collaterall et de garrantiez " que comensont per disseisin, de attornament, de *surrenderons*, de discon- " tinuance, de remitterez, de *tenant per elegit*, de *tenant per estatut merchant*, " de *tenant per estatut de la staple, &c.*"

On this addition to the printed copies of Littleton, sir William Jones, who kindly favoured me with the readings from the two Cambridge manuscripts, writes this observation.—" It is very remarkable, that in this argument a " Chapter is promised concerning *surrenders*, of which Littleton has not ex- " pressly and separately treated. The word *surrenderons*, which is abbreviated " by the transcriber, seems completely to have puzzled a former owner of " the manuscript. He says in the margin, *ceste parole est en auter fragment* " *que jeo ay: quære ce que il signifie.* Since then *surrenders* are mentioned " in two manuscripts as one of the heads of the third book; it is not impro- " bable, that the author intended to have written a distinct chapter concerning " them, as he did write concerning *tenants by* ELEGIT, and by STATUTE " MERCHANT and STAPLE."—See Sect. 324, where Littleton refers to a Chapter on *elegits*.—[Note 1.]

but daughters, and dieth, and the tenements descend to the issues (2), *and the daughters enter into the lands or tenements so descended to them, then they are called parceners, and be but one heire to their ancestor* (Parceners solonque le course del common ley sont, lou home, ou feme, seisie de certaine terres ou tenements en fee simple ou en taile, n'ad issue forsque files, et devie, et les tenements discendont a les issues, et les files entront en les terres ou tenements issint discendus a eux, donques els sont appels parceners, et quaunt a files els sont (1) * forsque un heire a lour ancestor): *And they are called parceners*; *because by the writ, which is called* breve de participatione faciendâ, *the law will constraine them, that partition shall be made among them. And if there be two daughters to whom the land descendeth, then they be called two parceners*; *and if there be three daughters, they be called three parceners*; *and four daughters, four parceners*; *and so forth* (2) †.

OUR author having treated in his two former bookes, first of estates of lands and tenements, and in his second booke of tenures whereby the same have beene holden, now in his third booke doth teach us divers things concerning both of them; as, 1. The qualities of their estates. 2. In what cases the entry of him that right hath may be taken away. 3. The remedies, and in what cases the same may be prevented, or avoyded. 4. How a man may be barred of his right for ever, and in what cases the same may be prevented or avoyded.

For the first, he, having spoken of sole estates, divideth the quality of estates into individed and conditionall. Individed, into coparcenary, joyntenancy, and tenancy in common. Coparcenary into parceners by the ☞ common law, and parceners by the custome; and he beginneth his third book with parceners claiming by descent, which, comming by the act of law and right of bloud, is the noblest and worthiest meanes whereby lands do fall from one to another. Conditional, into conditions expresse or in deed, and conditions in law. Conditions in deed, into gages; which he divideth into *vadia mortua* and *vadia viva*. *Vadia mortua*, so called because either money or land may be lost: and *viva*, because neither money nor land can be lost, but both preserved. Then speaketh he of descents, wherby the entry of him that right hath may be taken away. And next to that of the remedy how to prevent the same, viz. by continuall claim. Then he teacheth, how a man, having a defeasible or an imperfect estate, may perfect and establish the same by three meanes, viz. by release, by confirmation, and attournment, where that is requisite. Having spoken of a descent, being an act in law which taketh away an entry, he doth then speake of a discontinuance, the act of the party, whereby the entry of them that right have shall be taken away. And next unto that he teacheth in what case the same may be avoided by remitter. After he had treated of descents and discontinuances which take away entries, but bar not actions, lastly, he setteth forth the learning of warranties, (a curious and cunning kind of learning

[163. b.]

Vide Sect. 385.

* † *These are notes* 1, *and* 2, *of* 163. *b. in the* 13*th and* 14*th editions.*

(2) In L. and M. and in Roh. it is *daughters* instead of *issues*.
(1) * See below note 3.
(2) † in L. and M. and in Roh. an *&c.* comes in here.

ing I assure you) whereby both entry, action, and right may be barred, and the remedies how they may be prevented before they fall, and in what cases they may be avoyded after they be fallen. And thus have you an account of the thirteene severall chapters of his third booke. And now his method being understood, let us heare what our author will say unto us concerning parceners.

"*Et quant a files els sont forsque un heire a lour* [*a*] *ancester.*" This is false printed; for the originall is, *et quanque files els sont, els sont parceners, et sont forsque un heire a lour auncestor* (3).

[*a*] Bract. lib. 2. fo. 66. 71, &c. & 76, &c. and lib. 5. fo. 443. Brit. fo. 58. 112. 128. 183, 184, 185. 189. 193. Flet. lib. 5. ca. 9. li. 6. ca. 47. Glan. li. 7. ca. 3. & li. 13. c. 11.

"*Parceners.*" [*b*] *Jus descendit quasi uni hæredi propter juris unitatem, sicut sunt plures filiæ, &c. Et ubi omnes simul et in solidum hæredes sunt, plures cohæredes sunt quasi unum corpus, propter unitatem juris quod habent.* Whereupon it followeth, that albeit where there be two parceners [*c*] they have moities in the lands descended to them, yet are they both but one heyre; and one of them is not the moity of an heire, but both of them are but *unus hæres*.

[*b*] Bract. li. 2. fo. 66. 76. Flet. ubi supr. Brit. ubi sup. & Statut. de Hibern.

And it is to be observed, that there is a diversity betweene a descent, which is an act of the law, and a purchase, which is an act of the party. [*d*] For if a man be seised of lands in fee, and hath issue two daughters, and one of the daughters is attainted of felony, the father dieth both daughters being alive; the one moitie shall descend to the one daughter, and the other moitie shall escheat. But if a man make a lease for life, the remainder to the right heires of *A.* being dead, who hath issue two daughters, whereof the one is attainted of felony; in this case some have said, that the remainder is not good for a moitie, but voyd for the whole, for that both the daughters should have beene (as *Littleton* saith) but one heire (4).

[*c*] Vide Sect. 8. vers. fin.

[*d*] Fleta, lib. 5. ca 9. Fleta, lib. 6. ca. 47.

[164. a.] ☞ A man makes a gift in taile, reserving two shillings rent to himselfe during his life, and if he die his heire within age then reserving a rent of twentie shillings to his heires for ever; he dieth having issue two daughters, the one of full age, the other within age: in this case the donee shall hold by fealty onely, insomuch as the one daughter as well as the other is his heire, and both of them (as *Littleton* saith) make but one heire, *ergo*, his heire is not within age, neither is his heire in that case of full age. But if the reservation had been, "and if he die, his heire neither being within age, nor of full age, "&c." in this case the reservation had beene good. And if it doth not begin in his next heire, it shall never begin as this case is, for that the precedencie is not performed. [*e*] But yet if one of them be of age, and the other within age, she shall have her age and other priviledges and advantages that an heire within age shall have;

(Post. 196. b.)

[*e*] Temps E. 1. Age, 128. 8 E. 2. Judgement, 240. 30 E. 3. 7. 44 E. 3. Age, 47. 26 Ass. 65. 13 E. 3. Age, 51. 28 Ass. 22. 29 Ass. 25. 57. 34 H. 6. 4 Ass. 17.

(3) The words are as here corrected by lord Coke both in L. and M. and in Roh.

(4) See ant. 25. b. 26. b. and post. 196. b. 374. b. Here lord Hale introduces the following note.—*Donee in tail on condition not to discontinue. Donee has issue two daughters. One discontinues. The donor may enter. R. 26 Eliz. C. B. sir W. Moore's case.* Hal. MSS.—[Note 2.]

have; and when they are demandants, for the nonage of the one the paroll shall demurre against them both (1). [*f*] *Sunt autem plures participes quasi unum corpus in eo quòd unum jus habent; et oportet quòd corpus sit integrum, et quòd in nullâ parte sit defectus.* And when the right heire doth claime by purchase, he must be (say they) a compleat right heire in judgement of law (2). And therefore if lands be given to a man and to the heires females of his bodie, and he hath issue a son and a daughter, and dieth, the daughter shall have the land by descent; but if a remainder be limited to the heires females of the bodie of *I. S.* and he hath issue a son and a daughter, his daughter shall never take it by purchase, for that she is not heire female of the body of *I. S.* because he hath a son.

[*f*] Fleta, lib. 5. ca. 9. et lib. 6. cap. 47. (1 Co. 103. 2 Ro. Abr. 416.)

If a man give lands to another, and to the heires males of his body, upon condition, that if he die without heire female of his bodie, that then the donor shall re-enter, this condition is utterly voyd (3), for he cannot have an heire female, so long as he hath an heire male.

And as they be but one heire, and yet severall persons; so have they one entire freehold in the land, as long as it remaines undivided, in respect of any stranger's *præcipe*. [*g*] But betweene themselves to many purposes they have in judgement of law severall freeholds; for the one of them may infeoffe another of them of her part, and make liverie. [*h*] And this coparcenarie is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue, and one *præcipe* shall lie against them, for they shall never joyne as heires to severall ancestors in any action ancestrell, but when one right descends from one ancestor: and then *propter unitatem juris*, though they be in severall degrees from the common ancestor, yet shall they joyne. But the issues of severall coparceners, because severall rights descend, shall never joyne as heires to their mothers; and yet when they have recovered, a writ of partition lieth betweene them.

[*g*] 10 E. 4. 17 E. 3. 46. (Mo. 60.)

[*h*] 37 H. 6. 8. 19 H. 6. 45. (Post. 196. a.)

Vid Sect. 313.

For example, [*i*] If a man hath issue two daughters, and is dis-

[*i*] 7 E. 3. 30. 34. 48 E. 3. 14. 24 E. 3. 13. F. N. B. 221. 35 H. 6. 23. 27 E. 3. 89. 31 H. 6. 14. b.

seised,

(1) But in the writ *de partitione faciendâ* the younger sister shall not have her age against the elder. Post. 171. a.—[Note 3.]

(2) In a former note I have much at length, and as I fear tediously, endeavoured to support lord Coke in this doctrine. Ant. 24. b. note 3. But since the writing of that note a case has been published, in which the court of king's bench, after three arguments, decided against applying the rule to a *will*. See Willes and others *v.* Palmer and others, 5 Burr. 2615. In another case also, which was three times argued, the court of exchequer, as I understand, refused to apply the rule to a *marriage-settlement*. Evans on demise of Burtenshaw *v.* Weston, determined in a special verdict in Scaccar. Mich. 1774, or Hill. 1775. This latter case had been previously determined in B. R. in a case reserved in an ejectment in which Mr. Burtenshaw was defendant, and there too the case was argued three times. In both courts the judgment was against Mr. Burtenshaw. But the question on the construction of *heirs female of the body*, considered as words of *purchase*, was only a *secondary* point; and whether it was debated in B. R. or not, I am not at present informed. After such authorities, it can be scarcely necessary to guard the reader against incautiously adopting my private ideas.—[Note 4.]

(3) As to effect from a condition's being void, see post. 206. a. & b.

seised, and the daughters have issue and die, the issue shall joyne in a *præcipe*; because one right descends from the ancestor; and it maketh no difference, whether the common ancestor, being out of possession, died before the daughters or after, for that in both cases they must make themselves heires to the grandfather which was last seised, and when the issues [*k*] have recovered they are coparceners, and one *præcipe* shall lie against them. And likewise if the issues of two coparceners, which are in by severall descents, be disseised, they shall joyne in assise. But in the same case if the two daughters had beene actually seised, and had beene disseised, after their deceases the issues shall not joyne; because severall rights descended to them from severall ancestors: and yet when they have severally recovered, they are coparceners (4), and one *præcipe* lieth against them, and a release made by one of them to the other is good. And so note a diversitie *inter descensum in capita, et in stirpes.*

[*k*] 37 H. 6. 8. 9 E. 4. 13. b. 42 E. 3. 16, 17. (8 Co. 86. Post. 196. a. 364. b.)

And the statute of *Gloucester*, cap. 6, made *anno* 6 Edw. 1. speaketh *si home murge, &c.* if a man dieth; so as that statute extendeth not but where one dieth, and hath divers heires, whereof one is son or daughter, brother or sister, nephew or neece, and the others be in a further degree, all their heires from henceforth shall have their recoverie by writ of mort-dauncestor. And this seemeth to me to be the common law; for *Bracton*, who writ before this statute, saith, [*l*] *in casu cùm sit assisa mortis antecessoris conjungenda cum consanguinitate, non erit postea recurrendum ad præcipe de consanguinitate, sed ad assisam mortis; quia persona, quæ propinquior est, et facit assisam, et trahit ad se personam et gradum remotiorem ut ubi potius procedat assisa quàm præcipe, quia id, quod est magis remotum, non trahit ad se quod est magis junctum, sed è contrario in omni casu.* And herewith agreeth the most of our [*m*] bookes; and two coparceners shall have a writ of *ayel*, and by their count suppose the common ancestor to be grandfather to the one, and great grandfather to the other (5).

(F.N.B. 195. H.)

[*l*] Bract. lib. 4. 254. b. Brit. fol. 181, 182. & 178. 204. Fleta, lib. 5. cap. 1, et 2, & 9, in fine.

[*m*] 19 E. 3. tit. Joyndre in Action, 31. 7 E. 3. 30, et 34. 27 E. 3. 89.

48 E. 3. 14. 24 E. 3. 13. F. N. B. 221. Register. Vide 32 E. 1. Joindre in Action, 34. 13 E. 3. ibid. 29. Temps E. 2. ib. 35. 30 E. 1. ibid. 36. 25 H. 6. 23.

I have beene the longer herein, for that this inheritance of coparceners is the rarest kind of inheritance that is in the law.

Furthermore it is to be observed that herein also in case of coparceners, [*n*] sometimes the descent is *in stirpes* (viz.) to stockes or roots; and sometime *in capita*, to heads. As if a man hath issue two daughters and dyeth, this descent is *in capita*, viz. that every one shall inherit alike, as *Littleton* here saith.

[*n*] Bracton, lib. 2. 66. Britton, cap. 71. Fleta, lib. 5. cap. 9. et 6. cap. 47.

[164. b.] But if a man hath issue two daughters, and ☞ the eldest daughter hath issue three daughters, and the youngest one daughter, all these foure shall inherit; but the daughter of the youngest shall have as much as the three daughters of the eldest, *ratione stirpium*, and not *ratione capitum*, for in judgement of law every daughter hath a several stocke or root.

Also if a man hath issue two daughters, and the eldest hath issue divers sonnes and divers daughters, and the youngest hath

(4) See the like as to jointenants, post. 188. a.
(5) See F. N. B. 197. B.

hath issue divers daughters, the eldest son of the eldest daughter shall onely inherit; for this descent is not *in capita*, but all the daughters of the youngest shall inherit, and the eldest son is coparcener with the daughters of the youngest, and shall have one moitie (viz.) his mother's part; so that men descending of daughters may be coparceners, as well as women, and shall joyntly implead and be impleaded, as is aforesaid.

[o] 20 E. 2. Nuper ob. 14. F. N. B. 197. 7 E. 3. 13.

[o] If there be two coparceners, and the one bring a *rationabili parte* or a *nuper obiit* against the other, the defendant claime by purchase, and disclaime in the blood, the plaintife shall have a *mortdauncester* against her as a stranger for the whole (1).

Bract. lib. 2. fo. 66. 71, &c. Brit. ca. 71. Fleta, li. 5. ca. 9.

"*Parceners are of two sorts.*" Here *Littleton* doth divide parceners; and herewith do agree the ancient books of law.

"*And they are called parceners, &c.*" Parceners, *participes, et dicuntur participes, quasi partis capaces, sive partem capientes; quia res inter eas est communis ratione plurium personarum.* This tenancie in the ancient books of law is called *adæquatio*, and sometime *familia hirciscunda* (2), an inheritance to be divided; and many times parceners are called coparceners.

"Breve de participatione faciendâ." This is false printed (3), and should be *De partitione faciendâ* (4), a writ whereby the coparceners are compelled to make partition. [p] *Item est alia actio mixta, quæ dicitur actio familiæ hirciscundæ; et locum habet inter eos qui communem habent hæreditatem, &c. Et locum habet, ut videtur, inter cohæredes, ubi agitur de proparte sororum; vel inter alios, ubi res inter partes et cohæredes dividi debeat, sicut sunt plures sorores, quæ sunt quasi unus hæres, vel inter plures fratres, qui sunt quasi unus hæres ratione rei quæ divisibilis est inter plures, masculos, &c.*

[p] Regist. Orig. 76. 316. Regist. Jud. 80. Brit. ubi sup. Flet. ubi sup. Bract. ubi sup. & 5 Co. 443. b.

(Ant. 32. a. 150, 151.)

"*Of lands or tenements.*" It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made between them. Wherein it is to be observed, that of inheritances some be entire and some be severall: againe, of entire, some be divisible, and some be indivisible. And here it appeareth by *Littleton*, that parceners take their appellation, because they are compelled to make partition by writ of *partitione faciendâ*; where, note, that *Littleton* alloweth well to finde out the true derivation of words, as often hath been and shall be observed.

If a villeine descend to two coparceners, this is an entire inheritance; and albeit the villeine himselfe cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one weeke, &c. and the other another day or weeke, &c. And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the Chapter of Dower.

(1) See post. 175. 242. a.
(2) See the verb *hercisco* or *ercisco* used ant. 86. a.
(3) But in L. and M. and in Roh. it is the same.
(4) *Monsieur Houard* derives this writ from the capitulars of the first French kings. 1 Hou. Littl. 318.

Dower (5). Likewise an advowson is an entire inheritance; [q] and yet in effect the same may be divided betweene coparceners, for they may divide it to present by turnes (6).

[q] 13 E. 2. tit. Quar. Imp. 170. 17 E. 3. 38. Flet. li. 5. ca. 9. Mirror, cap. 2. sect. 17.

A rent charge is entire, and against common right; [r] yet may it be divided betweene coparceners, and by act in law the tenant of the land is subject to severall distresses, and partition may be made before seisin of the rent.

[r] 44 E. 3. tit. Partic. 6. & tit. Avowrie, 75. (2 H. 6. fol. 11, Ant. 148. a.)

Entire inheritances not divisible, we finde divers in our bookes; and some inheritances that are divisible, and yet shall not be parted or divided betweene coparceners, as hereafter shall appeare.

[s] If a man have reasonable estovers, as housebote, heybote, &c. appendant to his freehold, they are so entire as they shall not be divided betweene coparceners. [t] So if a corody incertaine be granted to a man and his heires, and he hath issue divers daughters, this corodie shall not be divided betweene them; but of a corodie certaine partition may be made.

[s] 2 E. 2. tit. Dower, 123.

[t] 17 E. 2. Nuper obiit, 12. 16 E. 2. ibid. 11. 5 Mariæ, Dier, 153.

[u] Homage and fealtie cannot be divided betweene coparceners (7). [w] So a pischarie incertaine, or a common *sauns nombre* (8), cannot be divided betweene coparceners, for that would be a charge to the tenant of the soile.—[x] The lord *Mountjoy*, seised of the mannor of *Canford* in fee, did by deed indented and inrolled bargaine and sell the same to *Browne* in fee, in which indenture this clause was contained. *Provided alwayes, and the said Browne did covenant and grant to and with the said lord Mountjoy, his heires and assignes, that the lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were greate wasts) parcell of the said mannor, and to dig turfe also for the making of allome.* And in this case three poynts were resolved by all the judges. First that this did amount to a grant of an interest and inheritance to the lord *Mountjoy*, to digge, &c.

[u] 17 E. 3. 72.

[w] 13 E. 2. Quare Imp. 170. Fleta, lib. 5. cap. 9.

[x] Mich. 24 et 25 Eliz. inter Comitem de Huntingdon et Seignior Mountjoy. (Mo. 174.)

[165. a.] Secondly, that ☞ notwithstanding this grant *Browne* his heires and assignes might dig also, and like to the case of common *sauns nomber*. Thirdly, that the lord *Mountjoy* might assigne his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the lord *Mountjoy*, &c. assigne his interest in any part of the wast to one or more, for that might worke a prejudice and a surcharge to the tenant of the land; and therefore if such an incertaine inheritance descendeth to two coparceners, it cannot be divided betweene them (1).

(Ant. 122. a. 1 Saund. 351.) Vide 5 Mariæ, Dier, 153. (Noy, 145. Cro. Jam. 256, 257. 1 Mod. 74.)

But

(5) Ante 32. a.

(6) See an instance of a partition of an advowson between jointenants in Carth. 505.

(7) See ante 67. b. and Dav. Rep. 61. b.

(8) Acc. as to common *sans nombre*, ante 149. a. See the note on this sort of common, ante 122. a.

(1) This same case of the earl of Huntingdon and lord Mountjoy is reported in Godb. 17. 1 And. 307. and Mo. 174. Lord Anderson gives the opinion of the judges as it was certified in writing to the privy council; but this certificate takes no notice of the point of *indivisibility*; nor is it one of the questions stated by lord Anderson to have been referred to the judges.—In Mo.

(6 Co. 1.)

But then it may be demanded, what shall become of these inheritances? The answer is, that it appeareth in our bookes, that regularly [y] the eldest shall have the reasonable estovers, common, pischary, corody incertaine, &c. and the rest shall have a contribution, that is, an allowance of the value in some other of the inheritance, and so of the like. But what if the common ancestor left no other inheritance to give any thing in allowance, what contribution or recompence shall the younger coparceners have? It is answered, that if the estovers or pischary or common be incertaine, then shall one coparcener have the estovers, pischary, or common, &c. for a time, and the other for the like time; as the one for one yeare, and the other for another, or more, or lesser time, whereby no prejudice can grow to the owner of the soile. Or in case of the pischary, the one may have one fish, and the other the second, &c. or the one may have the first draught, and the second the second draught, &c. And if it be of a park, one may have the first beast, and the second the second, &c. And if of a mill, one to have the mill for a time, and the other the like time; or the one one toll dish, and the other the second, (2) &c. And this appeareth to be the ancient law; for it is said [z] *Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ, cùm dividi non possunt, conceduntur uni; ita quòd aliæ cohæredes alibi de communi hæreditate habeant ad valorem, sicut sunt vivaria, piscariæ, parci; vel saltem quòd partem habeant pro defectu, sicut secundum piscem, tertium vel quartum; vel secundum tractum, tertium vel quartum. Item, in parcis secundam, tertiam aut quartam bestiam.*

[y] 2 E. 2. Dower, 123. 13 E. 2. Quar. imp. 170. Fleta, ubi supra. Vide Mirror, ca. 2. sect. 17.

[z] Bracton, lib. 2. 76. Britton, cap. 71, 72. Fleta, lib. 5. cap. 9.

(Ant. 18. b. 27. a.)

But now let us turne our eye to inheritances of honor and dignity. And of this there is an ancient booke case, [*] in 23 H. 3. tit. *Partition*, 18, in these words: Note, if the earldome of *Chester* descend to coparceners, it shall be divided betweene them, as well as other lands, and the eldest shall not have this seigniory and earldome entire to herselfe; *quod nota*, adjudged *per totam curiam* (3). By this it appeareth, that the earledome (that is, the possessions (4) of the earledome) shall be divided; and that where there be more daughters than one, the eldest shall not have the dignity and power of the earle, that is, to be a countesse. What then shall become of that dignity? The answer is, [a] that in that case the king, who is the soveraigne of

[*] 23 H. 3. tit. Partition, 18. contra, Cruise on Dig. 143.

[a] 3 H. 3. tit. Prescription, (5).

Mo. 707, the same case is cited *arguendo*; and there four judges are represented to have been equally divided in opinion as to the first point mentioned by lord Coke. But according to Anderson the difference of opinion was only, whether any remedy was furnished by law for the interest reserved to lord Mountjoy by the proviso. As to this latter point, see 8 Co. 46. Noy, 145. —[Note 5.]

(2) How dower is to be assigned out of indivisible inheritances, see ant. 32. a.

(3) See Dav. Rep. 61. b.

(4) In 2 Ro. Abr. 254, the case of 23 H. 3, relative to the earldom of Chester, is mentioned as if the daughters might have been coparceners of the *dignity* itself, and not merely of the *possessions of the earldom.* How the earldom of Chester became annexed to the crown in the reign of Hen. 3, on the death of John Scot the last earl leaving three sisters his coheirs, is explained in 1 Dugd. Bar. 45. See further on this point of indivisibility, Bract. 76. b. Brit. 187. Flet. 313. and Dav. Rep. 61. b.—[Note 6.]

(5) Fitz. Abr. *Prescription*, 56.

of honour and dignity, may for the incertainty conferre the dignity upon which of the daughters he please. And this hath been the usage since the Conquest, as it is said (6).

But if an earle that hath this dignity to him and his heires dieth, having issue one daughter, the dignity shall descend to the daughter; for there is no incertainty, but onely one daughter, and the dignity shall descend unto her and her posterity, as well as any other inheritance. And this appeareth by many precedents, and by a late judgement given in *Sampson Leonard's* case, who married with *Margaret* the only sister and heire of *Gregory Fines lord Dacre* of the South, and in the case of *William lord Ros* (7).

But there is a difference betweene a dignity or name of nobility, and an office of honor. For if a man hold a mannor of the king to be high constable of *England*, and dye having issue two daughters, the eldest daughter taketh husband, he shall execute the office (8) solely, and before marriage it shall be exercised by some

(6) This doctrine about the abeyance of titles of honour, and their being revived by the royal nomination, though our books furnish little matter on the subject, is undoubtedly law; and there are many instances of an exertion of this prerogative. One of the most remarkable took place during the present reign in the person of the late Mr. Norborn Berkley, who in 1764 was called to the house of peers in right of the old barony of Botetourt, after an abeyance of several centuries, and was allowed to sit according to the antiquity of that barony. See Cas. in Dom. Proc. for 1764. Another instance in the present reign is the case of sir Francis Dashwood, late lord Despenser; for in 1763 he was called to the ancient barony of that name in right of his deceased mother, who was eldest sister and one of the coheirs of an earl of Westmorland, on whose death that barony had become in abeyance; and being so summoned he took his seat as premier baron in place of lord Abergavenny, who before possessed that distinction.—[Note 7.]

(7) The first of these cases was in 1596, and the second in 1616. Both are now in print, having been published from manuscripts of the time by Mr. Collins in his claims concerning baronies, &c. See p. 24, & 162. It must not be inferred from the purpose for which lord Coke cites them, that the descent of a barony to a female, where in the creation it was not confined to heirs *male*, was controvertible. The points debated in those cases were of another kind. In Sampson Leonard's the question was, whether the husband can be tenant by the courtesy of a title of honour. See my observation as to that point, ante 29. b. note 1. That of lord Ros depended on the effect of superadding an earldom in tail *male* to one having a barony before descendible to heirs *general*, it being contended, that the former should attract the latter in point of descent so as to be inseparable whilst the earldom continues.—[Note 8.]

(8) In a late contest about the office of *great chamberlain*, which arose in consequence of the late duke of Ancaster's leaving two sisters his co-heiresses, one of whom was married to Mr. Burrell, the then attorney-general made a report in conformity to the doctrine here stated by lord Coke as to the office of high constable; and this report, of which I have a copy, contains a very learned investigation of the subject. But afterwards, when the case came before the lords, the judges gave it as their opinion, *that the office belongs to both sisters; that the husband of the eldest is not of right entitled to execute it; and that both sisters may execute it by deputy to be appointed by them, such deputy not being of a degree inferior to a knight, and to be approved of by the king.* See Journ. Dom. Proc. 25 May 1781, the printed cases of the several claimants, and the Parl. Reg. for 1780–1, v. 4. 258 to 297.—[Note 9.]

some sufficient deputy: and all this was resolved by all the judges of *England*, in the case of [b] the duke of *Buckingham*. But the dignity of the crowne of *England* is without all question descendible to the eldest daughter alone, and to her posterity (10), and so hath it beene declared by act of parliament. * [*] For, *regnum non est divisibile*. And so was the descent of *Troy*:

[b] 11 Eliz. Dier, 285, the duke of Buckingham's case (9).

[*] 25 H. 8. cap. 22.

Virgil, 1. Æneid.

Præterea sceptrum, Ilione quod gesserat olim
Maxima natarum Priami.———

[b] Bract. lib. 2. fol. 76. Fleta, lib. 5. cap. 9.

[b] If a castle that is used for the necessary defence of the realme, descend to two or more coparceners, this castle might be divided by chambers and roomes, as other houses be. But yet, for that it is *pro bono publico et pro defensione regni*, it shall not be divided: for as one saith, *propter jus gladii dividi non potest*; and another saith, [*] *pur le droit del espèe que ne soeffre division en aventure que la force del realme ne defaille pax taunt*. But castles of habitation for private use, that are not for the necessary defence of the realme, ought to be parted betweene coparceners as well as other houses; and wives may thereof be endowed, as hath been said in the Chapter of Dower (11).

[*] Britton, 186, 187.

Vide Sect. 36.

If there be two coparceners of certaine lands with warranty, and they make partition ☞ of the land, the warranty shall remayne; because they are compellable to make partition. [c] But otherwise it was of joyntenants at the common law, as shall be said hereafter in his proper place.—[d] *Thomas de Eberston*, seised of the mannor of *Eberston* within the forrest of *Pickering*, had kept time out of mind a woodward for keeping of the woods parcell of that mannor, and had the barke of all the trees felled in the said woods by any of the forresters of that forest as belonging to his mannor (which he could not have without a prescription) (1). *Thomas* of *Eberston* infeoffed two of the said mannor; betweene whom partition was made, so as one of them had the one halfe in severalty and the other the other halfe (2). *Robert Wyerne* afterwards had the one halfe, and *Thomas Thurnise* the other: and they in the eyre of *Pickering* claimed to keepe a woodward within the said woods, and the barke aforesaid; and the truth hereof and the usage being specially found by the forrestors verderors and regardors, *Willoughby Hungerford* and *Hanburie* justices

[165. b.]

[c] 29 E. 3. Garrantie, 70. (6 Co. 12. b.)

[d] Itin. Pickering. 8 E. 3. Rot. 34. (Ant. 115. a.)

(9) S. C. Keilw. 170. b. 4 Inst. 127.

(10) See ant. 15. b.

(11) Ant. 31. b.

(1) The claim of a like privilege as appurtenant to a manor is mentioned in Crompt. Jurisd. Co. 192. b. See further concerning the office of *woodward* in Manwood's For. Laws by Nelson, 389.—[Note 10.]

(2) It is observable in this partition, that no provision is made in respect to the office of woodward, and privilege of having the bark of felled trees, which were appurtenant to the manor. In a former place lord Coke states the partition of a manor to which an advowson was appendant, and explains what the effect is on the advowson, where from want of any particular agreement between the parties it is left to the law to regulate how the advowson shall be disposed of. Ant. 122. a.—[Note 11.]

justices itinerants within that forrest gave judgment as followeth. *Ideo consideratum, est quòd prædict' Robertus et Thomas habeant woodwardum et corticem in bosco prædicto de quercubus prædictis sibi et hæredibus suis in perpetuum. Salvo semper jure, &c.*

Sect. 242.

ALSO, if a man seised of tenements in fee simple or in fee-tayle dieth without issue of his bodie begotten, and the tenements descend to his sisters, they are parceners, as is aforesaid. And in the same manner, where he hath no sisters, but the lands descend to his aunts, they are parceners (3), *&c. But if a man hath but one daughter, she shall not be called parcener, but she is called daughter and heire, &c.*

"*OR in fee tayle.*" This must be intended of an estate taile made to the father and to the heires of his body; for otherwise if the state tayle were made to a man and to the heires of his body, his sisters cannot inherit. And not only daughters shall be coparceners, but sisters, aunts, great aunts, &c.

"*Daughter and heire, &c.*" Here by *(&c.)* is implyed sister and heire, aunt and heire, great aunt and heire, and so upward.

Sect. 243.

AND it is to be understood, that partition may be made in divers maners. One is, when they agree to make partition, and do make partition of the tenements; as if there be two parceners to divide between them the tenements in two parts, each part by it selfe in severalty and of equall value; and if there be three parceners, to divide the tenements in three parts by it selfe in severalty, &c.

BY this Section, and the *(&c.)* in the end of it, it is to be understood, that there are two kind of partitions betweene coparceners; the one in deed or expresse, and the other in law or implicite. (Ant. 46. a.) Of partitions in deed or expresse, some be voluntary, whereof *Littleton* enumerates four manners; and one compulsory, that is, by writ of partition (4).

[166. a.] ☞ The first partition in deed betweene coparceners, (F. N. B. 167.) is that which *Littleton* here speaketh of, viz. *When they agree and make partition of the tenements, &c. each part by itselfe in severalty and of equall value, &c.* If coparceners make partition, at full age and unmarried, and of *sane memorie*, of

(3) *they are parceners* not in L. and M. nor Roh.

(4) The reference in the margin to fol. 46. a. is to an instance of the difference in point of effect on the lessee for years of a coparcener, between partition by writ and partition without.—[Note 12.]

of lands in fee simple, it is good and firme for ever, albeit the values be unequall; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall bind the parties themselves, but not their issues unlesse it be equall; or if any be *covert*, it shall bind the husband, but not the wife or her heires; or if any be within age, it shall not bind the infant; as shall be said more fully hereafter (1). The second partition followeth in the next Section. And here the *(&c.)* implyeth further, that if there be four parceners, then four parts, if five, five parts, and so forth. It further implyeth, that all this must be in severalty; whereof, and with what limitations this is to be understood, it hath been declared before.

Vide Sect. 241.

Sect. 244.

ANOTHER partition there is, viz. to choose, by agreement betweene themselves, certaine of their friends, to make partition of the lands or tenements in forme aforesaid. And in these cases, after such partition, the eldest daughter shall choose first one of the parts so divided, which she will have for her part, and then the second daughter next after her another part, and then the third sister another part, then the fourth another part, &c. if so be that there be more sisters, &c. unlesse it be otherwise agreed between them. For it may be agreed between them, that one shall have such tenements, and another such tenements, &c. without any primer election.

31 Ass. 26.

"*THEN the fourth another part, &c.*" Here the *(&c.)* implyeth the 5 sister, and after her the 6, and so forth.

"*For it may be agreed betweene them, that one shall have such tenements, and another such tenements, &c.*" Here by this *(&c.)* is implyed divers rules of law proving the conclusion of *Littleton* in this Sect. viz. *Modus et conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introduct'*, but with this limitation that these rules extend not to any thing, that is against the commonwealth or common right. For *conventio privatorum non potest publico juri derogare.*

(1 Sid. 193. 269. Cro. Eliz. 664.) (1 Sid. 339.)

☞ Sect. 245. [166. b.]

AND the part which the eldest sister hath, is called in Latine enitia pars. *But if the parceners agree, that the eldest sister shall make partition of the tenements in manner aforesaid, and if she do this, then it is said, that the eldest sister shall choose last for her part, and after every one of her sisters, &c.* (1)*.

"*ENITIA*

(1) See post. Sect. 255 to 258, inclusive. See also 173. b.

(1) * The *&c.* not in L. and M. nor Roh.

"*ENITIA pars.*" It is called in old bookes* *æisnetia*, which is derived of the French word *eisne* for eldest, as much as to say the part of the eldest; for *Bracton* saith, *quòd eisnetia semper est præferenda propter privilegium ætatis; sed esto, quòd filia primogenita relicto nepote vel nepte in vitâ patris vel matris, decesserit, præferenda erit soror antenata tali nepoti vel nepti quantum ad eisnetiam, quia mortem parentum expectavit.* And herewith agreeth *Fleta*, also, *quod nota:* whereby it appeareth that *enitia pars* is personall to the eldest, and that this prerogative or priviledge descendeth not to her issue, but the next eldest sister shall have it. [*f*] And here is a diversity to be observed betweene this case of a partition in deed by the act of the parties, for there the priviledge of election of the eldest daughter shall not descend to her issue; and where the law doth give the eldest any priviledge without her act, there that priviledge shall descend. As if there be divers coparceners of an advowson †, and they cannot agree to present, the law doth give the first presentment to the eldest; and this priviledge shall descend to her issue; nay her assignee shall have it (2); and so shall her husband, that is tenant by the curtesie, have it also (3).

* Bract. li. 2. 77. Fleta, lib. 5. ca. 9. Britton, ca. 72.

[*f*] 45 E. 3. Fines, 41. 19 E. 3. Quar. imp. 59. 18 E. 2. ibid. 176. 5 H. 5. 10. 38 H. 6. 9. Doct. & Stud. 116, 117. Vid. Bract. 238. 249.

† 5 H. 7. 8. 34 H. 6. 40. 11 H. 4. 54. 20 E. 3. Quar. imp. 63. 34 E. 3. ib. 198. 15 E. 3. Dar. Present. 11. 17 E. 3. 20, 21. (Post. 186. b.)

"*Then it is said that the eldest sister shall choose last, &c.*" By this and the *&c.* in the end of this Section is implyed, the rule of law is, *cujus est divisio, alterius est electio.* And the reason of the law is for avoyding of partiality.

21 E. 3. 21. F. N. B. 32.

(*Ipsæ*

(2) Acc. P. 18 E. *Quare Impedit*, 176. Post. 186. b. 3 Co. 22. b. 2 Inst. 365. 2 Ro. Abr. 346. Mallory's Quare Impedit, 145. Three judges also held accordingly, East. 23 Eliz. in Harris & Hales *v.* Nichols, Cro. Eliz. 18. But Anderson chief justice doubted whether a grantee should have the privilege. In Keilwey there is a case of 18 H. 7, in which Frowike chief justice is made to give it to the grantee of the eldest sister, only where it has been once exercised by herself. But he afterwards doubted his own distinction, and seemed to incline to the grantee's right generally; in consequence of which the report concludes thus: *Stude bene et quære.* Keilw. 49. Upon the whole therefore it seems, that the point is not quite settled; and to determine it properly would require a very careful examination of the numerous cases cited by lord Coke here and in the Second Institute. See 7 Ann. c. 18. I was led into this note by a reference to the case from Cro. Eliz. in a Coke upon Littleton of the late Mr. Beversham Filmer, and by an opinion of the same very learned gentleman, in which he represents the point to be doubtful, and therefore dissuaded accepting the title to the next presentation of an advowson belonging to three sons as heirs in gavelkind, unless they would all join in the grant. The eminence of Mr. Filmer as a barrister, more especially in the conveyancing line, will, I presume, fully justify me for thus introducing his name. The doubts of a lawyer so profound and correct, as he was universally allowed to be, will ever claim high respect; and it is with peculiar pleasure that I take this opportunity of expressing the veneration with which I hold him in my remembrance. See H. Black. 412.—[Note 13.]

(3) Agreed by lord Anderson in the case from Cro. Eliz. cited in the preceding note.

(Ipsæ etenim leges cupiunt ut jure regantur.)

which might apparently follow if the eldest might both divide and choose (4). Now followeth the third partition in deed.

Sect. 246.

ANOTHER partition or allotment is, as if there be four parceners, and after partition of the lands be made, every part of the land by itself is written in a little scrowle and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the 4 balls of waxe are put in a hat to be kept in the hands of an indifferent man, and then the eldest daughter shall first ☞ put her hand into the hat, and take a ball of waxe with the scrowle within the same ball for her part, and then the second sister shall put her hand into the hat and take another, the 3 sister the 3 ball, and the 4 sister the 4 ball, &c. and in this case every one of them ought to stand to their chance and allotment.

[167. a.]

"*ALLOTMENT.*" Of this partition by lots ancient authors * write, that in that case coparceners *fortunam faciunt judicem.* And *Littleton* here termeth it chance; for in the end of this Section he saith, that in this case every of them ought to hold herselfe to her chance; and of this kind of division you shall read in holy scripture, where it is sayd, *dedi vobis possessionem quam dividetis forte.*

* Flet. lib. 5. ca. 9. Bracton, lib. 2. 75. Britton, cap. 72.

Vide Numbers, ca. xxvi. ver. 54, 55. & ca. xxxiii. ver. 54. of division by lots.

The *&c.* in the end of this Section implyeth, that if there be more coparceners there must be more balls according to the number of the parceners.

Sect. 247.

ALSO, there is another partition. As if there be four parceners, and they will not agree to a partition to be made between them, then the one may have a writ of partitione faciendâ *against the other three, or two of them may have a writ of* partitione faciendâ *against the other two, or three of them may have a writ of* partitione faciendâ *against the fourth, at their election.*

HERE followeth the fourth partition in deed. *Littleton* having spoken of voluntary partitions, or partitions by consent: now he speakes of a partition by the compulsary means of law where no partition can be had by consent. Now of what inheritance partition may be made by the writ of *partitione faciendâ* may partly appeare by that which hath been sayd. Moreover it is to be observed that the words of the writ *de partitione faciendâ* be * *quòd cùm eædem* A. *et* B. *insimul et pro indiviso teneant tres acras terræ cum pertinen', &c.* And note that this word *(tenet)*

* 3 E. 3. 47, 48.

(4) See Hob. 107, where the doctrine is cited with approbation.

(tenet) (1) in a writ doth alwayes imply a tenant of a freehold. And therefore [g] if one coparcener maketh a lease for yeares, yet a writ of partition doth lie (2). But if one or both make a lease for life, a writ of partition doth not lye between them: because *non insimul et pro indiviso tenent*, they do not hold the freehold together, and the writ of partition must be against the tenant of the freehold. [h] If one coparcener disseise another, during this disseisin a writ of partition doth not lie between them; for that *non tenent insimul et pro indiviso*.

[g] 21 E. 3. 57. F. N. B. 62. G. 28 H. 6. 2. 11 H. 4. 3. 4 H. 7. 10. b. (Post. 176. b.)

[h] 4 H. 7. 9. 11 Ass. 23. (Post. 167. b. 187. a.)

But there be other partitions in deed than here have been mentioned. [i] For a partition made between two coparceners, that the one shall have and occupy the land from *Easter* untill the first of August only in severalty by himselfe, and that the other shall have and occupie the land from the first of August untill the feast of *Easter* yearely to them and their heires, this is a good partition (3). Also if two coparceners have two mannors by descent, ☞ and they make partition, that the one shall have the one manor for one yeare, and the other the other manor for this yeare, and so *alternis vicibus* to them and their heires, this is a good partition. The same law is, if the partition be made in forme aforesaid, for two or more yeares, and each coparcener have an estate of inheritance, and no chattell, albeit either of them *alternis vicibus* have the occupation but for a certaine terme of yeares.

[i] Temps E. 1. Partition, 21. F. N. B. 62. I. (7 Co. 5.)

[167. b.]

Of partitions in law, some be by act in law without judgement, and some be by judgement, and not in a writ *de partitione faciendâ*. And of these in order.

[k] If there be lord, three coparceners mesnes, and tenant, and one coparcener purchase the tenancy, this is not onely a partition of the mesnalty, being extinct for a third part, but a division of the seigniory paramount, for now he must make severall avowries (1).

[k] 36 H. 6 7. (Post. 192. a.)

[l] If one coparcener make a feoffment in fee of her part, this is a severance of the coparcenarie, and severall writs of *præcipe* shall lie against the other coparcener and the feoffee (2).

[l] 37 H. 6. 8. 43 E. 3. 1.

[m] If two coparceners be, and each of them taketh husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law.

[m] 17 E. 3. 14, 15.

[n] If two coparceners be, and one disseise the other, and the disseisee bringeth an assise, and recover, it hath beene said, that

[n] 12 E. 3. Judgm. 162. 7 Ass. 10.

7 E. 3. 49. 10 Ass. 17. 12 Ass. 5. 17. 10 E. 3. 40. 43. 28 Ass. 35. 23 Ass. 18. 20 E. 3. Ass. 62. 3 E. 3. 48. b. 19 H. 6. 45. 7 H. 6. 4. 3 E. 4. 10.

she

(1) See the various applications of the verb *tenet* explained ant. fol. 1. a. & b.

(2) So too execution of dower is not prevented by a lease for years subsisting at the husband's death. Ant. 32. a. How lessee for years is affected by such a partition, is before explained by lord Coke in fol. 46. a.—[Note 14.]

(3) See the case of a *moveable* fee simple, stated ant. fol. 4. a.

(1) But according to Bro. Nouv. Cas. 108, the lord should have notice of the partition.—[Note 15.]

(2) Acc. ant. 67. b. post. 175. a. 195. a. But this sort of partition is not a partition in the sense in which Littleton writes of partitions, nor in the common sense of the word. He means a division of the land itself; whereas what lord Coke here calls a partition is a mere severance of the unity of title, which operates, as Littleton afterwards states, by making a tenancy in common. See Sect. 309.—[Note 16.]

she shall have judgement to hold her moity in severalty. And this seemeth (say they) verie ancient, and thereupon vouch *Bracton*, * *si res fuerit communis, locum habere poterit communi dividendo judicium.* And [*o*] so (say they) if the one coparcener recover against another in a *nuper obiit* or a *rationabili parte*, the judgement shall be, that the demandant shall recover and hold in severalty. But *Britton* is to the contrary; for he saith, * *et si ascun des parceners soit enget ou disturbe de la seisin per ses auters parceners, un, ou plusors, al disseisee viendra assise per severall pleint sur les parceners et recovera, mes nemy a tener en severaltie, mes en common solonque ceo que avant le fist, &c.* [*p*] And this seemeth reasonable; for he must have this judgement according to his plaint, and that was of a moitie, and not of any thing in severaltie, and the sherife cannot have any warrant to make any partition in severalty or by metes and bounds.

* Bract. lib. 4. fo. 216. b.
[*o*] 3 E. 3. 48. 21 R. 2. tit. Nuper ob. 22. 4 H. 7. 10. 30 E. 1. Nuper ob. 18. F. N. B. 9. B.
* Britton, fol. 112. a.
[*p*] 6 Co. 12, & 13. Morrice's case accord. (Post. 187. a.)

Sect. 248.

AND when judgement shall be given upon this writ, the judgment shall be thus; that partition shall be made betweene the parties, and that the sherife in his proper person shall go to the lands and tenements, &c. and that he by the oath of 12 *lawful men of his bailiwick, &c. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintif or to one of the plaintifs, and another part to another parcener, &c. not making mention in the judgement of the eldest sister more than of the youngest.*

Bract. fo. 66, &c. Brit. 71, &c. Brit. ca. 72. Fleta, lib. 5. ca. 9.

NOTE, the first judgement in a writ of partition, whereof *Littleton* here speaketh, is *quòd partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis*, after which judgement. By this *&c.* viz. *tenements, &c.* is implyed, that a writ shall be awarded to the sherife, *quod assumptis tecum* 12 *liberis et legalibus hominibus de vicineto tuo, per quos rei veritas meliùs sciri poterit, in propria personâ tuâ accedas ad tenementa prædicta cum pertinentibus, et ibidem per eorum sacramentum, in præsentiâ partium* (3) *prædictarum per te præmuniendarum si interesse voluerint,*

(3) These words, enjoining the partition to be made *in the presence of the parties*, show that the proceeding before the sheriff is quite *open*. So too, as it seems, should be the execution of a *commission* of partition issued by chancery as a court of equity, such commission being in nature of a writ at common law for the like purpose. But I understand, that there have been instances of treating the commission of partition as a *close* proceeding, and that on that idea it has been sometimes the practice to annex an oath of secrecy to the commission. This practice, I presume, has grown from not attending to the difference between commissions to divide lands and commissions to examine witnesses merely. In the latter sort of commission an oath to keep the depositions secret is expressly required by an order of chancery of the 9th of February 1721; and exclusively of the order the proceeding implies secrecy, the depositions being ever kept close under seal till leave is obtained to divulge them by the passing of publication. But neither the language nor spirit of this order is applicable to commissions of partition, which like the writ of partition ought to be *openly* executed.—[Note 17.]

voluerint, prædicta tenementa cum pertinentibus per sacramentum bonorum et legalium hominum prædictorum, habito respectu ad verum valorem earundem, in duas partes æquales partiri et dividi, et unam partem partium illarum, &c.

This last *&c.* in this Section is evident.

Ockam ca. quid sit liber judiciarius (4). 40 E. 3. 45. 9 Ass. 2. 8 Ass. 35. 49 E. 3. 2. Regist. F. N. B. 16.

[168. a.] "*Judgement,*" ☞ *Judicium est quasi juris dictum,* so called, because so long as it stands in force *pro veritate accipitur* (1) and cannot be contradicted. And thereupon antiquitie called that excellent booke in the exchequer, *Domesday, Dies judicii. Sicut enim districti et terribilis examinis illa novissima sententia nullâ tergiversationis arte valet eludi, &c. sic sententia ejusdem libri inficiari non potest, vel impunè declinari; ab hoc nos eundem librum judiciarium nominamus, &c. quòd ab eo sicut a prædicto judicio non licet ullâ ratione discedere.* By *Littleton* it appeareth, that the formes of judgements, pleas, and other legall proceedings, do conduce much to the right understanding of the law and of the reason thereof; as here *Littleton* rightly collecteth upon the forme of the judgement, that the sherife shall deliver to them such parts as he thinks good, and that the eldest coparcener shall have no election when partition is made by the sherife. And it is to be observed, that there be two judgements in a writ of partition. Of the former *Littleton* speaketh in this place. And when partition is made by the oath of twelve men, and assignement and allotment thereof, and so returned by the sherife, then the latter judgment is, *ideo consideratum est, quòd partitio prædicta firma et stabilis in perpetuum teneatur,* and this is the principall judgement. [*q*] And of the other, before this be given, no writ of error doth lie (2).

[*q*] 11 Co. 40. Hill. 39 Eliz. Rot. 327, in Banke le Roy, inter An. Countes de War. & le Seignior Berkley. (Fortesc. 52. Ant. 50. a. 109. b.)

"*Sherife.*" *Shireve* is a word compounded of two Saxon words, viz. *shire,* and *reve. Shire, satrapia,* or *comitatus,* commeth of the Saxon verbe *shiram, i. e. partiri,* for that the whole realme is parted and divided into shires; and *reve* is *præfectus,* or *præpositus*; so as *shireve* is the *reve* of the shire, *præfectus satrapiæ, provinciæ,* or *comitatûs.* And he is called *præfectus,* because he is the chiefe officer to the king within the shire; for the words of his

(4) See Dialog. de Scaccar. lib. 1. cap. 16. which hath the same title.

(1) See same explanation of *judicium,* ante 39. a.

(2) The difference between an *interlocutory* judgment or award and a *final principal* or *plenary* judgment is here pointed at; as to which see Metcalf's case, 11 Co. 30, both questions in it depending on the distinction. See also Office of Exec. ed. 1676, chap. 17. p. 279. How the *civil* and *canon* laws distinguished between *interlocutory* and *definitive* sentences, especially in point of appeal, and between sentences *merely interlocutory,* and *interlocutory* sentences *having the effect of definitive,* may be collected in some degree by consulting Voet. ad Dig. lib. 42. tit. 1. s. 4. Perez. in Cod. lib. 7. tit. 62. Wood's Civ. L. 8vo ed. 379. and Gilb. Chanc. c. 10. As to the difference between interlocutory and final decrees or orders in our courts of equity, see Pract. Reg. in Chanc. 122, and 153, and Nosle *v.* Foot, in Dom. Proc. 12 March 1739. On the same subject in our ecclesiastical courts, see 1 Ought. Ord. and Comett's Prac. of Spirit. Co. 3d edit. 229 to 250. These references may assist inquiry; but a far more extended information will be necessary before the distinctions can be well ascertained, and the use of them in point of *appeal, conclusion,* or otherwise, be fully understood. — [Note 18.]

his patent be, *commisimus vobis custodiam comitatûs nostri de, &c.* And he hath a threefold custodie, *triplicem custodiam*, viz. First, *vitæ justiciæ*; for no suit begins, and no processe is served but by the sherife. Also he is to returne indifferent juries for the triall of mens lives, liberties, lands, goods, &c. Secondly, *vitæ legis*; he is, after long suits and chargeable, to make execution, which is the life and fruit of the law. Thirdly, *vitæ reipublicæ*; he is *principalis conservator pacis*, within the countie (3), which is the life of the common wealth, *vita reipublicæ pax.*

Vide the Second Part of the Institutes. W. 1. c. 10.

He is called before, Sect. 234, *viscount*, in Latyne, *vicecomes*, *i. e. vice comitis*, that is, in stead of the earle of that countie, who in antient time had the regiment of the countie under the king.

* Mirror, cap. 1. sect. 3.

For it is said in the *Mirror**, that it appeareth by the ordinance of antient kings before the Conquest, that the earles of the counties had the custodie or gard of the counties, and when the earles left their custodies or gards, then was the custodie of counties committed to viscounts, who therefore (as it hath been sayd) are called *vicecomites*. And *Ockam cap. quid centuria, &c. porro vicecomes dicitur quòd vicem comitis suppleat.*

Ockam, cap. QuidCentur. &c.

Marculphus saith, this office is *judiciaria dignitas*; *Lampridius*, that it is *officium dignitatis*. *Fortescue* saith, *quòd vicecomes est nobilis officiarius*. And see there, and observe well his honourable and solemne election and creation at this day. But to confirme all that hath been said touching this point, and to conclude the same, among the lawes of *Edward* the Confessor (4) I finde it thus recorded. *Verùm quòd modo vocatur comitatus olim apud Britones temporibus Romanorum in regno isto Britanniæ vocabatur consulatus et qui modò vocantur vicecomites tunc temporis viceconsules vocabantur*; *ille verò dicebatur viceconsul, qui consule absente ipsius vices supplebat in jure et in foro* (5). Herein many things

Fortescue, cap. 24. 12 R. 2.

Lambert, fol. 129. 12.

(3) See Lamb. Just. ed. of 1602, p. 12, 13. and 2 Inst. 174. in both of which books the coroner is so styled.

(4) Concerning the dispute about the authenticity of these laws, see notes 3 and 4. ant. 68. b. to which add Preface to 8 Co. Rep. 1 Tyrr. Hist. b. 6. p. 103. Ibid. v. 2. p. 62. Brad. Introd. to Eng. Hist. 260. and a note by the late bishop of St. David, Dr. Squire, in his book on the Anglo-Saxon Gov. in Engl. ed. of 1753, p. 219. Mr. Selden's opinion of these laws was, that "as the "ordinary copies are, and as they speak in the published volume of Saxon "laws, they are not without many mixtures of somewhat later transcribers." Seld on Tithes, ed. 1618, p. 225. A like temperate caution concerning these laws is interposed by Sir Henry Spelman and Mr. Somner. Spelm. Gloss. 3d ed. 67. Reliq. Spelm. 61. Somn. on Gavelk. 101. But Dr. Brady is not content with this; for, moved by that excess of party spirit, which is so destructive of truth, and so much tarnishes his learned writings on the English history, he indiscriminately and passionately rejects the whole body of these laws. His words in one place are as follow: "The factious bishops and "churchmen, and the seditious and dissolute barons, made a noise for king "Edward's laws. But what they were it is now a hard matter to know. "Those put forth under his name with Mr. Lambard's Saxon laws were none "of his. They are incoherent farce and mixture, and a heap of nonsense, "put together by some unskilful bishop, monk, or clerk, many years after his "death, to serve the ends and designs of the present times." General Pref. to Brad. Eng. Hist. xxx. See further Wright Ten. 65. note (i).—[Note 19.]

(5) The passage here cited from the laws of Edward the Confessor seems rather a remark by the copier or translator of the law, than a part of the law itself;

things are worthy of observation. First, for the antiquitie of counties. Secondly, that which we called *comitatum*, the Romans more Latinely called *consulatum*. Thirdly, whom the Saxons afterwards called (as hath been said) *shireve* or *earle*, the Romans called *consul*. Fourthly, that the sherife was deputy of the consull or earle; and therefore the Romans called him *viceconsul*, as we at this day call him *vicecomes*. Fifthly, that the sherife in the Romans time, and before, was a minister to the king's courts of law and justice, and had then a court of his own, which was the county court, then called *curia consulatûs*, as appeareth by these words, *ipsius vices supplebat in jure et in foro*. Sixthly, that this realme was divided into shires and counties, and those shires into cities, burroughs, and towns, by the Brittains: so that king *Alfred*'s division of shires and counties was but a renovation or more exact description of the same (6). Lastly, the consequence that will follow upon these things being so ancient, (as in the time of, and before the Romans) the studious reader will easily collect. And afterwards, fol. 135, amongst the laws of the same king it appeareth, that those whom the Saxons sometimes called (and now we call) *ældermen* or *eorles*, the Romans called *senatores, et similiter olim apud Britones temporibus Romanorum in regno isto Britanniæ vocabantur senatores, qui postea temporibus Saxonum vocabantur aldermani, non propter ætatem, sed propter sapientiam et dignitatem, cùm quidam adolescentes essent, jurisperiti tamen et super hoc experti* (7).

Cæsar Polichro. Huntingdon. Polidor. inter leges Molmucii. Hooker, lib. 2.

[168. b.] ☞ "*Of his bailiwick.*" It appeareth before, that the enquest must be *de vicineto* of the place where the lands doe lie, and not generally *de balivâ tuâ*. By this it appeareth, that the sherife is *balivus*, and his county called *baliva*; and therefore it is good to be seen what *balivus* originally signified, and whereof it is derived.

Baylife (1) is a French word, and signifies an officer concerned in

Flet. lib. 2. cap. 67. (Cro. Jam. 178. Plowd. 28. b. 1 Ro. Abr. 339.) Bract. lib. 3. tract. 2. cap. 33. nu. 3. Idem, lib. 3. fol. 121. b.

itself; and perhaps it is on this account that Lambard distinguishes this passage in the printing by an *Italic* letter. But whether the passage is to be deemed part of the law or not, the comparison it draws of the Roman denominations of their territorial government and officers in Britain with those of the Saxons, seems to me quite imaginary. At least I am not able to find any trace of authority to prove such an use or application of the words "*consu-*" "*latus, consul* and *viceconsul*" amongst the Romans whilst Britain was a part of their empire, as this extract supposes.—[Note 20.]

(6) This agrees with the idea of Sir John Spelman in his life of Alfred, and of Mr. St. Amand in his Essay on the Legislative Power of England. Dr. Stuart in his Historical Dissertation of the English Constitution makes some additional remarks in support of the same opinion. See 2d ed. of this latter book, 250.—[Note 21.]

(7) The remark above in note 5, on the former extract from Lambard's Anglo-Saxon Laws equally applies to this second one. As to the origin and office of sheriffs, see further Preface to 3 Co. Rep. Dav. Rep. 60. Dalt. on Sher. Spelm. Gloss. vocibus *comites comitatus et vicecomes*, Seld. tit. Hon. ed. 1681, p. 627. 2 Henry's Hist. Gr. Brit. 242. a note by lord Fortescue in his ancestor's book on absolute and limited monarchy, 112, and Stewart's Hist. Dissert. on Engl. Const. 2d ed. 241.—[Note 22.]

(1) See ante 61. b. at the bottom. The additional references in the margin on the side of the word *bailiff* relate to *bailiffs of manors*.

in the administration of justice of a certaine province; and because a sherife hath an office concerning the administration of justice within his county or bailiwick, therefore he called his county *baliva sua*. For example, when he cannot find the defendant, &c. he returneth, *non est inventus in balivâ meâ*.

I have heard great question made, what the true exposition of this word *balivus* is. In the statute of *Magna Charta*, cap. 28, the letter of that statute is, *nullus balivus de cætero ponat aliquem ad legem manifestam nec ad juramentum simplici loquelâ suâ sine testibus fidelibus ad hoc inductis.* And some have said, that *balivus* in this statute signifieth any judge; for the law must be waged and made before the judge. And this statute (say they) extends to the courts of common pleas, king's bench, &c. for they must bring with them *fideles testes, &c.* and so hath been the usage to this day.

Bract. lib. 3. 156. b. Britt. fol. 56. Flet. li. 2. ca. 63. 10 Co. 103. Post. 195. a.)

But I have perused a very ancient and learned reading upon this statute; and the reader taketh it, that, at the common law before this statute, he, that would make his law in any court of record, must bring with him *fideles testes*. And this opinion herein is warranted by *Glanvil*, who wrote in the reign of *Henry* the second. But the reader holdeth, that in the courts which were not of record (2), as the county court, the hundred court, the court baron, &c. there the defendant without any faithfull witnesses might before this stat. have made his law, for remedy whereof this act was made; and therefore (saith he) the statute extendeth to the judges of such courts as are not of record. In 10 H. 4. it is holden, that if a lord, that hath a franchise in a leet, doth not enquire of things enquirable, and punish them, the sherife shall enquire in his turne, *et si le vicount ne faire en son torne, le baylie le roy enquirer' quant il vient, ou auterment serra inquise per justice en eire*, where *baylie le roy* is understood *justice le roy*. And in the *Mirror** it is holden, that the statute doth extend to everie justice, minister of the king, steward, &c. and all comprehended under this word *baylife*.

Glanv. li. 1. ca. 9.

10 H. 4. 4. (Cro. Jam. 551. 584.)

* Mirror, ca. 5. sect. 2. Vi. Bract. fo. 409. Fleta, lib. 2. cap. 63. 56.

The chiefe magistrates in divers antient corporations are called baylifs, as in Ipswich, Yarmouth, Colchester, &c. And *baylife* in French is *dicecetes*, *nomarcha*, in English, a bailife or governor. But of this thus much shall suffice.

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AND of the partition which the sherife hath so made, he shall give notice to the justices (3) *under his seale, and the seales of every of the* 12, *&c. And so in this case you may see, that the eldest sister shall not have the first election* (4), *but the sherife shall assigne to her her part which she shall have, &c. And it may be that the sherife will assigne first one part to the youngest, &c. and last to the eldest, &c.*

"*UNDER*

(2) Concerning the distinction of courts of record, see ante 117. b.
(3) In L. and M. and in Roh. there is an *&c.* here.
(4) An *&c.* here in L. and M. and in Roh.

"*UNDER his seale.*" Note, the partition, made and delivered by the sherife and jurors ought to be returned into the court under the seale of the sherife, and the seales of the twelve jurors; for the words of the judiciall writ of partition, which doth command the sherife to make partition, are *assumptis tecum* 12, *&c.* (so as there must be twelve) *et partitionem inde, &c. scir' facias justiciariis, &c. sub sigillo tuo, et sigillis eorum per quorum sacramentum partitionem illam feceris, &c.* And this is the reason, wherefore in this case the partition, which they make upon oath ought to be returned under their seales: and the reason of that is for the more strengthening of the partition by the 12, and that the sherife should not returne what partition he would. Now after all this, this (*&c.*) viz. 12, *&c.* doth imply, that the principall judgement upon the partition so returned is, *ideo consideratum est per curiam quòd partitio firma et stabilis imperpetuum teneatur* (1). The latter two (*&c.*) are evident (2).

Brit. fo. 185. b. acc. Bract. l. 2. fo. 71, &c. Fleta, l. 5. ca. 9.

[169. a.]

Lib. 11. fol. 40. in Metcalf's case.

(1) See acc. ant. 168. a.

(2) Here I shall subjoin to Littleton's explanation of the different modes of express partition the following notices for the aid of students:

I. Since Littleton's time a statute has been made for newly regulating the proceedings on a writ of partition, with a view to render them less dilatory and more effectual; and this statute equally extends to parceners, join-tenants, and tenants in common. See 8 & 9 W. 3. c. 31. What the form of proceeding under the writ of partition was before, is explained in Flet. lib. 5. c. 9. Bract. lib. 2. c. 33. Brit. c. 71, 72, 73, and Booth on Real Actions, 244.

II. Partition by *release* between co-parceners, which I do not observe to be noticed by Littleton or Coke, is mentioned in 2 Fulbeck's Paral. fol. 57. b.

III. There is a partition by *judgment* exclusive of that on the *partitione faciendâ*. An instance of it is stated in 6 Co. 12. b.

IV. Littleton hereafter adds to the forms of partition explained by him in this chapter, one other form; namely, partition by throwing into hotchpot, which is the subject of Sect. 266.

V. Besides the writ of partition mentioned by Littleton there was another also issuing out of chancery, which was called a writ of livery and partition. It applied, where land holden of the king *in capite* descended to two or more as co-parceners, in which case they could not have livery of their land from the crown without a partition, the reason of which is explained in Staunf. Prerog. 24. b. 81. b. The various forms of this writ of partition may be seen by consulting F. N. B. 256. F. 259. C. 261. B. C. and Reg. Orig. 316, 317. It differed from the common writ *de partitione faciendâ* in almost every respect. *That* was directed to the sheriff, *this* to the escheator: *that* was returnable in the common pleas, *this* in chancery: *that* was executed with a jury, *this* without: *that* was given for the benefit of the party suing it, *this* grew out of a policy to increase the number of the king's tenants *in capite* for his advantage: the partition in *that* was confirmed by a judgment of the court, on return of the writ, the partition in *this* had no such solemnity added to it; and lastly, the partition on *that* was conclusive on the parties, though infants, and all claiming under them, but the partition on *this* was open to subsequent inquiry, and if unequal avoidable by *scire facias* in chancery or a *partitione faciendâ* at common law. See Staunf. Prerog. and Fitz. N. B. in the places before cited, and post. 171. a. & b. See further on the force of such partition in chancery 29 Ass. pl. 3. Bro. Abr. Jurisdiction, 114. Partition, pl. 10. But this species of partition under the writ of livery is no longer in force: for it was a mere incident to livery; and livery being taken away by the 12 Cha. 2. c. 24, as one of the great grievances from tenure *in capite*, all writs of livery of course are, as a very learned writer has forcibly expressed it, *uno statu* dis-

persed. See Mr. serjeant Wynne's observat. on F. N. B. in his Miscellany of Law Tracts, p. 51.

VI. Another kind of partition in chancery unnoticed by Littleton was, where two persons succeeded as co-parcenary heirs to land holden of the king *in capite*, and one of them being within age was in ward to the crown; for then the king's committee of the infant heir might assent to make partition with the other coparcener, in which case the writ for livery to the coparcener of full age recited that with such assent the king had assigned certain estates for the purparty of such co-parcener, and directed the escheator to give livery accordingly. F. N. B. 260. B. This mode of partition in chancery is also at an end from the same cause as the writ of partition and livery.

VII. A new compulsory mode of partition has sprung up, and is now fully established; namely, by decree of chancery exercising its *equitable* jurisdiction on a bill filed praying for a partition: in which case it is usual for the court to issue a commission for the purpose to various persons, who proceed without a jury. How far this branch of equitable jurisdiction, so trenching upon the writ of partition, and wresting from a court of common law its ancient exclusive jurisdiction over this subject, might be traced by examining the records of chancery, I know not. But the earliest instance of a bill for partition I observe to be noticed in the printed books is a case of the 40 Eliz. in Tothill's Transact. of Chanc. title *Partition*. According to the short report of this case the court interposed from necessity in respect of the minority of one of the parties, the book expressing that on that account he could not be made party to a writ of partition; which reason seems very inaccurate; for, if lord Coke is right, that writ doth lie against an infant, and he shall not have his age in it, and after judgment he is bound by the partition. See post. 171. b. But probably in lord Coke's time this was a rare and rather unsettled mode of compelling partition; for I observe in a case in chancery of the 6 Cha. 1. which was referred to the judges on a point of law between two co-parceners, that the judges certified for issuing a *writ of partition* between them, and that the court ordered one accordingly; which, I presume, would scarce have been done if the decree for partition and a commission to make it had then been a current and familiar proceeding with chancery. 1 Cha. Rep. 49. However it appears by the language of the court in a very important cause, in which the grand question was, whether the lord chancellor here could hold plea of a trust of lands in Ireland, that in the reign of James the Second bills of partition were become common. 1 Vern. 421. 2 Cha. Cas. 189. For other reported cases on bills of partition, see Toth. Transact. tit. *Partition*, 1 Cha. Rep. 235. 3 Cha. Rep. 29. 2 Cha. Cas. 214. 237. 2 Vern. 232. 1 P. Wms. 446. 2 P. Wms. 518. As to the forms of a commission of partition, see 1 Prax. Alm. Cur. 3d ed. 93, 94. Clerk's Tutor in Chanc. 3d ed. 360. and 2 Harrison's Chanc. last ed. 396. For cases in which chancery interposes by awarding commissions to ascertain boundaries, which subject in some degree connects with commissions of partition, see Tothill 84. 126. 130. Nels. Ch. Rep. 14. 121. 1 Cha. Rep. 41. 63. 259. Rep. temp. Finch. 17. 154. 239. 462. 96. Car. Rep. 107. 1 Cha. Cas. 145. 1 Vern. 359. 456. 2 Vern. 38. and 1 Ves. 453. To these add Fitzh. N. B. 133. See further 4 Ves. 180. 6 Ves. 293. 9 Ves. 344. on the writ *de perambulatione faciendâ*, which being considered, may perhaps throw some light on the origin of this branch of equitable jurisdiction; and concerning the modes of *partition* by our law, see the cases under that title in Fitzh. Abr. Bro. Abr. and Viner.—Concerning partition by the Roman law, see Fulbeck in his Parallel of the Civil, Canon, and English Laws, b. 2. p. 57. This neglected but ingenious writer extracts from the Roman law three actions having the like object with our writ of partition. These are the action *de familiâ herciscundâ*, the action *pro socio*, and the action *de communi dividendo*. He applies the first to partition amongst co-heirs, the second to that amongst join-tenants, and the third to that amongst tenants in common; an assimilation in which he is partly followed by lord Stair in respect to the law

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AND note, that partition by agreement between parceners may be made by law betweene them, as well by paroll without deed, as by deed (3).

HERE it appeareth, that [*r*] not onely lands and other things that may passe by livery without deed, but things also that do lie in grant, as rents, commons, advowsons and the like, that cannot passe by grant without deed, whether they be in one county or in severall counties, may be parted and divided by paroll without deed. [*s*] But a partition between joyntenants is not good without deed, albeit it be of lands, and that they be compellable to make partition by the statutes of 31 H. 8. cap. 10*, and 32 H. 8. cap. 32, because they must pursue that act by writ *de partitione faciendâ*; and a partition between joyntenants without writ remaines at the common law, which could not be done by paroll. And so it is and for the same reason of tenants in common. But if two tenants in common be, and they make partition by paroll, and execute the same in severalty by livery, this is good, and sufficient in law. And therefore where books say, the joyntenants made partition without deed, it must be intended of tenants in common and executed by liverie.

Nota, between joyntenants there is a two-fold privity, viz. in estate and in possession: betweene tenants in common, there is privity only in possession, and not in estate: but parceners have a threefold privity, viz. in estate, in person, and in possession.

[*r*] 3 E. 4. 9, 10. 9 E. 4. 38. 11 H. 4. 3. 9 H 4. Partition, 13. 21 E. 3. 38. (Dy. 350. b. Post. 187. a. 198. b.)

[*s*] Vide Sect. 290. 3 H. 4. 1. 19 H. 6. 25. 28 H. 6. 2. 3 E. 4. 9, 10. 47 E. 3. 22. 47 Ass. 3. 19 H. 6. 1. 17 E. 3. 46. 30 Ass. 8. lib. 4. fo. 73. lib. 6. fo. 12, 13. 2 H. 7. 5. Dier, 18 Eliz. 358. 31 H. 8. Dier, 46. 2 Eliz. Dier, 179. 28 H. 8. Dier, 29. 1 Mar. Dier, 98.

(1 Leon. 103. 6 Co. 12. 8 Co. 42. Post. 186. a. 193. b. 200. b. 335. a. 2 Inst. 403.)

* *It should be cap. 1. The 31 H. 8. c. 10, regulates precedency in the house of lords, and in no wise relates to the subject of jointenants.*

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ALSO, if two meses descend to two parceners, and the one mease is worth twenty shillings per annum, *and the other but ten shillings* per annum, *in this case partition may be made between them in this manner; to wit, the one parcener to have the one mease, and the other parcener*

law of Scotland. Stair's Instit. 48. The second and third of these Roman actions are treated of in lib. 10. tit. 2 & 3 of the Digest, tit. 1. of the same book, being upon the action *finium regundorum*, which partly answers to our bill in equity for ascertaining boundaries. It is remarkable also, that Fleta represents the three Roman actions last mentioned as a part of our law. Flet. lib. 5. c. 9. p. 309. See further as to the Roman law about *partition*, 1 Dom. Civ. L. by Strah. 326. For partition according to the French law, see tit. *partage* in their book; and for the like subject in the Scotch law, see concerning the *obligation of division, heirs, portioners, commonties* and *writs of division*, in Stair's Instit. 48. 477. 169. 576. and in Erskine's Instit. 468.—[Note 23.]

(3) In 1 Atk. 542. there is a case in equity, in which lord Hardwicke allows of a *parol* agreement for a partition. See infra note 4, and 1 Vern. 472. —[Note 24.]

parcener the other mease; and she which hath the mease worth 20 *shillings* per annum *and her heires shall pay a yeerely rent of five shillings issuing out of the same mease to the other parcener and to her heires for ever, because each of them should have equality in value.*

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AND such partition made by paroll is good enough; and that parcener, who shall have the rent, and his heires, may distrein of common right for the rent in the sayd mease worth twenty shillings, if the rent of 5 *shillings be behinde at any time, in whose hands soever the same mease shall come, although there never were any writing of this made betweene them for such a rent.*

[t] 8 E. 3. 16. 21 Ass. p. 1. 21 E. 3. 38. 11 H. 4. 61. 45 E. 3. 21. 2 H. 6. 14. 21 H. 6. 11. 1 Mar. Dier, 91. (Aut. 34. b.) (Mo. 29.)

"BY *paroll.*" *Nota*, here [t] a rent may be granted for owelty of partition without (4) deed, even as a rent in case of a lease for yeares, for life, or a gift in taile, may be reserved, without deed; and so may a rent be assigned to a woman out of the land, whereof she is dowable, &c. without deed. But albeit an exchange for lands in the same county may be without deed; yet a rent granted for egality (5) of the same exchange cannot be without deed. And the cause of the difference is apparent; for coparceners are in by descent, and compellable to make partition.

"*The rent, &c.*"

The same law is of common of estovers, or a corodie, or a common ☞ of pasture, &c. or a way granted upon the partition by the one coparcener to the other. All which and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

[169. b.]

[x] 1 Mariæ, Dyer, 91. [z] 29 Ass. 23. 29 E. 3. 9. b. Pl. Com. 34. (Post. 252. b.) [a] 15 H. 7. 14. 29 Ass. 23. 29 E. 3. 9. b. (5 Co. 8. a. Wyndham's case. 3 Co. 22. b. Hob. 172. Post. 177. b.)

"*Issuing out of the same mease, &c.*" [x] For if it be granted out of other lands, then descended to the coparceners, then there must be a deed. [z] But if the rent be granted generally (out of no land in certaine) for owelty of partition, *pro residuo terræ*, it shall be intended out of the purpartie of her that granteth it.

[a] If there be three coparceners, and they make partition, and one of them grant twenty shillings *per annum* out of her part to her two sisters and their heires for equality of partition, the grantees are not joyntenants of this rent; but the rent is in nature of coparcenary, and after the death of the one grantee the moity of the rent shall descend to her issue in course of coparcenary, and not survive to the other, for that the rent doth come in recompence of the land, and therefore shall ensue the nature thereof; and if the grant had beene made to them two of a rent of twenty shillings,

(4) Here the eleventh edition of this book has a note questioning whether such *parol* grant would be good now in respect of the 29 Cha. 2. c. 3, and Mr. serjeant Hawkins in his Abridgment makes a like question. See supra note 3.—[Note 25.]

(5) Of *equality* in exchanges, see ant. 50. b. 51. a. & b.

shillings, viz. to the one ten shillings, and to the other ten shillings, yet shall they have the rent in course of coparcenary, and joyne in action for the same.

[b] If one coparcener be married, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the fem covert, this partition being equall shall charge the part of the fem covert for ever.

[b] 29 Ass. 23. 29 E. 3. 9. 17 E. 3. 10.

[c] If two coparceners by deed indented alien both their parts to another in fee, rendring to them two and their heires a rent out of the land, they are not joyntenants of this rent, but they shall have the rent in course of coparcenary; because their right in the land, out of which the rent is reserved, was in coparcenary.

[c] 38 E. 3. 26. b; but see ante 12. b.

"*May distrein of common right, &c.*" That is, [d] in this case the law doth give a distresse, lest the grantee should be without remedy, for the which upon the partition she hath given a valuable recompence in land, which descended, &c. And so in the case of dower abovementioned (1).

[d] 1 Mariæ, Dyer, 91. 8 E. 3. 16. and other the bookes abovesaid.

Sect. 253.

IN the same manner it is of all manner of lands and tenements, &c. where such rent is reserved to one or to divers parceners upon such partition, &c. But such rent is not rent service, but a rent charge of common right (1)* *had and reserved for equality of partition* (2)†.

[170. a.] "*LANDS and tenements, &c.*" Here (*&c.*) implyeth a caution, viz. that they be such lands ☞ and tenements out of which a rent for egaltie of partition may be granted, whereof sufficient hath been said before.

"*Reserved to one.*" Here reservation is taken for a grant; and if it be used upon the partition, doth amount in this case to a grant, which is worthy the observation.

Sect. 254.

AND note, that none are called parceners by the common-law, but females or the heires of females, which come to lands or tenements by discent; for if sisters purchase lands or tenements, of this they are called joyntenants, and not parceners.

This needs no explanation.

Sect.

* † *These are notes* 1, *and* 2, *of* 170. *a. in the* 13*th and* 14*th editions.*

(1) See ante 34. b. 153. a. and Shep. Common. Assur. 425.
(1) * See ante 153. a. note 1.
(2) † In L. and M. *&c.* here.

Sect. 255.

ALSO, if two parceners of land in fee simple make partition between themselves, and the part of the one valueth more than the part of the other, if they were at the time of the partition of full age, sc. *of* 21 *yeares, then the partition shall alway remaine, and be never defeated. But if the tenements (whereof they make partition) be to them in fee taile, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition; yet if the parcener, which hath the lesser part in value, hath issue and dye, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister, &c. as if no partition had been made* (1)†.

"*THEN the partition shall alway remaine, &c.*" Hereby it appeareth, that the inequality of the value shall not impeach a partition made of lands in fee simple between coparceners of full age (3), no more than it shall do in case of an exchange (4.)

9 H. 6. 5. and other the bookes abovesaid.

"*They be concluded during their lives.*" This inequall partition doth so conclude the parceners themselves, as she that hath the unequall part shall not avoid it during her life.

(Post. 352. a.)

"*Concluded.*" This word is derived of *con* and *claudo* (5), and in this sense signifieth to close or shut up her mouth that she cannot speake to the contrary.

11 Ass. p. 2.

☞ Husband and wife tenants in speciall taile of certaine lands in fee have issue a daughter, the wife dyeth, the husband by a second wife hath issue another daughter, both the daughters enter (where the eldest is only inheritable) and make partition: the eldest daughter is concluded during her life to impeach the partition, or to say that the youngest is not heire, and yet she is a stranger to the taile, but in respect of privity in their persons the partition shall conclude, for a partition between meere strangers in that case is voyd, but the issue of the eldest shall avoyd this partition as issue in taile.

[170. b.]

See after the chapter of Warranty (2.) (Doctor and Stud. 65.)

[g] 21 E. 3. 34, 35. 2 E. 2. Bastardy, 19. 11 Ass. 23. 30 Ass. 7. 17 E. 3. 59. (8 Co. 101. b. Post. 244. b.)

[g] *I. S.* seised of lands in fee hath issue two daughters, *Rose* and *Anne*, bastard eigne and *mulier puisne*, and dieth. *Rose* and

Anne

† *This is note* 1 *of* 170. *b. in the* 13*th and* 14*th editions.*

(3) Ante acc. 166. a.
(4) Ante 51. a.
(5) Acc. ante 37. a.

(1)† This case of Littleton turns upon the *inequality* of the partition; for if the parts are equal, it binds notwithstanding infancy. Ante 166. a. Post. 173. b.—[Note 26.]

(2) See the case of discontinuance stated by lord Coke, post. 373. b.

Anne do enter and make partition. (3) *Anne* and her heires are concluded for ever (4).

Sect. 256.

ALSO, if two parceners of lands in fee take husbands, and they and their husbands make partition between them, if the part of the one be lesse in value than the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit it shall stand during the lives of their husbands, yet after the death of the husband, that woman which hath the lesser part may enter into her sisters part as is aforesaid, and shall defeat the partition (et defeatera la particion).

"*THEY and their husbands.*" Here it appeareth, that the wife must be party to the partition, and so are the books* to be intended that speak of this matter.

* 42 Ass. 22. 8 E. 4. 4. 9 E. 3. 38. 15 E. 4. 20. F. N. B. 62. 29 Ass. 23. 9 H. 6. 5. 48 Ass. 14.

"*And shall defeat the partition.*" Note, the partition shall not be defeated for the surplusage onely to make the partition equall, but here it appeareth that it shall be avoyded for the whole. But of this more shall be said hereafter in this chapter, *sectione* 264. [*h*] And though the partition be unequall, yet is not the particion voyd, but voydable; for if after the decease of the husband, the wife entereth into the unequall part, and agreeth thereunto, this shall binde, and therefore *Littleton* ☞ used the word *(defeatera,)* which proveth it to be voydable.

[*h*] Vid. 2 E. 2. Cui in vita 17.

[171. a.]

Sect. 257.

BUT if the partition made betweene the husbands [perenter les barons (1)] *were thus, that each part at the time of the allotment made was of equall yearely value, then it cannot afterwards be defeated in such cases.*

"*BETWEENE the husbands* (perenter les barons)." This is mistaken, for the originall is *perenter eux*, that is, betweene the barons and fems, and not as it is here betweene the barons, therefore this error would be hereafter reformed.

"*At*

(3) In a Coke upon Littleton I have with MS. notes and references, the annotator is for excluding from such an estoppel as is here stated, a partition in *pais*. His note is thus expressed: "If two make partition in *court of record*, "when one of them had no right, he thereby shall gain a moiety by estoppel "or conclusion. Bro. Nouv. Cas. pl. 306. But otherwise I conceive of a par- "tition in *pais*; though the book speaketh generally; and upon this difference "you shall read a like case in this booke, fol. 46. a."—[Note 27.]

(4) Acc. Dr. & Stud. dial. 1. c. 19. where *mulier puisne* sues livery with *bastard eigne*. See Bro. Abr. *Entrie congeable*, 31. and *Discent*, 9. But it is said that this sort of estoppel will not bind in chancery. Cary's Rep. 26. See further 2 Co. 4. b. Cro. Cha. 110. Pollexf. 67. and 3 Com. Dig. 278.—[Note 28.]

(1) *Instead of* les barons *it is* eux *in L. and M. and Roh.*

"*At the time of the allotment.*" Hereby it appeareth, that if the parts at the time of the partition be of equall yearely value, neither the wives nor their heyres shall ever avoyd the same; and the reason hereof is, for that the husbands and wives were compellable by law to make partition, and that which they are compellable to do in this case by law, they may do by agreement without processe of (2) law. If the annuall value of the land be equall at the time of the partition, and after become unequall by any matter subsequent, as by surrounding, ill husbandry, or such like, yet the partition remaines good.

9 H. 6. 5, and other the bookes abovesaid. (Post. 179.)

Judicis officium est, ut res ita tempora rerum
Quærere; quæsito tempore tutus eris.

But if the partition be made by force of the king's writ, and judgement thereof given, it shall binde the feme-coverts for ever, albeit the parts be not of equall annuall value; because it is made by the sherife by the oath of twelve men by authority of law; and the judgement is, that partition shall remaine firme and stable for ever, as hath beene said. [*a*] But a partition in the chancery where one coparcener is of full age and sueth livery, and one other is within age and hath an unequall part allotted to her, this shall not binde her at full age; for in a writ directed to the escheator to make partition, there is a *salvo jure*, and there is no judgement upon such a partition. But if such a partition be equall, it shall binde, so that a part of the land holden *in capite* be allotted to every of the coparceners, for to that end there is an expresse *proviso* in the writ. [*b*] And this partition may be avoyded either by *scire fac'* in the chancery, or by a writ *de partitione faciendâ* at the common law at her full age (3).

[*a*] F. N. B. 256. 259, 260, 261, 262, 263. 9 H. 6. 6. 21 E. 3. 31.

[*b*] Vide 21 E. 3. 31.

Sect. 258.

ALSO, if two coparceners be, and the youngest being within the age of twenty-one years, partition is made betweene them, so as the part which is allotted to the youngest is of lesse value than the part of the other, in this case the youngest, during the time of her nonage, and also when she commeth to full age, scil. *of* 21 *yeares, may enter into the part allotted to her sister, and shall defeat the partition. But let such parcener take heed when she comes to her full age, that she taketh not to her owne use all the profits of the lands or tenements which were allotted unto her; for then she agrees to the partition at such age, in which case the partition shall stand and remaine in its force. But peradventure she may take the profits of the moitie, leaving the profits of the other moitie to her sister* (1)*.

AS

* *This is note* 1 *of* 171. *b. in the* 13*th and* 14*th editions.*

(2) In 1 Atk. 541. there is a case, in which lord chancellor Hardwicke is represented to say, that a partition by agreement between two husbands will not bind the inheritance of their wives. But notwithstanding this high authority, I take the doctrine of Littleton and Coke, that such a partition will bind the wives, if parties, *unless it be unequal*, to be clear law, and for the cogent reason here given by the latter. See acc. F. N. B. 62. F.—[Note 29.]

(3) Acc. F. N. B. 62. H. Yet see before 166. a. which seems *contra*, unless what is there expressed is applied, not to a fee-simple, but to an estate-tail, which probably was lord Coke's meaning.

(1)* In L. and M. and Roh. an *&c.* here.

AS before in the case of the fem-covert, [c] so it is in the case of the enfant; for if the partition be equall at the time of the allotment, it shall binde him for ever, because he is compellable by law to make partition, and he shall not have his age in a *partitione ☞ faciendâ* (2); and though the partition be unequal, and the infant hath the lesser part, yet is not the partition void but voidable by his entry; for if he take the whole profits of the unequall part, after his full age, the partition is made good for ever. And therefore *Littleton* here giveth him a caveat, that in that case he take not the whole profits of his unequal part, neither shall an unequall partition in the chancery binde an infant, as appeareth before (3). But a partition made by the king's writ *de partitione faciendâ* by the sherife by the oath of twelve men, and judgement thereupon given, shall binde the infant, though his part be unequall, *causâ quâ suprà*.

[171. b.]

[c] 43 Ass. 14. 9 H. 6. 5. 6. 7 E. 3. 13. 8 E. 3. 24. 10 H. 4. 5. 31 Ass. 16. 21 H. 6. 25. (1 Ro. Abr. 138. Hob. 179.)

Sect. 259.

AND it is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of 21 *yeares; for if before such age any deed* (ascun fait) *or feoffement, grant, release, confirmation, obligation, or other writing, be made by any of them, &c. or if any within such age be baylife or receiver to any man, &c. all serve for nothing, and may be avoided*. Also a man before the sayd age shall not be sworne in an enquest, &c.* (1) †.

THE law hath provided for the safety of a man's or woman's estate, that ‖ before their age of twentie one yeares they cannot binde themselves by any deed (4), or alien any land (5), goods or chattels (6).

‖ Vid. Sect. 402, 403. (2 Inst. 673. F. N. B. 192. G. 8 Co. 44. b.)

Post. 246. a. 337. b. 350. a. & b. 380. a. Ante 171. a.

" *Age*

† *This is note* 1 *of* 172. a. *in the* 13*th and* 14*th editions.*

(2) Acc. 6 Co. 4. b. But there the reason given for an infant's not having his age in partition is different, namely, that *both* coparceners *are in possession*. In the Year-Book of 9 H. 6. 6. b. the reason is expressed to be the *prejudice which otherwise there might be to the infant* —[Note 30.]

(3) See the case of partition of an advowson between coparceners, where one is within age, in F. N. B. 36. D.

* See Lord Chief Justice Eyre's remark on this, 2 H. Black. 514.

(1) † No *&c.* in L. and M. nor Roh.

(4) See ante 51. b. note 2. and 52. a. note 2. To the references there add 3 P. Wms. 208.

(5) Not even though a special power is given to him, though it is otherwise with a feme covert. So held by lord chancellor Hardwicke in a case in 1 Ves. 298. and 3 Atk. 695. See Mo. 512. But by the 7 An. c. 19, an infant having a real estate only as a trustee or under a mortgage is enabled to convey under the direction of the court of chancery or the court of exchequer. However this act is deemed not to extend to trusts merely constructive. 2 P. Wms. 549. 3 P. Wms. 387. Another exception to an infant's not being able to alien land arises from the custom of particular places, as the custom of Kent in respect to gavelkind lands, which may be aliened by an infant on attaining 15. See the late Mr. Robinson's excellent Treatise on Gavelk. 193. and Mo. 512.—[Note 31.]

(6) But an infant may before 21 dispose of personal estate by last will, though it is controverted at what age this testamentary power begins to attach in infants.

"*Age of* 21 *yeares.*" Before this age a man or woman is called an enfant.

Brit. fol. 65, 66. & 101. Fleta, lib. 3. cap. 14. (Perk.sect.135.)

"*Deed* (fait)." (1). *Factum, Anglicè*, a deed, and signifieth in the common law, an instrument consisting of three things, viz. writing, sealing, and delivery, comprehending a bargaine or contract between party and party, man or woman. It is called of the civilians *literarum obligatio.*

"*Feoffement.*" Of this word sufficient hath been ☞ sayd before in the first chapter of the first booke. [172. a.]

Lib. 3. fol. 63. in Lincolne Colledge case.

"*Grant,*" *Concessio,* is in the common law a conveyance of a thing that lies in grant and not in livery, which cannot passe without deed; as advowsons, services, rents, commons, reversions, and such like. Of this also sufficient likewise hath been said in the first chapter of the first booke. (9. b.)

"*Release, confirmation, &c.*" Of these shall be spoken hereafter in their proper places and chapters.

"*Obligation,*" is a word of his owne nature of a large extent: but it is commonly taken in the common law, for a bond containing a penalty, with condition for payment of money or to do or suffer some act or thing, &c. and a bill is most commonly taken for a single bond without condition.

"*Or other writing, be made by any of them, &c.*" Here by this *&c.* is implied some exceptions out of this generality, [*d*] as an infant may bind himselfe to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards: but if he bind himselfe in an obligation or other writing with a penalty (2) for the payment of any of these, that obligation shall not bind him. [*e*] Also other things of necessity shall bind [him], as a presentation to a benefice (3), for otherwise the laps shall incur against him. Also if an infant be an executor upon payment of any debt due to the testator, he may make an acquittance; but in that case a release without payment is voyd (4): and generally whatsoever an infant

[*d*] 18 E. 4. 2. 21 H. 6. 3. lib. 9. fol. 87. Pinchon's case. (2 Ro.Abr. 146. Cro. Eliz. 920. 2 Inst. 483. Cro. Cha. 179. Cro. Jam. 494. 560. 1 Ro. Abr. 729. Plowd. 364.)

[*e*] 8 E. 4. 4. 9 H. 6. 5. 17 E. 3. 9. 29 Ass. 25. 2 Mariæ, Dyer, 104, 105. (5 Co. 29. b. 27. a. 6 Co. 3. Cro. Cha. 324. 590. 502. Mo. 105. Cro. Jam. 320. 1 Sid. 41. 259. 446.)

infants. On this point I have heretofore expressed my notions at length. See note 6, of fol. 89. b.—[Note 32.]

(1) In the cases of Wells *v.* Gough, and of Oxenham *v.* Horsfall, in B. R. Mich. T. 37 G. 3, the court is said to have holden sealed award by an arbitrator to be a deed within the stamp-duties, though it was contended, that to constitute a deed there should be a contract and delivery, as well as sealing; and that otherwise all wills, and all warrants of magistrates, would become liable to the deed-stamp-duties; but *quære* as to the grounds of the decision; and note, that I have seen a subsequent opinion of Mr. serjeant Hill concerning an award by commissioners of an inclosure act, not quite accord with the cases in B. R. I have thus referred to.

(2) Acc. 1 Ro. Abr. 729. pl. 8. Mo. 679. Cro. Eliz. 920. Godb. 219. But lord Coke's words imply, that a single bond, that is, one *without a penalty*, being given for necessaries, may be good against an infant; and so it hath been frequently adjudged. See March, 145. 1 Ro. Abr. 729. pl. 8. and 1 Lev. 86.—[Note 33.]

(3) See acc. ante 89. a. and note 1, there.

(4) Acc. post. 264. b.

infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law (5). But of this common learning this little tast shall suffice.

"*Baylife or receiver to any man, &c.*" By this *&c.* many things are implied, as that by baylife is understood a servant that hath administration and charge of lands goods and chattels to make the best benefit for the owner against whom an action of account doth lie for the profits which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expences deducted. [*f*] But one under the age of twenty-one yeares shall not be charged in any such account (6); because, by intendment of law, before his full age he hath not skill and ability to raise or make any such improvement and profit.

Fleta, lib. 2. ca. 64. & ca. 67. Britton, fol. 62. 70. Fleta, lib. 2. cap. 64. 41 E. 3. 39. 46 E. 3. Account, 40. 2 R. 2. ibid. 45. 6 R. 2. ibid. 3 E. 3. 10. (Cro. Jam. 177. 1 Leon. 219.)

[*f*] 13 E. 3. Infant, 9. 17 E. 2. Account, 121. 21 E. 3. 8. 10 H. 4. 14. 2 H. 4. 13. Regist. 135. (Finch, L. 302, 303. Noy, 12.)

An account against a receiver is, when one receiveth money to the use of another to render an account; but upon his account he shall not be allowed his expences and charges. [*g*] And therefore a man cannot charge a baylife as a receiver; because then the bailife should lose his expences and charges.

[*g*] 43 E. 3. 31. 46 E. 3. 3. b. 4 H. 6. 27. (1 Ro. Abr. 119. 2 Inst. 379. 4 Leon. 39. 1 Ro. Rep. 87.)

In an account against a receiver, the plaintife must declare by whose hands the defendant received the money, which he shall not doe in the case of a baylife. [*h*] But in some case in an action of account against one as *receptor denariorum*, he shall have allowance of his expences and charges, and also shall account for the profit he received (7) or might reasonably receive; and this was provided by law in favour of merchants, and for advancement of trade and trafficke.

[*h*] 30 E. 3. 1. Account, 127. 47 E. 3. 22. 10 H. 7. 16. Bract. lib. 5. fol. 334. Britt. fol. 62. Fleta, lib. 2. cap. 64. & 51. 5 E. 3. 1. Lib. intrat. 17, 18, 19. F. N. B. 117. D. Post. 182. a. Cro. Jam. 410.)

As if two joynt merchants occupy their stocke goods and merchandizes in common to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius* B. *ex quâcunque causâ & contractu ad communem utilitatem ipsorum* A. & B. *provenien' sicut per legem mercatoriam rationabiliter monstrare poterit.*

[*i*] If there be two joyntenants or tenants in common of lands, and the one make the other his baylife of his moity, he shall have an action of account against him as bailife: and so are the bookes to be intended, that speake of an action of account in that case (8).

[*i*] 45 E. 3. 10. 3 E. 3. 27. 39 E. 3. 27. 47 E. 3. 22. F. N. B. 118. (Post. 186. 200. b.)

So as there be but three kinds of writs of account, viz. against one as gardian, whereof *Littleton* hath spoken before in the Chapter of Socage; the second against one as baylife; and the third as receiver; as here it appeareth. [*k*] For a man shall

[*k*] 13 E. 3. Account, 76.

41 E. 3. ibid. 34. 8 E. 3. 46. 8 E. 4. 6. b. F. N. B, 119. D. (2 Inst. 379. F. N. B. 119. C. 1 Ro. Abr. 119.)

not

(5) See F. N. B. 168. D. and the notes b. &c. in the 4to edition as to infant's binding himself to serve.

(6) See acc. ante 88. b.

(7) See Dy. 21. b.

(8) But now one jointenant or tenant in common may have account against the other as bailiff for receiving more than his share of profits, though there is no appointment of him as bailiff. See 4 Anne, c. 16. s. 27. See too 1 Leon. 219.—[Note 34.]

not be charged in an account as surveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there must be, either a privity (9) in deed by the consent of the partie, for [*l*] against a disseisor or other wrongdoer no account doth lie; or a privity in law *ex provisione legis* made by the law, as against a gardian, &c. whereof sufficient hath been spoken in the Chapter of Socage (10).

[*l*] 2 Mar. B. Account, 89. F. N. B. 117. Pl. Com. 542. 2 H. 4. 12. 33 H. 6. 2. 4 H. 7. 6. &c. (F N.B. 119. C.)

"☞ *Shall not be sworne in an enquest, &c.*" By this *&c.* is implied a maxime in law, [*m*] *quòd minor jurare non potest.* For example [*n*] an infant cannot make his law of *non summons*; [*o*] and therefore the default shall not grieve him; for seeing the meane to excuse the default is taken away by law, the default it selfe shall not prejudice him. But yet this rule hath an exception, that [*p*] an infant, when he is of the age of 12 yeares, shall take the oath of allegiance to the king (1): and this was, as *Bracton* saith, *secundùm leges sancti Edwardi*; but indeed such was the law in the time of king *Arthur* (2). [*q*] An infant cannot upon his oath make his law in an action of debt. [*r*] And the husband and wife of full age, for the debt of the wife before the coverture, shall make their law.

[172. b.]

[*m*] Bract. lib. 5. fol. 340. b. [*n*] 13 E. 3. Ley, 50. [*o*] 26 E. 3. 63. 2 Mariæ, Dyer, 104. 105. [*p*] Vid. devant cap. de Homage et cap. de Fealty, Sect. 85. 91. Bract. lib. 2. fol. 124. Britt. fol. 73. 74. et fol. 19. Fleta, lib. 1. cap. 27. [*q*] 11 H. 40. 1 H. 7. 25. 15 E. 4. 24. (Post. 295.) [*r*] 46 E. 3 10. 9 E. 4. 24. 15 E. 4. 2. 21 H. 3. 23. (Post. 295. a. Cro. Eliz. 161.)

Sect. 260.

ALSO, if lands or tenements be given to a man in taile, who hath as much land in fee simple, and hath issue two daughters and die, and his two daughters make partition betweene them, so as the land in fee-simple is allotted to the younger daughter in allowance for the lands and tenements

(9) See as to this and the king's prerogative in charging persons as accountants the earl of Devonshire's case, 11 Co. 89. a.

(10) Ante 90. b.

(1) Acc. ante 68. b. and 78. b. See also 128. a.—Another exception is, that he may be sworn as a witness at 14, and *before* if he appears to understand an oath, or rather as it is expressed by lord Hale, hath competent discretion. 11 Mod. 228. 2 Hal. H. P. C. 271.—Also according to lord Hale in some cases of exigence, as in rape, an infant of tender years may be examined without oath.—In 1 Stra. 700, there is a case in which an infant of 7 years was refused. There too the point about examining infants as witnesses is ably argued. The same point was touched upon incidentally in the great case of Omichund and Barker, before lord chancellor Hardwicke, about receiving a Gentoo's evidence; which I more particularly refer to here, because in it lord Hale's doctrine of admitting infants to give evidence in criminal cases *without oath* is said to have been over-ruled at the Old Bailey after mature deliberation, and also by lord Raymond. 1 Atk. 29. See 1 Hal. Hist. P. C. 302. 634. and 2 Hal. H. P. C. 279. and Lamb. Just. 24. 1602. p. 85.—[Note 35.]

(2) See notes 3 and 4 of fol. 68. b.

tenements (en allowance des terres et (3) tenements) *in taile allo'ted to the elder daughter, if, after such partition made, the younger daughter alieneth her land in fee simple to another in fee, & hath issue a son or daughter and dies, the issue may enter into the lands in taile and hold and occupy them in purparty with her aunt. And this is for two causes. One is, for that the issue can have no remedie for the land sold by the mother, because the land was to her in fee simple; and in as much as she is one of the heires in taile, & hath no recompence of that which belongeth to her of the lands in taile, it is reason that she hath her portion of the lands tailed, and namely when such partition doth not make any discontinuance* (1)†.

But the contrary is holden M. 10 *H.* 6. scil. *that the heire may not enter upon the parcener who hath the intailed land, but is put to a* formedon.

"*THE land in fee simple is allotted to the younger daughter.*" It is first to be observed upon this whole case, that the fee simple land is allotted to the youngest daughter, and the land entailed to the eldest. This partition *primâ facie* is good (4); and herein the partition differeth from the exchange, where in the exchange the estates must be equal. (4 Co. 121. b.) (Ant. 51. a.)

But yet this partition by matter subsequent may become voidable (as *Littleton* here puts the case). The eldest coparcener hath by the partition and the matter subsequent barred herself of her right in the fee simple lands, insomuch as when the youngest sister alieneth the fee simple lands and dieth, and her issue entreth into halfe the lands entailed, yet shall not the eldest enter into halfe of the lands in fee simple upon the alienee: for by the alienation, the privitie of the state is destroyed.

[173. a.] "*The younger daughter alieneth her land in fee simple, &c.*" The same law it is, if the youngest ☞ daughter had made a gift in tayle, for the reversion expectant upon an estate tayle is of no account in law (2), for that it may be cut off by the tenant in tayle. Otherwise it is of an estate for life or yeares. If in this case the youngest daughter alien part of the land in fee simple, and dieth, so as a full recompence for the land entailed descends not to her issue, she may waive the taking of any profits thereof and enter into the land entailed; for the issue in taile shall never be barred without a full recompence, though there be a warranty (3) in deed or in law descended. If on the other side the eldest coparcener alien the land (Post. 174. b.)

† *This is note* 1 *of* 173. *a. in the* 13*th and* 14*th editions.*

(3) *In L. and M. instead of* terres et *it is* autres.

(1) † In L. and M. Roh. and the two Cambridge MSS. these words are added, *of the tail, as will be said hereafter in the chapter of* Discontinuance. What follows in this Section is not in L. and M. Roh. nor the MSS.

(4) Acc. F. N. B. 62. M.—Here lord Hale's MS. makes a question, *whether such partition be void or voidable, being made by husband*, and cites M. 30, 31 Eliz. B. R. Morris and Maule.—[Note 36.]

(2) For the effect of this doctrine about reversions on estates tail, and with what qualification it should be understood, see the authorities collected in 1 Vin. Abr. 141. pl. 2. to which add 2 Atk. 206. and post. 174. b.

(3) Lord Coke may be here presumed to mean a *lineal* warranty; because hereafter he allows, and in his time it was the common learning, that *collateral* warranty would bar the issue in tail without recompense. Post. 374. b.—[Note 37.]

land entayled and dyeth, her issue shall have a *formedon* alone (4) for the whole land entailed; for so long as the partition continueth in force (5), she is only enheritable to the whole land entailed.

"*And hath no recompence.*" This is intended, as it appeareth, of a full recompence.

See more of this in the Chapter of Discontinuance, Section †.

"*Such partition doth not make any discontinuance.*" And the reason thereof is, for that it passeth not by livery of seisin, but the partition is in truth lesse than a grant, for that it maketh no degree, but each coparcener is in by descent from the common ancestor.

"*But the contrary is holden, &c.*" This is no part of *Littleton*, and is contrary to law, as appeareth by *Littleton* himselfe; and besides, the case intended is not truly vouched, for it is not in 10 H. 6, but in 20 H. 6, and yet there is but the opinion of *Newton*, *obiter*, by the way. *Vide F. tit. part* 1.

20 H. 6. 14.

† *Probably Sect.* 618; *for the general words there used, or at least the first &c. in the section, may, it seems, be said to include the case of a partition; and in the commentary on the same section lord Coke expressly mentions the case of an exchange, though not that of a partition: but he adds an* &c.

Sect. 261.

ANOTHER reason is, for that it shall be accounted the folly of the eldest sister (pur ceo que il serra rette la folly del eigne soer), *that she would suffer or agree to such a partition, where she might if she would have had the moiety of the land in fee simple and a moiety of lands entailed for her part, and so to be sure without losse.*

"*ANOTHER reason, &c.*" This is another reason to prove, that by the partition the eldest daughter hath concluded her selfe, as is aforesaid.

"*A moiety of lands entailed.*" For if a writ of partition had been brought, the eldest should not have been compelled to take the whole estate in tayle, for the prejudice that might after ensue, but might have challenged the one moiety of the lands in taile, and another moiety of the lands in fee simple, and this she might do *ex provisione legis*. But when she will not submit her to the policie and provision of the law, but betake herselfe to her owne policy and provision, there the law will not ayde her, as here by *Littleton* it manifestly appeareth. And so it is in the other case. (*) As if a man be seised of three mannors of equal value in fee, and taketh wife, and chargeth one of the mannors with a rent charge, and dyeth, she may by the provision of the law take a third part of all the mannors and hold them discharged; but if she will accept the entire mannor charged, it is holden that she shall hold it charged.

(*) 26 E. 3. Dower, 133. 17 E. 2. tit. Dower, 164. 18 H. 6. 27. (Ant. 32. b. 33. a.) Dyer, 1 Mar. 98.

A partition

(4) In a Coke upon Littleton I have with MS. notes there is the following remark.—*Quære* of this; for I think the formedon must be brought in the "name of the issue and the surviving parcener, and then the parcener to be "summoned and severed, and then the issue to make a special count and show "the partition."—[Note 38.]

(5) See post. 176. b. and Sect. 274.

[173. b.] ☞ A partition of lands intailed betweene parceners, if it be equall at the time of the partition, shall bind the issues in taile for ever (1), albeit the one do alien her part.

But here it may be demanded, that seeing *Littleton* saith, that it shall be taken to be the folly of the eldest parcener, &c. what if so be the eldest did not know of the estate tayle either in respect of the antiquity thereof, or for want of having of the evidence, or for any other cause, what folly can be imputed to her?

The answer is, that it is presumed in law, that every one is conusant of her right and title to her owne land; and on the other side it should be arrected (2) great folly in her to be ignorant of her owne title. And therefore the reason of *Littleton* doth firmly hold.

Sect. 262.

ALSO, if a man be seised in fee of a carve of land by just title, and he disseise an infant within age of another carve, and hath issue two daughters, and dyeth seised of both carves, the infant being then within age, and the daughters enter and make partition, so as the one carve is allotted for the part of the one, as per case *to the youngest in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof he was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath, and hold in parcenary with her. But if the youngest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed her self to have any part of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for terme of yeares, or for terme of life, or in fee tayle saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed her selfe of all which was in her, but hath reserved to her the reversion and the fee, &c.*

BEFORE (3) it appeareth that when the privity of the estate is destroyed by the feoffment of one coparcener, that upon eviction of a moity by force of an entayle against the other she shall not enter upon the alienee. But in this case that *Littleton* here putteth, when the privity of the state remaineth, and the part of the one is evicted (*), she shall enter and hold in coparcenary with her other coparcener; and so it is in the case of an exchange. By reason of the *&c.* in the end of this Section there may two questions be justly demanded.

(*) 15 E. 4. 3. a. per Littleton. lib. 4. fo. 121, 122. Bastard's case.

What

(1) Acc. ant. 166. a. 2 Vern. 233.

(2) This word, which is so uncommon that I cannot find it noticed in any dictionary I have seen, is apparently used for *reckoned*. Lord Coke seems to borrow it from Littleton's use of the word *rette* at the beginning of the Section here commented upon †.—[Note 39.]

(3) Ant. 172. b.

† *It has been said that the word* arrected *was formed from the French* arrêté, adjudged; *and that* il serra rette *was used for* il serra arrêté, it shall be adjudged. *See Mr. Ritso's Intr. p.* 110. *n.* 19.

What if the whole estate in part of the purparty of one parcener be evicted by a title paramount; whether is the whole partition avoyded, for that *Littleton* here putteth the case that the whole purpartie of the one is defeated?

The second question is, whether if but part of the state of one coparcener be evicted, as an estate in taile, or for life, leaving a reversion in the coparcener, whether that shall avoid the partition in the whole?

To the first it is answered, that if the whole estate in part of the purparty be evicted, that shall avoyd the partition in the whole, be it of a mannor, that is entire, or of acres of ground, or the like, that be severall; [*n*] for the partition in that case implyeth for this purpose both a warrantie and a condition in law (4), and either of them is entire, and giveth an entry in this case into the whole. And so hath ☞ it been lately resolved [*o*] both in the case of exchange and of the partition. [174. a.]

[*n*] 13 E. 4. 3. 42 Ass. 22.

[*o*] Bastard's case, lib. 4. fol. 121.

To the second, if any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoyded in the whole (1). As if *A.* be seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and he disseise the lessee for life who makes continuall clayme; *A.* dyeth seised of both acres, and hath issue two daughters; partition is made, so as the one acre is allotted to the one, and the other acre to the other; the lessees enter†: the partition is avoided for the whole, and so likewise hath [*p*] it been lately resolved.

[*p*] Bastard's case, ubi supra.

[*q*] Yet there is a diversity betweene the warranty, and the condition which the law createth upon the partition. Where one coparcener taketh benefit of the condition in law (2), she defeateth the partition in the whole. But when she voucheth by force of the warranty in law for part, the partition shall not be defeated in the whole, but she shall recover recompence for that part. And therein also there is another diversity betweene a recovery in value by force of the warranty upon the exchange and upon the partition. For upon the exchange he shall recover a full recompence for all that he loseth. But upon the partition she shall recover but the moity, or halfe of that which is lost, to the end that the losse may be equall (3).

[*q*] Vide 5 E. 3. tit. Voucher 249

(6 Co. 12. b. 1 Ro. Abr. 815. 4 Co. 122.)

Many other diversities there be between exchanges and partitions; for there are more and greater privities in case of partitions in persons bloud and estates, than there is in exchanges; all which were too tedious to rehearse in this place, seeing so much as hath been said herein is sufficient for the explanation of the cases of partition which *Littleton* hath put.

18 E. 2. tit. Aid, 171. 19 H. 6. 26. (Ant. 50. b.)

" *Then*

† *As* lessee, *in the singular number, is before spoken of by lord Coke, grammatical accuracy here requires the words* the lessee enters, *instead of* the lessees enter. *See Mr. Ritso's Intr. p.* 118.

(4) That is, a condition to give re-entry and a warranty to vouch and have recompense. See post. 384. a.

(1) So it is of an exchange. Hob. 152. Calthrope's reading on Lord and Copyholder, 92. 1 Ro. Abr. 815.—[Note 40.]

(2) This is, *by entry.*

(3) See acc. the case of dower, post. 384. b. See also the provision in favour of the lord for the third part not devisable by the statute of wills 34 and 35 H. 8. c. 5. s. 11.

" *Then she cannot enter into the other carve, &c.*" By this is also approved that which hath beene often said before, that when the whole privity betweene coparceners is destroyed, there ceaseth any recompence to be expected either upon the condition in law or warranty in law by force of the partition.

" *By her alienation she hath altogether dismissed herself to have any part of the tenements as parcener.*" Hereupon it followeth, that if one parcener maketh a feoffement in fee, and after her feoffee is impleaded and voucheth the feoffor, [r] she may have aid of her coparcener to deraigne a warranty paramount (4), but never to recover *pro ratâ* against her by force of the warranty in law upon the partition; for *Littleton* here saith, that by her alienation she hath dismissed her selfe to have any part of the land as parcener, and without question as parcener she must recover *pro ratâ*, upon the warranty in law, against the other parcener. (Post. 243. b.) [r] 41 E. 3. 24. 11 H. 4. 22, 23. 14 E. 3. Aid, 24. (Hob. 21. 26.)

And yet in some case the feoffee of one coparcener shall have aid of the other parceners to deraigne the warranty paramount. And therefore [a] if there be two coparceners, and they make partition, and the one of them enfeoffes her son and heire apparent and dyeth, the son is impleaded, albeit he be in by the feoffement of his mother, yet shall he pray in ayd of [174. b.] ☞ the other coparcener to have the warranty paramount; and the reason [b] of the granting of this aid is, for that the warranty betweene the mother and the son is by law annulled (1), and therefore the law giveth the son albeit he be in by feoffment, to pray in ayd of the other parcener, to deraigne the warranty paramount; wherein is to be observed the great equity of the common law in this case; [a] 43 E. 3. 23. Pl. Com. 4 E. 3. 15. 5 E. 3. 7. 38 E. 3. 17, &c. [b] 32 E. 1. tit. Aid, 178. 3 E. 2. ibid. 163. (Post. 384. b.)

Ipsæ etenim leges cupiunt ut jure regantur.

[*] But if a man be seised of lands in fee, and hath issue two daughters, and make a gift in taile to one of them, and dye seised of the reversion in fee which descends to both sisters, and the donee or her issue is impleaded, she shall not pray in aid of the other coparcener, either to recover *pro ratâ*, or to deraigne the warranty paramount; for that the other sister is a stranger to the state taile, whereof the eldest was sole tenant, and never particion was or could be thereof made (2). [*] 2 H. 6. 16. (Plowd. 9. b. Mansel's case.)

" *But if the youngest before the entry of the infant make a lease of this, &c. or in fee tayle saving the reversion to her, &c.*" This (upon that which hath been said) (3) needeth no explanation. Only this is to be observed, that, albeit it is in the power of tenant in taile to cut off the reversion, yet if the infant enter before it be cut off, the law hath such consideration of this reversion, that she that loseth it shall enter into her sister's part, and hold with her in coparcenary, for that the privity betweene them was not wholly destroyed (4). (Ant. 173. a.)

Sect.

(4) See 31 H. 8. c. 1. s. 3. 4 H. 7. 3. a. and Plowd. Mansel's case, 7. a. & b.

(1) Acc. post. 390. a.

(2) See post. 177. b. *contra* as to land given in frankmarriage. See also 2 H. 6. 16.

(3) Ant. 173. a. and note 2, there.

(4) See ant. 103. a. & b.

Sect. 263.

ALSO, if there be three or four coparceners, &c. which make partition betweene them, if the part of the one parcener be defeated by such lawfull entrie, she may enter and occupie the other lands with all the other parceners, and compell them to make new partition betweene them of the other lands, &c.

"*BETWEENE them of the other lands, &c.*" This *&c.* implieth, that so it is betweene the surviving parceners and the heires of the other, or betweene the heires of parceners, all being dead.

Sect. 264.

ALSO, if there be two parceners, and the one taketh husband, and the husband and wife have issue betweene them, and his wife dieth, and the husband keepes himselfe in as tenant by the curtesie, in this case the parcener which surviveth, and the tenant by the curtesie may well make partition between them, &c. And if the tenant by the curtesie will not agree to make partition, then the parcener which surviveth may have against the tenant by the curtesie a writ de partitione faciendâ, &c. *and compel him to make partition. But if the tenant by the curtesie would have partition to be made between them, and the parcener which surviveth will not have this, then the tenant by the curtesie cannot have any remedy to have partition, &c. For he cannot have a writ of* partitione faciendâ, *because he is no parcener. For such a writ lyeth for parceners only. And so you may see, that a writ of* partitione faciendâ *lyeth against tenant by the curtesie, and yet he himselfe cannot have the like writ.*

"*THE husband keepes himselfe in as tenant by the curtesie.*" This is no severance of the state in coparcenary, [*b*] for the other coparcener and the tenant by the curtesie shall be joyntly impleaded; for he doth continue the state of coparcenary, as the other parcener did (5).

[*b*] 24 E. 3. 29. 31 E. 3. Briefe, 339. 9 E. 4. 13. 19 H. 6. 26. 3 H. 6. 26. 3 H. 6. Ass. 1. 37 H. 6. 8. 21 E. 3. 14. (Ant. 167. b.)

"*Against the tenant ☞ by the curtesie a writ de partitione faciendâ, &c.*" Here by the *&c.* is implyed, that albeit that the tenant by the curtesie be an estranger in blood, yet the [*c*] writ *de partitione faciendâ* clearly lies against the tenant by the curtesie, because he continueth the estate of coparcenary. [175. a.]

[*c*] 3 E. 3. 47. 9 E. 5. 13. 16 E. 3. Aid, 129. 19 E. 3. ib. 144. 28 E. 3. 5.

If two coparceners be, and one doth alien in fee, they are tenants in common, and severall writs of *præcipe* must be brought against

(5) Acc. post. 175. b. See also fo. 192. a. and Bro. Joinder in Action, 40.

against them (1); and yet the parcener shall have a writ of partition against the alienee at the common law, which is a far stronger case than the case put of tenant by the curtesie.

"*Such writ lyeth for parceners only.*" Hereby it appeareth, that neither the tenant by the curtesie, nor (much lesse) the alienee of a coparcener shall have a writ of *partitione faciendâ* at the common law (2); for *Littleton* saith here, that such a writ lyeth onely for parceners, [*] but it may be brought by a parcener against strangers, as it appeareth before. But a *nuper obiit* and a *rationabili parte* (3) do lye only betweene two coparceners on both sides.

[*] 3 E. 3. 47, 48 (F. N. B. 197. Plowd. 306. b.)

If three coparceners be, and the eldest doth purchase the part of the youngest, the eldest, having one part by descent and the other by purchase, shall have a writ of partition at the common law against the other middle sister, *et sic de similibus*. And so it is in a far stronger case, if there be three coparceners, and the eldest taketh husband, and the husband purchase the part of the youngest, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in the right of his wife who is a parcener (4).

Dier, 1 Mariæ, 98.

F. N. B. 52. Registr.

"*To have partition, &c.*" Here by this *&c.* is included all others that be strangers in blood, whether they come to their estates by purchase or by act in law. Since *Littleton* wrote, by the statutes [*d*] one joyntenant or tenant in common may have a writ of partition against the other; and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common: and the like had been attempted in former parliaments [*], but prevailed not untill these latter statutes.

[*d*] 31 H. 8. cap. 1. 32 H. 8. cap. 32. Vid. Sect. 290.

[*] Rot. Parl. 1 R. 2. nu. 82.

[175. b.] [*e*] The tenant by the curtesie shall have a writ of partition upon the statute of ☞ 32 H. 8. ca. 32. for albeit he is neither jointenant nor tenant in common, for that a *præcipe* lyeth against the parcener and tenant by the curtesie, as hath been said, yet he is in equall mischiefe as another tenant for life.

[*e*] Brooke, tit. Partition, 41.

[*f*] If there be three coparceners and a stranger purchase the part of one of them, he and one other of the coparceners shall not joyne in a writ of partition, neither by the common law, nor by force of the statute; for the words of the preamble of the statute be *(and none of them by the law doth or may know their severall parts, &c. and cannot by the laws of this realme make partition thereof, without other of their mutuall assents, &c.)* Now in this case the one of the plaintifes, viz. the parcener, may have a writ of partition at the common law, and the other parcener being a purchaser may have it by the statute; and therefore they shall not joyne in one writ.

[*f*] Mich. 7 & 8 Eliz. Bendloes inter Wotton & Cooke (1)† Dier, 3 Mariæ, 128. A. and 7 Eliz. 243.

CHAP.

(1) Acc. ant. 176. b. But it is no severance if the alienation be only for life. Post. 192. a.

(2) See acc. Dy. 98. b.

(3) See ant. 164. b.

(4) See in F. N. B. 62. S. the form of the writ in such a case.

(1)† S. C. is also in Dy. 260. b.

Chap. 2. Parceners by Custome. Sect. 265.

PARCENERS by the custome are, where a man seised in fee simple, or in fee tayle, of lands or tenements which are of the tenure called gavelkind within the countie of Kent, and hath issue divers sons and die, such lands or tenements shall descend to all the sons by the custome, and they shall equally inherit and make partition by the custome, as females shall do, and a writ of partition lieth in this case as between females. But it behooveth in the declaration to make mention of the custome. Also such custome is in other places of England, and also such custome is in North-Wales (2) (3), *&c.*

(1 Sid. 136. Ant. 140. a.) See before all the ancient authors of the law concerning gavelkind, ubi supra. Lambert, verbo Terra exscript. [g] 5 E. 4. 8. b. 21 E. 4. 56. b. Plo. Com. 129.b. in Buckleis case. Vide Sect. 8. versus finem. (1 Sid. 138.

"*BUT it behooveth in the declaration to make mention of the custome.*" Well said *Littleton*, [g] that he in his declaration must make mention of the custome, as to say, that the land is of the custome of *gavelkinde*; but he shall not prescribe in it. And so it is of *Burgh English*. And these two vary in that point from other customes; for the law, when they are generally alledged, taketh knowledge of these two (4).

In [h] *Domesday* it is thus said *duo fratres tenuerunt in paragio* (5) *quisque habuit aulam suam, et potuerint ire quò voluerint.*

"*Also such custome is in other places of England.*" Of this sufficient hath beene said before (6).

Doctr. Plac. 105.) [h] Berochescire. Hereford.

"*North*

(2) In L. and M. and the two MSS. it is *in Northumberland and North Wales, &c.*

(3) But by the 34 and 35 H. 8, gavelkind descent of lands in Wales is expressly taken away, and all lands there are made descendible to the eldest son according to the common law of England. See that statute c. 26. s. 91. and 128. Also in Kent various estates have been made descendible according to the common law by special statutes for this purpose. See Robins. on Gavelk. 75.—[Note 41.]

(4) But according to a very accurate writer on *gavelkind* this doctrine must be restrained to the special descent of *gavelkind* and *Borough English* lands, which is considered as the essence of both; and therefore the other customs incident to *gavelkind* and *Borough English* land must be *specially* pleaded. See Robins. on Gavelk. 41. For this difference several authorities are cited; namely, as to *gavelkind*, a case in Cro. Cha. 562. another in 1 Lev. 79. 1 Sid. 137. and Raym. 76. and a third in 2 Sid. 153. and as to *Borough English*, a case in 1 Salk. 243. I the rather introduce these references because Mr. Robinson's Treatise is become very scarce.—[Note 42.]

(5) This word means *equality*, being derived from the adjective *par*, and made a substantive by the addition of *agium*. Read more concerning the termination of *agium*, ant. 86. a. See also as to *disparagatio*, ant. 80. a.—[Note 43.]

(6) Ant. 14. a. and 140. a. See also book 1. chap. 7. of Robinson on Gavelkind, where the reader will see a most learned dissertation on the origin, antiquity and universality of partible descents.

"*North-Wales.*" Wales, *Wallia.* It commeth [*i*] of the Saxon word *wealth*, which signifieth *peregrinus*, or *exterus*; for the *Saxons* so called them, because in troth they were strangers to them, being the remaine of the old and ancient Britons, a wise and warlike nation inhabiting in the west part of England. These men have kept their proper language for above these thousand yeares past; and they to this day call us Englishmen *Saisons* (that is) Saxons. And the like custome, as our author here saith was in North Wales, was also in Ireland; for there the lands also (which is one marke of the ancient Brittons) were of the nature of *gavelkinde:* but where by their *Brehon* law the ☞ bastards inherited with their legitimate sons, as to the bastards that custome was abolished (1). And agreeing with *Littleton* in this point, see an old statute.* *Aliter usitatum est in Walliâ quàm in Angliâ, quoad successionem hæreditatis, cò quòd hæreditas partibilis est inter hæredes masculos, et à tempore cujus non extitit memoria partibilis extitit, dominus rex non vult, quòd consuetudo illa abrogetur, sed quòd hæreditates remaneant partibiles inter consimiles hæredes sicut fieri consuevit, et fiat partitio illius sicut fieri consuevit* (2).

[*i*] Lamb. verb. Welshmen. Silvester Giraldus.

[176. a.]

Vide Sect. 212.

* Stat. Walliæ, an. 12 E. 1.

"*Parceners by the custome, &c.*" Well sayd *Littleton*, "by the custome," for sons are parceners in respect of the custome of the fee or inheritance, and not in respect of their persons, as daughters and sisters, &c. be. [*h*] *Et sunt participes quasi partem capientes, &c. ratione ipsius rei quæ partibilis est, et non ratione personarum, quæ non sunt quasi unus hæres et unum corpus, sed diversi hæredes, ubi tenementum partibile est inter plures cohæredes petentes, qui descendant de eodem stipite et semper solent dividi ab antiquo.*

[*h*] Bract. lib. 5. fol. 428. Britton, cap. 71. Fleta, lib. 5. cap. 9.

Sect.

(1) The gavelkind descent of lands in Ireland was an incident to the custom of *tanistry*, and as such fell to the ground with its principal in consequence of a solemn judgment against the latter in a case of the fifth of James the First. For this case, which is excellently reported by Sir John Davis, who was attorney-general in Ireland at the time, see Dav. Rep. 28. But in the reign of queen Anne the policy of weakening the Roman Catholic interest in Ireland was the cause of an Irish statute to make the lands of papists descendible according to the gavelkind custom, unless the heir conformed within a limited time. See Robins. on Gavelk. 17. However now by an Irish statute of 17 & 18 G. 3. c. 49. s. 1. the descent of the lands of papists is again reduced to the course of the common law. Lord Coke, from his supposing that the Brehon law of partibility except as to bastards, remained in Ireland, seems not to have been aware of the case of tanistry. Indeed what he writes in this respect was before that case more applicable to Wales than Ireland; for the statute of Wales cited in the next passage, confirms the partible descent of lands there amongst males, with an exception excluding bastards, whereas I doubt whether there is any evidence of confirmation of the Brehon law with such an exception. See ante 141. a. where lord Coke himself takes notice of a total abolition of the Brehon law.—[Note 44.]

(2) See ante 175. b. note 4.

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ALSO, there is another partition which is of another nature and of another forme than any of the partitions aforesaid be. As if a man seised of certaine lands in fee simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frankmarriage, and dyeth seised of the remnant, the which remnant is of a greater yearely value than the lands given in frankmarriage.

"*GIVETH part of his lands to the husband with his daughter in frankmarriage.*"

Here it appeareth, that a gift in frankmarriage may be made after marriage, as hath been sayd in the Chapter of Fee Tayle (3).

"*Which remnant is of greater yearely value, &c.*" Admit that the lands given in frankmarriage are of greater value than the lands descended in fee simple, shall the other sister have any remedy against the donees? It is plaine she shall not; because it is lawfull for a man to dispose of his own lands at his will and pleasure.

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IN this case, neither the husband, nor wife, shall have any thing for their purpartie of the said remnant, unless they will put their lands given in frankmarriage in hotchpot, *with the remnant of the land with her sister. And if they will not do so, then the youngest may hold and occupie the same remnant, and take the profits onely to her selfe. And it seemeth, that this word* (hotchpot) *is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the lands given in frankmarriage with the other lands in* hotchpot, *if the husband and wife will have any part in the other lands.*

"*IN this case neither the husband, nor wife, shall have any thing for their purpartie, &c.*" [*i*] This gift in frankmarriage shall *primâ facie* be intended a sufficient advancement; and therefore the remnant shall descend to the other coparcener, onely with this provision in law *tacitè* annexed, that if the ☞ donees will put the land into *hotchpot*, then she shall out of the remnant make up her part equall. But the donees must do the first act, and in [176. b.]

[i] 8 H. 3. Breve, 880. 34 E. 1. Nuper obiit, 15. adjudg. 4 E. 3. 49. 10 Ass. p. 14. Vi. 10 E. 3. 38. & 30 Ass. 7. Bracton, lib. 2. fol. 77. lib. 5. fol. 428. Britton, cap. 72. Fleta, lib. 6. cap. 47.

the

(3) See ante 21. b. See also acc. as to dower *ex assensu patris* after marriage, F. N. B. 151. L.

the meane time the whole fee simple land descends to the other. And this is warranted here by *Littleton*, viz. that the donees shall have nothing for the purpartie of the remnant, unlesse they will put their lands given in frankmarriage in *hotchpot* so as the donees must do the first act; and more expresly after in this Chapter (1), where he directly saith, that the other sister shall enter into the remnant, and them to occupy to her own use, unlesse the husband and wife will put the lands given in frankmarriage into *hotchpot*. And herewith agreeth *Fleta* (2), who saith, *cùm dicat tenens excipiendo, quòd non tenetur petenti respondere, quia* A. *participem habet, &c. replicari poterit à petente quòd prædict'* A. *tenet quandam partem in maritagium de communi hæreditate, nec vult illud in partem ponere.* And here are three things (that I may speak once for all) to be observed. First, that in this speciall case where there be two daughters, one of them only shall inherit the lands in fee simple. Secondly, that in this case there lieth no writ of partition: because *non tenent insimul et pro indiviso*. Thirdly, if the parcener, to whom the land in fee simple descended, will not put the lands in *hotchpot*, then may the donees enter into the fee simple lands, and hold them in coparcenarie with her.

And it seemeth by our old bookes, [*k*] that by the ancient law there was a kind of resemblance hereof concerning goods. *Si autem post debita deducta, et post deductionem expensarum quæ necessariæ erunt, id totum, quod tunc superfuerit, dividatur in tres partes; quarum una pars relinquatur pueris* (3) *si pueros*

[*k*] Glanvil. lib. 7. cap. 5. Bracton, lib. 2. fol. 60. Fleta, lib. 2. cap. 5. (4) Magna Carta, cap. 18. F. N. B. 222. 30 E. 3. 25. 31 E. 3. Resp. 60. 31 Ass. 14. 17 E. 2. Detinue, 3. 17 E. 3. 17. 1 E. 2. Detinue, 56. 31 H. 8. tit. Rationab. parte bonorum, 6.

habuerit

(1) See Sect. 268.

(2) See also acc. F. N. B. 197. O.

(4) The chapter of Fleta is here referred to erroneously. It should be cap. 57.

(3) Though *pueri* more commonly means *boys*, yet it is plain that here it comprehends children of both sexes; because afterwards *liberi* is used for the same purpose. The word is used in the same large sense in the writ *de rationabili parte bonorum*; and therefore Fitzherbert observes, that the son and daughter may join in that writ. F. N. B. 122. C. Also this large sense of *pueri* is warranted both by the application of the word in the Roman law, and by its derivation from the Greek word παῖς, which is masculine or feminine according to the article before it. To this effect Justinian's Digest, in the title *de verborum significatione*, gives the following extract from the Commentary of the Roman lawyer, Julius Paulus, on his famous predecessor Sabinus. *Pueri appellatione etiam puella significatur: nam et fœminas puerperas appellant recentes ex partu; et Græcè παιδίον communiter appellatur.* See Dig. lib. 50. tit. 16. leg. 163. and Menag. Jur. Civil. Amœnitates, cap. 39. voce *puerpera*, where that learned French writer expatiates on the etymology of *puer*. I have been induced to give this explanation of the word *puer* by a case in our own law-books, which actually turned upon the question, Whether a *daughter* could take lands under that description. The case arose on a remainder in a settlement made by a man on his first marriage *seniori puero* of the husband and the heirs of his body; and this was decided by two judges against one to entitle a daughter and only child of the first marriage in preference to the son of a second. Dy. 337. b. However there is a much earlier case on the construction of *pueri*, in which it was interpreted to exclude *females*. Hob. 33. and the case there cited from 30 Ass. 47.

and

habuerit defunctus, secunda uxori si superstes fuerit, et de tertiâ parte habeat testator liberam disponendi facultatem. Si autem liberos non habeat, tunc medietas defuncto, et alia medietas uxori: si autem sine uxore decesserit liberis existentibus, tunc medietas defuncto, et alia medietas liberas tribuatur: si autem sine uxore et liberis, tunc id totum defuncto remanebit. And by the law before the Conquest it * was thus provided, *sive quis incuriâ sive morte repentinâ fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito, verùm eas judicio suo uxori liberis et cognatione proximis justè pro suo cuique jure distribuito.*

* Lamb. f. 119. 68. (Post.185.b. Ante 149. b.)

But it appeareth by the *Register* [*l*] and many of our bookes, that there must be a custome alledged in some county, &c. (5) to inable the wife or children (5) † to the writ *de rationabili parte bonorum*;

[*l*] Regist. 142. 34 E. 1. Detinue, 60. 1 E. 4. 6. 7 E. 4. 21. 43 E. 3. 38. (F. N. B. 122. L.)

and 30 E. 3. 27. But now indeed, when legal instruments are so universally expressed in the English tongue, it is not probable that any dispute should arise in our courts of justice about the interpretation of this Latin word.—[Note 45.]

(5) The places usually named as those in which the customary division of personalty on a death prevailed, and so in favour of wife and children restrained the testamentary power to a third or a moiety, are these: the province of York, the city of London, and various districts of Wales. But since lord Coke's time several statutes have been made to remove this restraint in each of these different places; and under those statutes the *whole* of the personal estate is now disposable by last will in them through England and Wales, with this exception however, that there is still no statute affecting either the city of Chester, which is part of the province of York, or such other places not within that province, or London or Wales, as may have such a custom; though whether there be any such places, I am uncertain. See for the province of York, 4 W. & M. c. 2. and 2 & 3 An. c. 5; for London 11 G. 1. c. 18; and for Wales, 7 & 8 W. 3. c. 38. Indeed Sir William Blackstone treats the testamentary power over personal estate as now prevailing through *all* England. 2 Blackst. Comm. 9th ed. 493. But if there be no other statutes than those he cites, being the same as are before mentioned, I take this to be a mistake, so far at least as regards the city of Chester. The fact is, that both the cities of York and Chester were excepted in the 4 of W. & M. and that the 2 & 3 An. take away the exception as to the city of York only. As too, the statutes, which subject the custom of dividing the personal estate of deceased persons to the testamentary power, do not name any place in England except London and the province of York, it follows, that the local custom of any other part of England on this subject is not disturbed by any statutory provision. It now only remains to add here, that though the testamentary power is thus extended over the whole personalty, notwithstanding the customs within London or the province of York, or within any part of Wales, yet in the case of an intestacy the customs of those places still operate, there being a special provision to save them and all other peculiar customs in the statute of Cha. 2. for distributing the personal estates of intestates. See 22 & 23 Cha. 2. c. 10. See further as to the statutes about these customs in the latter part of note 9, infra; also 4 Burn. Eccl. Law, 2d edit. 346.—[Note 46.]

(5) † In Swinburne on Testaments there is a curious dissertation explaining the custom of the province of York in respect to filial portions; and in the course of it, the question, What sort of advancement shall exclude a child, is considered at large. This valuable part of Swinburne is not in the first edition; but was afterwards added by him. It is otherwise as to many additions in the latter editions of his book; these being full of enlargements coming

bonorum (6); and so hath it beene resolved in parliament [*m*]. But such children, as be reasonably advanced by the father in his life time with any part of his goods, shall have no further part of his goods; for the words of the writ be, *nec in vitâ patris promoti fuerunt* (7).

[*m*] 3 E. 3. Dette, 156. 40 E. 3. 18.

Note, the custom of *London* is, that if the father advance any of his children with any part of his goods, that shall bar them to demand any further part, unlesse the father under his hand or in his last will do expresse and declare, that it was but in part of advancement (8), and then that child so partly advanced

coming from others, but printed without discriminating them from Swinburne's own work. This manner of treating authors in new editions is ever dissatisfactory and unjustifiable; but in respect to law-books, it is peculiarly inconvenient, the weight and authority of these so much depending on the character of the author. To Swinburne on this subject add the title *wills* in Dr. Burn's Eccles. Law, in the course of which it is learnedly attempted to give the result of every thing to be met with on the subject in Swinburne's book or elsewhere.—[Note 47.]

(6) Acc. 2 Inst. 33. But in this point some of great respect differ from lord Coke. Fitzherbert in his commentary on the *de rationabili parte bonorum* contends, that the distribution, which excludes the testamentary power from one third or one moiety of the personal estate, was in his time the *general* law of the land, and therefore needed not a special custom to support it. He is followed by Swinburne in the same idea, and even by our great modern commentator on the law of England, who cites Finch's law to prove, that the general law was taken to be as represented by Fitzherbert as late as the reign of Charles the First. However, Mr. Justice Blackstone states, that about this period the general law insensibly changed; which amounts to an admission that lord Coke's doctrine of the necessity of a special custom for the *rationabili parte bonorum* became perfectly established within a few years after his advancing it, and that this was so without the aid of any statute. It is observable also, that Mr. Justice Blackstone considers Bracton and Fleta as clear authorities against lord Coke. But Mr. Somner, whose very learned and extended discussion of this subject seems to have escaped the author of the Commentaries, though not inclined to an entire agreement with lord Coke, cites various passages of the same ancient authors, from which it appears, that their writings in this respect are contradictory. See in Somn. Gavelk. 91. a dissertation on the question, *Whether the writ* DE RATIONABILI PARTE BONORUM *was by the common law, or by custom.* Nor is it a slight testimony of its being settled law in lord Coke's time not to allow of the writ *de rationabili parte bonorum* without a special custom, that Mr. Somner, whose book before cited was finished as early as 1647, though not published till the Restoration, observes on the order of partition under this writ, that it was then, and *that not lately*, antiquated, and vanished out of use in Kent and other counties, surviving only in the province of York, and some few cities.—[Note 48.]

(7) What under the custom of the province of York ought to be deemed a reasonable advancement sufficient to bar the right to a filial portion, is largely discoursed upon in Swinburne on Testaments, part 3. sect. 18. For the cases since Swinburne's time, see Eq. Cas. Abr. 160, 161. 11 Vin. Abr. 198. Burn's Eccles. L. tit. *Wills*.—[Note 49.]

(8) Mr. Somner writes doubtfully on the preceding doctrine, and makes it questionable, whether the child advanced may not wave his former portion, and elect to take benefit of the customary partition in the way of hotchpot. Somn. Gavelk. 91. By others the doctrine is absolutely denied in another form, by insisting, that the advancement must be equal to the customary share; and that, if the child advanced can prove the advancement to be less, then such child

advanced shall put his part in *hotchpot* with the executors and widow (9), and have a full third part of the whole, accounting that

child on the terms of throwing the advancement into hotchpot is entitled to the benefit of the customary partition, notwithstanding any declaration of the father to the contrary. Green's Priv. Lond. 52, 53. But in a case before lord Chancellor Somers, the mayor and aldermen of London certified the custom in terms not wholly agreeing either with lord Coke or with the differences from him before stated. According to this certificate, though the advancement shall not be equal to the customary share at the father's decease, yet the child so advanced shall be excluded from any further part of the customary estate, unless the father shall by his last will, or some other writing signed with his name or mark, declare the value of such advancement; in which case the child advanced, bringing the advancement into hotchpot, shall, notwithstanding the father's declaration of having fully advanced the child, have as much more as will make the advancement a full customary share. This certificate was considered by lord Somers as conclusive of the question; and has been since referred to by lord Chancellor Hardwicke, as settling the point. See the case of Chase *v.* Box, in 1 L. Raym. 484. & 1 Eq. Cas. Abr. 154. in which latter book the certificate from the city is given at length. See also lord Hardwicke's words in 1 Ves. 16. and those of Fortescue, Master of the Rolls, in 3 Atk. 45. Being therefore taken as the rule of future decision, the certificate demands particular attention. The result, with respect to its operation upon the several ideas, which, as is before stated, have prevailed concerning this point of the custom, may be thus stated:—Mr. Somner's notion, of a *general* right of election in the child advanced to wave his advancement and claim the customary share, seems to fall to the ground: there being no election, except where the father under his hand ascertains the advancement by confessing what its value was, and being so ascertained it can be proved to be less than what the custom gives.—The opinion, that the advanced child is universally at liberty to prove his customary share greater than the advancement, and so entitle himself to the benefit of the customary partition, seems to fail; because the terms of the certificate appear to admit no other evidence to ascertain what the value of the advancement was, than the father's hand-writing; though it must be confessed, that excluding other evidence is scarce to be satisfactorily accounted for, unless the common reason of the difficulty of taking an account of such advancements shall be deemed a sufficient one.—As to lord Coke's representation of the custom, this also receives some qualification from the before-mentioned certificate: for, though it leaves him perfectly right, where the father is silent about the advancement, yet it crosses lord Coke's opinion of the effect of the father's declaring the advancement to be in full, and makes such declaration inoperative where the advancement admitted by the father's hand-writing is not *actually* full and adequate.—[Note 50.]

(9) Here lord Coke extends the putting into hotchpot so as to make it for the benefit both of the executors in respect of the testamentary third and of the wife for her third part. But Salkeld reports it as the opinion of Sir Edward Northey, that the custom requires the advanced share to be brought into hotchpot for the benefit of other children only; and therefore that in case of there being no other child besides the advanced one, such child shall have his full orphan's part without any regard to what has been already received. Salk. 426. See acc. 1 Vern. 345. 2 Vern. 281. and 629. See further concerning this custom of London, a discourse in justification of it in 2 Stow's Survey of London. Strype's edition of 1720, first Appendix, 61. and the statute of 11 Geo. 1. c. 18. For the cases on the custom, and the statute of 11 Geo. 1, concerning it, see Eq. Cas. Abr. 159 to 160. the title *Custom of London*, in New. Abr. Viner's Abr. and 2 Eq. Cas. Abr. Com. Dig. tit. *Guardian*, G. 2. and the Contin. in same part, and Burn's Ecc. L. tit. *Wills*. Add

to

that which was formerly given unto him as part thereof. And this is that in effect, which the civilians call *collatio bonorum* (10).

[177. a.] ☞ "*And it seemeth, that this word (hotchpot) is in English* a pudding, *&c. Littleton* both here and in other places searcheth for the signification of words, in all arts; a thing most necessary; for *ignoratis terminis ignoratur et ars. Vide* for *Etymologies*, Sect. 95. 119. 135. 154. 164. 204. 234, *&c.*

Hutspot or *hotspot* is an old Saxon word, and signifieth so much as *Littleton* here speaks. And the French use *hotchpot* for a commixion of divers things together. It signifieth here metaphorically *in partem positio*. In English we use to say *hodgepodge*, in Latine *farrago* or *miscellaneum*.

The residue of this Section needeth no explication.

Vide Brit. cap. 72. 4 E. 3. 49. 6 E. 3. 30. 10 E. 3. 38. 24 E. 3. 27. F. N. B. 262. Regist. 320. Fleta, lib. 6, ca. 47. (1) Mich. 10 E. 1. coram rege Hereford in thesaur.

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AND this tearme (hotchpot) *is but a tearme similitudinary, and is as much to say, as to put the lands in frankmarriage and the other lands in fee simple together; and this is for this intent, to know the value of all the lands,* scil. *of the lands given in frankmarriage, and of the remnant which were not given, and then partition shall be made in form following. As, put the case that a man be seised of* 30 *acres of land in fee simple, every acre of the value of* 12 *pence by the yeare, and that he hath issue two daughters, and the one is covert baron, and the father gives ten acres of the* 30 *acres to the husband with his daughter in frankmarriage, and dyeth seised of the remnant, then the other sister shall enter into the remnant, viz. into the* 20 *acres, and shall occupie them to her owne use, unlesse*

to these March, 107. Forrest. 130. Barnard. Ch. Rep. 430. 2 Atk. 43. 523. 644. and 3 Atk. 213. 616. See also Flet. l. 2. p. 125.—Note, that though the 11 G. 1. c. 18, enables making a will of the whole personalty notwithstanding the custom, yet this is with the exception of freemen agreeing by writing upon or in consideration of marriage, or otherwise, to be subject to the custom. In this respect therefore there is a difference in the form of the statute alteration of the custom as to London, and the alteration as to Wales and the province of York, the statutes as to these two latter not providing for an agreement to abide by the custom. Perhaps however it may be doubted whether an *express* provision was necessary to create such an exception: but on this point I do not mean to offer any opinion.—[Note 51.]

(10) See on the *Collation of Goods*, Dig. lib. 37. tit. 6. 1 Dom. Civ. L. by Strah. 687.—The Roman law in respect to the collation of goods deserves the particular attention of the English lawyer; as our statute for distribution of the personal estate of intestates contains a like provision to prevent children advanced in the life-time of the intestate from having double portions, which was apparently borrowed in some degree from the *collatio bonorum*, and may therefore be considerably influenced in the construction by the rules of the Roman law and the doctrine of the civilians on that title. See 22 & 23 Ch. 2. c. 10. s. 5. Forrest. 276. See also for the cases in general on this part of the statute of distribution, 11 Vin. Abr. 189. 2 Com. Dig. 145. Continuation of same book 176. and Eq. Cas. Abr. 248.—[Note 52.]

(1) This reference to Fleta is wrong. It should be lib. 5. cap. 9. p. 314.

unlesse the husband and his wife will put the 10 *acres given in frankmarriage with the* 20 *acres in hotchpot, that is to say, together; and then when the value of everie acre is known, to wit, what every acre valueth by the year, and it is assessed or agreed between them, that every acre is worth by the yeare* 12 *pence, then the partition shall be* ☞ *made in this manner, viz. the husband and wife shall have besides the* 10 *acres given to them in frankmarriage* 5 *acres in severaltie of the* 20 *acres, and the other sister shall have the remnant,* scil. 15 *acres of the* 20 *acres for her purpartie, so as accounting the* 10 *acres which the baron and feme have by the gift in frankmarriage, and the other* 5 *acres of the* 20 *acres, the husband and wife have as much in yearly value as the other sister.* [177. b.]

Bract. lib. 2. fol. 77. lib. 5. fol. 428. Brit. cap. 72. and Fleta, lib. 6. ca. 47. 4 E. 3. 49. 10 E. 3. 37. [n] 10 E. 3. 37. 10 Ass. 14. 4 E. 3. 49. [o] 29 Ass. 23. (Ant. 169. b.)

AND herewith in expresse tearmes agreeth *Bracton*, *Britton*, and *Fleta*, and all the books abovesaid and many others. And it is worthy the observation [n], that after this putting into hotchpot, and partition made, the lands given in frankmarriage are become as the other lands which descended from the common ancestor, and of these lands if she be impleaded [o] she shall have aide of the other parcener as if the same lands had descended (1). So the coparcener that hath a rent granted to her for owelty of partition, as is aforesaid, hath the rent, as if it had descended to her from the common ancestor.

(Hob. 10.) (Ant. 23. a.)

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AND so alwaies upon such partition the lands given in frankmarriage remaine to the donees and to their heires according to the forme of the gift: for if the other parcener should have any of that which is given in frankmarriage, of this would ensue an inconvenience and a thing against reason, which the law will not suffer. And the reason, why the lands given in frankmariage shall be put in hotchpot, is this. When a man giveth lands or tenements in frankmarriage with his daughter, or with his other cousin, it is intended by the law, that such gift made by this word (frankmariage) is an advancement, and for advancement of his daughter, or of his cousin, and namely when ☞ *the donor and his heires shall have no rent nor service of them, but fealtie, untill the fourth degree be past* (1)†, (tanque le quart degree soit passe, &c.) *And for this cause the law is, that she shall have nothing of the other lands or tenements descended to the other parcener, &c. unlesse she will put the lands given in frankmarriage in hotchpot, as is said. And if she will not put the lands given in frankmarriage in hotchpot, then she shall have nothing of the remnant, because it shall be intended by the law, that she is sufficiently advanced, to which advancement she agreeth and holds her selfe content.* [178. a.]

"*OF*

(1) See ant. 174. b. *contra* as to gift in tail to a daughter not being in frankmarriage.

(1) † See ant. 21. b.

"*OF this would ensue an inconvenience and a thing against reason, which the law will not suffer.*"

Quod est inconveniens aut contra rationem non permissum est in lege. Hereby it appeareth, as it hath been often noted, [*o*] that an argument *ab inconvenienti aut ab eo quod est contra rationem* is forcible in law. [*p*] *Nihil enim quod est inconveniens, est licitum*†.

Regula.

[*o*] Vid. Sect. 138, 139. 231. 440. 478. 488. 722.

[*p*] 40 Ass. 27. (Ant. 23. b.)

"*Untill the fourth degree be past,* (tanque le quart degree soit passe, &c.)" Here by *&c.* is implyed how the degrees shall be accounted, whereof sufficient hath been said before.

Sect. Sect. 20.

Sect. 270.

THE same law is between the heirs of the donees in frankmarriage, and the other parceners, &c. if the donees in frankmarriage die before their ancestor, or before such partition, &c. as to put in hotchpot, &c.

BY these three *&c.* in this Section is implied, that if either the donees dye before the ancestor, or survive the ancestor and die before such a partition, or if the donees and all the parceners die before such partition upon the putting into hotchpot, their issues shall have the same benefit to put the lands into hotchpot; for that benefit is heritable, and descendible to the issues.

Sect. 271.

AND note, that gifts in frankmarriage were by the common law before the statute of Westm. second, and have been alwaies since used and continued, &c.

"*CONTINUED, &c.*" By this *&c.* is to be understood, that before the statute it was a fee simple, and ☞ since the statute a fee taile. So as it is true, that [*q*] the gifts do continue (as our author here saith) but not the estates; for the estate is changed, as at large appeareth in the Chapter of Estates in Taile. And albeit our author here saith, that such gifts have beene alwaies since used and continued, yet now they be almost growne out of use, and serve now principally for moote cases and questions in law that thereupon were wont to rise.

[178. b.]

[*q*] 12 H. 4. 11. 31 E. 3. Gard. 116. (Ant. 21. a.)

Sect. 272.

ALSO, such putting in hotchpot, &c. is, where the other lands or tenements which were not given in frankmarriage descend from the donors in frankmarriage only; for if the lands shall descend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor or other ancestor, and not by the donor, &c. there it is otherwise;

† *As to the qualification with which this maxim should be understood, see ante note* 1. *fol.* 66. *a.*

wise; for in such case she, to whom such gift in frankmarriage is made, shall have her part, as if no gift in frankmarriage had been made, because that she was not advanced by them, &c. but by another, &c.

THE lands given in frankmarriage and the lands in fee simple must move from one and the same ancestor, for the lands given in frankmarriage are in respect of the advancement accounted in law, as hath beene said (1), as if the same had descended from the same ancestor who died seised of the fee simple lands, and there is no reason to barre the donee of her full part of the fee simple lands that descended from another ancestor from whom she had no such advancement.

"*Not by the donor, &c.*" Here *&c.* implieth no more but that donor that made the gift of frankmarriage. The other two *&c.* in this Section need no explanation.

Sect. 273.

ALSO, if a man be seised of 30 *acres of land everie acre of equall annuall value, and have issue two daughters as aforesaid, and giveth* 15 *acres hereof to the husband with his daughter in frankmarriage, and dies seised of the other* 15 *acres, in this case the other sister shall have the* 15 *acres so descended to her alone, and the husband and wife shall not in this case put the* 15 *acres given to them in frankmarriage into hotchpot; because the tenements given in frankmarriage are of as great and good yearly value as the other lands descended, &c. For if the lands given in frankmarriage be of equall or of more yearely value than the remnant, in vaine and to no purpose shall such tenements given in frankmarriage be put in hotchpot, &c. for that she cannot have any of the other lands descended, &c. for if she should have any parcell of the lands descended, then she shall have more in yearly value than her sister, &c. which the law will not, &c. And as it is spoken in the cases aforesaid of two daughters or of two parceners; in the same manner it is in the like case, where there are more sisters or more parceners, according as the case and matter is, &c.*

BY this Section and the *&c.* herein some have gathered, that the value of the lands shall be accounted as they were at the time of the gift in ☞ frankmarriage. But it is clear, that the value shall be accounted as it was at the time of the partition; for if the donor purchase more land after the gift, or if the land given in frankmarriage be by the act of God decayed in value, or if the remnant of the lands in fee simple be improved after the gift, or *è converso*, the law shall adjudge of the value as it was at the time of the partition, (unlesse it be by the proper act or default of the parties) as hath been said before in the former Chapter. And some have collected upon this Section, that the reversion in fee of the lands given in frankmarriage shall only descend to the donee; for

[179. a.]

(Ant. 32. a. 171. a.)

(1) Ant. 177. b.

for otherwise the other sister shall have more benefit than the donee, which should be against the reason of our author.

"*In vaine and to no purpose, &c.*" For it is a maxime in law, *lex non præcipit inutilia, quia inutilis labor stultus.* Regula. Vid. Sect. 194. 578. lib. 5. fol. 89.

[179. b.]

☞ Sect. 274.

(Ante 172. b.)

AND it is to be understood, that lands or tenements given in frankmarriage shall not be put in hotchpot, *but where lands descend in fee simple; for of lands descended in fee taile partition shall be made, as if no such gift in frankemarriage had been made.*

FOR of lands intailed the donee in frankmarriage shall have as much part as the other coparcener, because, over and besides the land given in frankmarriage, the issue in taile claimeth *per formam doni*, and both of the parceners must equally inherit by force of the gift, *et voluntas donatoris, &c. observetur.* 31 Ass. pl. 14.

Sect. 275.

ALSO, no lands shall be put in hotchpot *with other lands, but lands given in frankmarriage only: for if a woman have any other lands or tenements by any other gift in taile, she shall never put such lands so given in* hotchpot, *but she shall have her purparty of the remnant descended, &c.* (videlicet) *as much as the other parcener shall have of the same remnant.*

FOR if the ancestor infeoffeth one of his daughters of part of his land, or purchase lands to him and her, and their heires, or giveth to her part of his lands in taile speciall or generall, she notwithstanding this shall have a full part in the remnant of the lands in fee simple; for the benefit of putting, &c. into *hotchpot* is only appropriated to a gift in frankmarriage, *(quia maritagium cadit in partem)* which shall be (as is aforesaid) accounted as parcel of her advancement. 13 E. 2. tit. Taile, 26. 6 E. 3. 30. b. 4 H. 3. 49. 50. Bracton, lib. 2. fol. 77.

Sect. 276.

ALSO, another partition may be made between parceners, which varieth from the partitions aforesaid. As if there be three parceners, and the youngest will have partition, and the other two will not, but [180. a.] *will hold in parcenarie that which to them ☞ belongeth, without partition, in this case, if one part be allotted in severalty to the youngest sister, according to that which she ought to have, then the others may hold the remnant in parcenarie, and occupy in common without partition, if they will, and such partition is good enough. And if afterwards the eldest or middle parcener will make partition between them of that which they hold, they may well do this when they*

please. But where partition shall be made by force of a writ of partitione faciendâ, *there it is otherwise; for there it behoveth, that every parcener have her part in severaltie, &c.*

More shall be said of parceners in the Chapter of Joyntenants, and also in the Chapter of Tenants in Common.

24 H. 3. tit. Partic. 19.

HERE it is to be observed, that this partition is good by consent, for *consensus tollit errorum*; but if it be by the king's writ, then everie parcener must have his part. And here you may see that *modus et conventio vincunt legem.*

Regula.

"*In severaltie, &c.*" Here by this *&c.* is implied another kind of severaltie than our author hath mentioned: and that is, that the one parcener shall have the land in severaltie from the feast of Easter untill the gule of August, (that is, the first of August) and the other in severaltie from thence until the feast of Easter, or the like, *et sic alternis vicibus* to them and their heires *in perpetuum*, whereof sufficient hath been spoken before (1).

Chap. 3. Of Joyntenants. Sect. 277.

JOYNTENANTS are, as if a man be seised of certaine lands or tenements, &c. and infeoffeth two, three, four, or more, to have and to hold to them for terme of their lives, or for terme of another's life, by force of which feoffement or lease they are seised, these are joyntenants. (Joyntenants sont, sicome home seisie de certaines terres ou tenements, &c. et enfeoffe deux, trois, quater, ou plusors, a aver et tener a eux pur term de lour vies, ou pur terme d'auter vie, per force de quel feoffment ou lease ils sont seisies, tiels sont joyntenants.)

Bract. lib. 4. fol. 262. (3) Britton, cap. 35. & fol. 112.

THIS agreeth not with the original (2), for it should bee, *joyntenants sont, sicome home seisie de certaine terres ou tenements,*

(1) Ante 4. a. and 167. a.

(2) Notwithstanding lord Coke's censure of the text here, it agrees with the print of the two earliest editions, neither the edition by L. and M. nor the Rohan one having any of the words added by lord Coke, except *ent* before *enfeoffe*. But I think that his addition seems requisite to the sense intended to be conveyed by Littleton, as well for the reason assigned by lord Coke, as because otherwise Littleton's description of jointenancy might be construed to exclude an estate in *fee*, which certainly could not be his intention. Probably therefore the omission of an estate in fee was an error in the manuscript from which Littleton was first printed. The addition of an estate in fee to Littleton's description of jointenancy was first introduced by Rastell in his edition of 1534, which I was first led to observe by a note I was favoured with from Mr. Justice Blackstone.—[Note 53.]

The edition by Machlinia alone, of the existence of which I was not apprised when I wrote the note, agrees with L. and M.

(3) I take this reference to Bracton to be erroneous. But in fol. 28. a. of Bracton there is a chapter which connects with Littleton's on jointenancy; the first branch of it being *de donationibus factis pluribus simul sive successivè*. See also Bract. fo. 12. b. and 13. a.

tenements, &c. et ent *enfeoffe deux, ou trois, ou quater, ou plusors, a aver et tener a eux* et a lour heires, ou lessa a eux *pur terme de lour vies, ou pur terme d'auter vie, per force de quel feoffement ou lease, &c.* The error may easily be perceived by that which is in print, viz. "by force of which feoffment or lease," &c. *ergo* there must ☞ be feoffment and lease spoken of before. Flet. lib. 3. ca. 4. 10. & lib. 6. ca. 47. (4) (2 Ro. Abr. 86.)

[180. b.]

There be also joyntenants by other conveyances than *Littleton* here mentioneth, as by fine, recoverie, bargaine and sale, release, confirmation, &c. So there be divers other limitations than *Littleton* here speaketh of: as if a rent charge of ten pounds be granted to *A.* and *B.* to have and to hold to them two, viz. to *A.* untill he be married, and to *B.* untill he be advanced to a benefice, they be joyntenants in the meane time, notwithstanding the severall limitations (1); and if *A.* die before marriage, the rent shall survive; but if *A.* had married, the rent should have ceased for a moitie, *et sic è converso* on the other side.

Littleton having spoken of one kinde of tenants *pro indiviso*, viz. of parceners, commeth now to another, viz. joyntenants: and first of joyntenants of freehold. If an alien and a subject purchase lands in fee, they are joyntenants, and the survivorship shall hold place (2), *et nullum tempus occurrit regi*, upon an office found. 7 E. 4. 29. 11 H. 4. 26. (5 Co. 52.)

"*Joyntenants.*" So called, because the lands or tenements, &c. are conveyed to them joyntly, *conjunctim feoffati, &c.* or *qui conjunctim*

(4) It should be cap. 48. to which, as a corresponding part of an almost cotemporary writer, add Bract. fol. 428. a.

(1) See ant. 169. b. post. 183. b. Hob. 171. and Sheppard's Common Assurances, 389. In the two latter books, especially in Hobart, there is a variety of curious matter expounding the nature and use of a *scilicet*, and how far it may qualify the *premises* or *habendum* in a conveyance. See also 1 P. Wms. 18. and the case of a bond to two with a *scilicet* severing the money between them in Dy. 350. Lord Hobart seems to consider the *scilicet* as a sort of *ancillary* clause, which may explain, but cannot operate in absolute contradiction of the *premises* or *habendum*. In a Coke upon Littleton I have, the learned annotator considers the *scilicet* as less potent than the *habendum*, observing upon the case here stated by lord Coke, that though the *scilicet* cannot sever the joint estate given in the *premises* and the *habendum*, yet that the *habendum* might so control the *premises*. He therefore holds, that if the grant of ten pounds had been to *A.* and *B. habendum* to *A.* till he be married, and to *B.* till he be advanced to a benefice, there they would be tenants in common. This nice distinction between the *habendum* and the *scilicet* in point of effect I leave to the consideration of the learned reader.—[Note 54.]

(2) See post. 186. a.—Lord Coke in his Reports qualifies this by adding *till office found under the great seal.* 5 Co. 52. b. But if the natural-born subject survives the alien, and then the king's title is found by office, shall it by relation to the creation of the jointenancy defeat the subject's title by survivorship? The words of lord Coke both here and in the fifth Report are ambiguous. His first words here favour the surviving jointenant. But his subsequent introduction of the rule of *nullum tempus occurrit regi*, with the qualification in the fifth Report, tends to a different conclusion. Though too lord Coke takes notice of a joint purchase by an alien and a subject, yet there is not enough to solve the difficulty. See post. 288. a. See as to this point of relation in offices finding the king's title, W. Jo. 78. and Nichols's case, Plowd. 481.—[Note 55.]

Fleta, lib. 6. cap. 47. Bract. lib. 5. fol. 435. a. (Noy 13. Ant. 164. Cro. Jam. 83. 166. Post. Sect. 311.)

junctim tenent, and are distinguished from sole or severall tenants, from parceners, and from tenants in common, &c. and anciently they were called *participes, et non hæredes*. And these joyntenants must joyntly implead and joyntly be impleaded by others (3), which propertie is common between them and coparceners; but joyntenants have a sole quality of survivorship, which coparceners have not. *Littleton*, having now spoken of parceners and of joyntenants of right, doth next speake of joyntenants by wrong.

Sect. 278.

ALSO, if two or three, &c. disseise another of any lands or tenements to their own use, then the disseisors are joyntenants. But if they disseise another to the use of one of them, then they are not joyntenants; but he to whose use the disseisin is made is sole tenant, and the others have nothing in the tenancy, but are called coadjutors to the disseisin, &c.

IT is to be observed, that some disseisors be tenants of the land, and some be no tenants of the lands; and of both these kinds *Littleton* here speaketh.

50 E. 3. 2. 17 Ass. 14. 14 Ass. 12. 8 Ass. p. 30. 10 E. 3. 47. 10 Ass. 22. 23 H. 8. tit. Disseis. p. 77. 28 Ass. 21. 27 Ass. 30. 12 E. 4. 9. 7 E. 4. 7. b. 38 Ass. 7. 21 H. 7. 35. 29 Ass. 50. 21 H. 8. 25. 35 H. 6. 61. 21 E. 4. 46. 15 E. 4. 15. F. N. B. 179. G. (Mo. 53. Post. 374. a. Ant. 10. a. 1 Ro. Abr. 660. Post. 188. a.) (Post. 245. a. 258. a.) (1 Ro. Abr. 663.)

"*&c.*" In the first *&c.* nothing is implied but four or five, or more. But in the latter *&c.* many things be to be understood. As of disseisors that be no tenants, some are coadjutors, whereof *Littleton* here speaketh, some counsellors, commanders, &c. when the disseisin is not to be done to any of their uses. Also if *A.* disseise one to the use of *B.* who knoweth not of it, and *B.* assent to it, in this case till the agreement *A.* was tenant of the land, and after agreement *B.* is tenant of the land, but both of them be disseisors: for *omnis ratihabitio retrotrahitur et mandato equiparatur* (4). And it is worthie of the observation, and implied also in the latter *&c.* that seeing coadjutors, counsellors, commanders, *&c.* are all disseisors, that albeit the disseisor which is tenant dieth, yet the assise lieth against the coadjutor, counsellor, commander, &c. and the tenant of the land (5), though he be no disseisor (6).

The

(3) See the statute *de conjunctim feoffatis*, 34 E. 1. lord Coke's notice of it in 2 Inst. 527, and Theloall's Dig. Orig. Br. in the Chapter on *Jointenants* in b. 2. fol. 456.

(4) But infants and femes covert are exceptions to this rule; for commandment before or agreement after is not sufficient to make them disseisors, but it must be by their actual entry, or their own proper act. Post. 357. b. F. N. B. 179. G. 3 H. 4. 17. a. Also in the case of persons of full age, if a disseisin to the use of another be accompanied with a forcible entry, his *subsequent* agreement, though it makes him a disseisor, shall not charge him with the force on the statute of 4 H. 4. actual entry being necessary for that purpose. Ant. 16. a. & b.—[Note 56.]

(5) That is, he that is seised of the freehold by title from the disseisor, as by feoffment, lease, or descent from him.

(6) See ant. 154. b.

[a] The demandant and others in a *præcipe* did disseise the tenant to the use of the others, and the writ did not abate; for the demandant was a disseisor, but gained no tenancy in the land, for that he was but a coadjutor. [a] 50 E. 3. 2. (Cro. Cha. 303. 1 Ro. Abr. 661, 662. Post. 323. a.)

A man disseiseth tenant for life to the use of him in the reversion, and after he in the reversion agreeth to the disseisin, it is said, that he in the reversion is a disseisor in fee, for by the disseisin made by the stranger, the reversion was divested (7), which (say they) cannot be ☞ revested by the agreement of him in the reversion, for that it maketh him a wrong doer, and therefore no relation of an estate by wrong can help him (1).

[181. a.]

"*Coadjutor.*" *Coadjutor est qui auxiliator alteri*, and is derived *à coadjuvando*. *Anglicè* a fellow helper.

Sect. 279.

AND note that disseisin is properly, where a man entreth into any lands or tenements where his entry is note ongeable, and ousteth him which hath the freehold, &c.

THIS description of a disseisin and the *&c.* in this place is understood only of such lands and tenements whereunto an entry may be made, and not of rents, commons, &c. (2) whereof sufficient heth been said before (3) in the Chapter of Rents; and so in effect *Littleton* described it before the edition of his book. And note here, that every entry is no disseisin, unlesse there be an ouster also of the freehold. And therefore *Littleton* doth not set down an entrie only but an ouster also, as an entry and a claimer, or taking of profits, &c.

3 E. 4. 2. 34 Ass. 11, 12. 26 Ass. 17. 41 Ass. 10. 24 E. 3. 31. Pl. Com. 89.

Now as there be joyntenants by disseisin, so are there joyntenants by abatement, intrusion, and usurpation, all which are included in the latter *&c.*

Parson de Hony Lane, 7. Ass. 10. 11 Ass. 25. 12 E. 3. tit. Ass. 88. 45 Ass. 7. 9 Ass. 19. 39 Ass. 1. 18 E. 2. Ass. 374.

Sect.

(7) Why disseisin of tenant for life makes a fee in the disseisor is thus accounted for by lord Hobart with his usual peculiarity and energy of phrase. "A grant to *J. S.* and his heirs during the life of *J. D.* is no fee, but a "special occupancy, as is resolved in Chudleigh's case. But a disseisin of "an estate for life by necessity in law makes a *quasi* fee; because wrong "is unlimited, and ravens all that can be gotten, and is not governed by "terms of the estates, because it is not contained within rules." Hob. 323.—[Note 57.]

(1) Acc. 277. b. To what lord Coke has written on *disseisin by procurement*, a learned annotator in a Coke upon Littleton I have, adds the following references relative to *procurers of trespass*, namely 11 H. 7. 6. a. 12 H. 7. 14. a. 21 H. 7. 22. a. 13 H. 7. 13. a.—[Note 58.]

(2) In respect to disseisin of rents, read post. 306. b. 323. a. and b.

(3) Ant. Sect. 233. and the comment thereon.

Sect. 280.

AND it is to be understood, that the nature of joyntenancy is, that he which surviveth shall have only the entire tenancie, according to such estate as he hath, if the joynture be continued, &c. As if three joyntenants be in fee simple, and the one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joyntenant hath issue and dye, yet the third which surviveth shall have the whole tenements to him and to his heires for ever. But otherwise it is of parceners; for if three parceners be, and before any partition made the one hath issue and dyeth, that which to him belongeth shall descend to his issue. And if such parcener die without issue, that which belongs to her shall descend to her co-heires, so as they shall have this by descent, and not by survivor, as joyntenants shall have, &c.

"*IF the jointure be continued, &c.*" Here by this *&c.* many points of learning are to be observed. As that it is proper to joyntenants only to have lands by survivor; for no survivor of other tenants *pro indiviso* shall have the whole by survivor, but only joyntenants: and this is called in law *jus accrescendi*. *Omnes feoffati sunt simul habendi et tenendi, nec totum nec partem separatam nec per se, sed ut quilibet eorum totum habeat cum aliis in communi; et cùm unus moriatur, non descendit aliqua pars hæredi morientis, nec separata nec in communi ante mortem omnium, sed pars illa communis per jus accrescendi accrescit superstitibus de personâ ad personam usque ad ultimum superstitem.* But although survivorship be proper to joyntenants, yet it is not proper *quarto modo* (that is) *omni, soli et semper*; for there may be ☞ joyntenants, though there be not equall benefit of survivor on both sides. As if a man letteth lands to *A.* and *B.* during the life of *A.* if *B.* dyeth, *A.* shall have all by the survivor, but if *A.* dyeth, *B.* shall have nothing (1). [181. b.]

Bracton, lib. 4. fol. 262. b. Britton, cap. 35. Fleta, lib. 3. ca. 4. & ca. 10. 49. E. 3. fol. 5, 6.

(9 Co. 75. b.) Two or more may have a trust or an authoritie committed to them joyntly, and yet it shall not survive. But herein are divers diversities to be observed. First, there is a diversitie between (1 Sid. 6.) a naked trust or an authoritie, and a trust or authoritie joyned to an estate or interest (2). Secondly, there is a diversitie between authorities created by the partie for private causes, and authoritie [*b*] 39 Ass. p. 17. 30 H. 8. tit. Devise, B. Dyer, 3. El. 190. created by law for execution of justice. As for example, [*b*] if a man devise that his two executors shall sell his land, if one of them dye, the survivor shall not sell it (3); but if he had devised

49 E. 3. 16. 2 Eliz. Dyer, 177. 23 Eliz. Dyer, 371. 4 Eliz. Dyer, 210. (Mo. 61. 341.) 10 H. 4. 2, & 3. 14 H. 4. 34. 39 H. 6. 42. 31 Ass. 20. 33 H. 8. Joynt. Br. 62. 30 H. 8. Condition, Br. 190.

his

(1) See further as to benefit of survivorship on one side only, post. 193. a. 239. b. & Dy. 10. b.

(2) See ant. 112. b. 113. a. post. 297. a.

(3) In a former part I have ventured to make a doubt of this, and to contend that the power to sell being given to the executors *by reason of an office and interest*, which do go to the survivor, may well survive with them. See ant. note 2, to 113. a.—[Note 59.]

his lands to his executors to be sold, there the survivor shall sell it; which diversitie is implyed by our author, for he saith, that he that surviveth shall have the entire tenancie.

If a man make a letter of atturney to two, to do any act, if one of them dye, the survivor shall not do it: but if a *venire facias* be awarded to four coroners to impannell and returne a jury, and one of them dye, yet the other shall execute and returne the same.

If a charter of feoffment [*c*] be made, and a letter of atturney to four or three joyntly or severally to deliver seisin, two of them cannot make liverie; because it is neither by them four or three joyntly, nor any of them severally; but if the sherife upon a *capias* directed to him make a warrant to four or three joyntly or severally to arrest the defendant, two of them may arrest him, because it is for the execution of justice [*d*], which is *pro bono publico*, and therefore shall be more favourably expounded, than when it is only for private; and so hath it been adjudged (4). *Jura publica ex privato promiscuè decidi non debent.*

[*c*] 38 H. 8. 8. Dyer, 62. 27 H. 8. fol. 6. (5 Co. 91. Yelv. 25, 26. Cro. Eliz. 913, 914.)

[*d*] Pasch. 45 Eliz. in the king's bench betweene King and Hobbes. (Hutt. 127.)

"*And dieth.*" Note, there is a naturall death and a civil death, and *Littleton*'s case is to be intended of both; and therefore [*e*] if two joyntenants be, and one of them entreth into religion, the survivor shall have the whole (5).

[*e*] 21 R. 2. Judgment, 263. (Ant. 132. b.)

Sect. 281.

AND as the survivour holds place betweene joyntenants (6) *in the same manner it holdeth place between them which have joynt estate or possession with another of a chattell, reall or personall. As if a lease of lands or tenements be made to many for terme of yeares, he, which survives of the lessees, shall have the tenements to him only during* [182. a.] *the terme by force of* ☞ *the same lease* (1). *And if a horse, or any other chattell personall be given to many, he which surviveth shall have the horse only.*

HEREBY it is manifest, that survivor holdeth place regularly as well between joyntenants of goods and chattels in possession or in right, as joyntenants of inheritance or freehold.

(Cro. Eliz. 33. 2 Ro. Abr. 86, 87.)

"*Chattell,*" or *Catell*, whereof commeth the word used in law [*f*] *Catalla*, and is, as *Littleton* here teacheth, two-fold, viz. reall and personall, and putteth examples of both.

[*f*] Regist. origin. 139. 244. Bract. lib. 2. Staunford Pr. 45.

39 H. 6. 35.

Sect.

(4) See acc. as to warrant of the peace to two, Lambard's Justice, ed. 1602, p. 84.

(5) See ant. note 7, of fol. 3. b. and note 1, of fol. 132. b. Add Ley's case, 2 Ro. Abr. 43.

(6) &c. in L. and M. and Roh.

(1) And this benefit of survivorship takes place on a lease for years to two, though one of the lessees dies before entry. Ant. 46. b.—[Note 60.]

Sect. 282.

IN the same manner it is of debts and duties, &c. for if an obligation be made to many for one debt, he which surviveth shall have the whole debt or dutie. And so is it of other covenants and contracts, &c. (3).

NOW he speaketh of debts, duties, covenants, contracts, &c. (2).

(1 Ro. Abr. 6.) F. N. B. 117. E. 38 E. 3. 7.

"*Debts and duties, &c.*" Here by force of this *&c.* an exception is to be made of two joynt merchants; for the wares, merchandizes, debts or duties, that they have as joynt merchants or parteners, shall not survive, but shall go to the executors of him that deceaseth; and this is *per legem mercatoriam*, which (as hath been said) is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*; for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet* (4).

(Ant. 172. a. Cro. Jam. 306. 1 Ro. Abr. 6. Cro. Cha. 301. 1 Sid. 236. 179.) (5)

[See 1 Ch. R. 57. 1 Vern. 217. 3 Wms. 158. 2 Atk. 54.

And to the latter *&c.* in this Section the like exception must be made.

See also 1 Vern. 33. & Nott. MSS. 1146. See further 3 Atk. 734. 1 Vern. 361. 2 Vern. 556. 1 Br. Ch. R. 118. 1 Atk. 467. 4 Bro. P. C. 224.]

Sect. 283.

ALSO, there may be some joyntenants, which may have a joynt estate, and be jointenants for terme of their lives, and yet have severall inheritances. As if lands be given to two men and to the heires of their two bodies begotten, in this case the donees have a joint estate for term of their two lives, and yet they have severall inheritances; for if one of the donees hath issue and dye, the other which surviveth shall have the whole by the survivor for terme of his life, and if he which surviveth hath also issue and die, then the issue of the one shall have the one moitie, and the issue of the other shall have the other moity of the land, and they shall hold the land between them in common, and they are not joyntenants, but are tenants in common. And the cause, why such donees in such case have a joynt estate for terme of their lives, is, for that at the beginning the lands were given to them two, which words without more saying make a joint estate to them for terme of their lives. For if a man will let land to another by deed or without deed, not making mention what estate he shall have, and of this make liverie of seisin, in this case the lessee hath an estate for terme of his life; and so in as much as the lands were given to them, they have a joint estate for term of their lives. And the reason why they shall have several inheritances is this, inasmuch as they cannot by any possibility have an heir between them ingendred, as a man and woman may have, &c. the law will that their estate and inheritance be such

(3) No *&c.* in L. & M. nor Roh.

(2) See further, as to things of which there shall be a survivorship, and where express words are necessary to give that benefit, 11 Co. 3. b. 2 Ro. Abr. 86. B. 2. 2 P. Wms. 672. and tit. *Survivor*, in Vin. Abr. and tit. *Jointenants*, B. 1. & D. ibid.

(4) See more fully as to this, 2 Brownl. 99. See also acc. Noy, 55.

(5) These additional references are retained, though they scarcely deserve it; for they only relate to different instances of the *lex mercatoria*, and do not touch the particular rule against the *jus accrescendi*.

such as is reasonable, according to the forme and effect of the words of the gift, and this is to the heires which the one shall beget of his body by any of his wives (1) † [*and to the heirs which the other shall beget of his body by any of his wives,*] *&c. so as it behoveth by necessitie of reason, that they have several inheritances. And in this case if the issue of one of the donees after the death of the donees dye, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moity as in his reversion, &c.* (Et en tiel cas si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad ascun issue en vie de son corps engendre donque le donor ou son heire poet enter en la moity come en son reversion, &c.) *although the other donee hath issue alive, &c. And the reason is, forasmach as the inheritances be several, &c. the reversion of them in law is severall, &c. and the survivor of the issue of the other shall hold no place to have the whole.*

"*THEY have a joint estate for term of their two lives, &c.*" Note, albeit they have severall inheritances in taile, and a particular estate for their lives, yet the inheritance doth not execute and so break the joyntenancy, but they are joyntenants for life, and tenants in common of the inheritance in tayle. Vide Sect. 296. (Post. 189. b.)

"*As a man and woman may have, &c.*" Here a diversity is implyed, when the estate of inheritance is limited by one conveyance, ☞ as in this case it is, there are no severall estates to drown one in another. But when the states are divided in severall conveiances, their particular estates are distinct and divided, and consequently the one drowns the other. As if a lease be made to two men for terme of their lives, and after the lessor granteth the reversion to them two, and to the heires of their two bodies, the joynture is severed, and they are tenants in common in possession. And it is further implied, that in this case of *Littleton* there is no division between the estate for lives, and the severall inheritances; for in this case they cannot convey away the inheritances after their decease (1), for it is divided only in supposition and consideration of law, and to some purposes the inheritance is said to be executed, as shall be said hereafter. Vide Westcote's case, 2 Co. 60. 61. (1 Sid. 83.) [182. b.] Vid. 12. E. 4. 2. b. (Sect. 285.)

If a man make a lease for [*f*] life, and after granteth the reversion to the tenant for life and to a stranger and to their heires, they are not joyntenants of the reversion, but the reversion is by act of law executed for the one moitie in the tenant for life, and for the other moity he holdeth it still for life, the reversion of that moity to the grantee. (*) [*f*] 39 H. 6. 2. b. (4 Leon. 37. Post. 299. b. Cro. Jam. 260, 261.)

And so it is, if a man maketh a lease [*g*] to two for their lives, and [*g*] Wescot's case, ubi supra.

† *This is note* 1 *of* 183. *a. in the* 13*th and* 14*th editions.*

(1) † In L. & M. and Roh. the following words here placed between brackets are omitted.

(1) See post. 184. b.

(*) A lessee for years accepts an estate to him and another as joint tenants for life; whether lease merged wholly, or for a moiety merged, and for a moiety was suspended, see Cro. El. 532. This book seems rather an authority for a total merger and extinction, and, as I incline to think, rightly in principle: joint tenants being seised *per my et per tout*, and each therefore having entire possession of the whole, as well as of every part. See however Lev. 127. See further, 3 Keb. 431. and what lord Coke writes here, according to which it is otherwise where reversion in fee is conveyed to tenant for life and a stranger. On what reason is it, that the merger should be of the whole in the one case, but only of the moiety in the other? See also 2 Saund. 380.

and after granteth the reversion to one of them in fee, the joynture is severed, and the reversion is executed for the one moitie, and for the other moitie there is tenant for life the reversion to the grantee (2).

Ibidem, 7 H. 6. If lessee for life granteth his estate to him in the reversion, and to a stranger, the joynture is severed and the reversion executed for the one moitie by the act of law (3).

☞ If a man maketh a lease for life and granteth the reversion to two in fee, the lessee granteth his estate to one of them, they are not joyntenants of the reversion; for there is an execution of the estate for the one moitie, and an estate for life, the reversion to the other of the other moity (2) †. [183. a.]

Here *Littleton* hath well resolved a doubt; for of ancient time it hath been said, [*h*] that when lands have been given to two women and to the heires of their two bodies begotten (which case our author putteth in the next Section) that the husband having issue should be tenant by the courtesie living the other sister; for that as some held the inheritance was executed, and that the sisters were tenants in common in possession, and consequently the husband to be tenant by the curtesie, which he could not be if the women had a joynt estate for terme of their lives; and likewise it was said [*i*] that the issue of the one should recover the moytie in a *formedon* living the other sister. But *verba sunt hæc*, and *Littleton*, grounding himselfe upon good authority in law, hath cleered this doubt.

[*h*] 17 E. 3. 51. 78. 18 E. 3. 39. 50 E. 3. Statham. tit. Done. 50, E. 3. Feoffments & faitz, 97.

(Ant. 13. a.)

[*i*] 44 E. 3. Taile, 13. 8 Ass. 33. 24 E. 3. 29. 7 H. 4. 16. Corbet's case. 1 Co. 84. b. 4 Mar. Dier 145.

See before, in the Chapter of Ten. by the Curtesie. Sectione. §

(Ant. 30. a. 2 Ro. Abr. 90.

[*k*] Pl. Com. in Throgmorton's case. (2 Co. 23. 55. 5 Co. 111. 2 Ro. Abr. 66.) Regula. (5 Co. 8. a. Plowd. 161. a. Ant. 42. a.)

"*Not making mention what estate he shall have.*" Here *Littleton* addeth materially (not making mention of what estate); for [*k*] if in the premisses lands be letten, or a rent granted, the generall intendment is, that an estate for life passeth; but if the *habendum* limit the same for years or at will, the *habendum* doth qualifie the generall intendment of the premisses. And the reason of this is, for that it is a maxime in law, that every man's grant shall be taken by construction of law most forcible against himselfe. *Quælibet concessio fortissimè contra donatorem interpretanda est*; which is so to be understood, that no wrong be thereby done; for it is another maxime in law, *quòd legis constructio non facit injuriam*. And therefore if tenant for life maketh a lease generally, this shall be taken by ☞ construction of law an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion. And so it is if tenant in taile make a lease generally, the law shall contrive this to be such a lease as he may lawfully make, and that is for terme of his owne life; for if it should be for the life of the lessee, it should be [183. b.]

§ *Sect.* 35.—*The first case stated in the second paragraph of* 183. *a. is mentioned before near the end of fol.* 30. *a. with a marginal reference to fol.* 183, *as being* contra.

(2) *Vid. Hil.* 35 *Eliz. B. R. rot. No.* 96. *Perkins & Pecke*, 21. *Dy.* 12. 41 *E.* 3. 21 *H.* 6. 40. 40 *Ass.* 45 *E.* 3. 2.—*Hil.* 37 *Eliz. Dickson v. Marsh, B. R. rot. No.* 103. *Devise to eldest son and another for life. Held, that they are jointenants though the fee descends; but male.* Hal. MSS. See as to the latter case, Cro. Jam. 260.—[Note 61.]

(3) See post. 192. 200. b. 335. a.

(2) † But it is otherwise on a *surrender*; for that enures to both jointenants of the reversion. Post. 192. a. See further, Perk. sect. 80.—[Note 62.]

be a discontinuance, and consequently the state which should passe by construction of law should worke a wrong (1).

"*And so inasmuch as the lands were given to them, they have a joint estate for term of their lives.*" This is plaine, but with this exception, unlesse the *habendum* doth otherwise limit the same. And therefore if a lease be made [*l*] to two, *habendum* to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premisses (2), and so hath it been oftentimes resolved. And so it is if a lease be made to two, *habendum* the one moity to the one, and the other moitie to the other, the *habendum* doth make them tenants in common; and so one part of the deed doth explaine the other, and no repugnancy between them, *et semper expressum facit cessare tacitum* (3).

[*l*] 8 E. 3. 427. tit. Feoffem. & Faits, 73. 30 H. 8. tit. Joynt. Br. 53. Dyer, fo. 361. Pl. Com. 160. (Hob. 171. Post. 190. b. 2 Ro. Abr. 65. 68. 1 Leon. 10, 11.) Bracton. (2 Ro. Abr. 66. 5 Co. 19. a. Hob. 313.)

"*By any possibility.*" Here it is to be observed, that where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibilitie may take effect, which is worthy of observation. *Benignæ faciendæ sunt interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quàm pereat.*

"*So as it behoveth by necessity of reason.*" The reason of the law is the life of the law; for though a man can tell the law, yet if he know not the reason thereof, he shall soone forget his superficiall knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others: for *cognitio legis est copulata et complicata*; and this knowledge will long remaine with him. All which is plainly implyed by the words and *&c.* of our author in this Section.

"*And in this case if the issue of one of the donees after the death of the donees dye, &c.—Et en tiel case si l'issue d'un des donees apres la mort des donees devie, issint que il n'ad ascun issue en vie de son corps engendre, donques le donor ou son heire poet enter en le moitie.*" This is mistaken in the imprinting, and varieth from the originall, (4) which is, *si l'un donee ou l'issue d'un des donees apres la mort des donees devie, issint que il n'ad ascun issue, &c.* For it is evident, that if the one donee himselfe dieth without issue, the inheritance doth revert for a moitie, and after the decease of the other donee, the donor may enter into that moitie; and whether the issue of the one donee dieth without issue at any time, either in the life of the other donee, or after his decease, it is not materiall, for whensoever no issue is remaining of the one donee, so as the state taile is spent, the donor may after the decease of the surviving donee enter into that moity (5).

"*And*

(1) Acc. ant. 42. a. and there the reason is more fully expressed.

(2) Acc. Perk. sect. 174.

(3) Acc. Sect. 298. See also 2 Co. 55. a. & b. ant. 180. b. post. 189. a. 299. b.

(4) But lord Coke's correction is not conformable either to L. and M. or the Roh. edition.

(5) See Hob. 33.

"*And the reason is, forasmuch as the inheritances, &c.*" *Littleton* in this Chapter hath often said, *and the reason is*, which is worthie of observation, for then we are truely said to know any thing when we know the true cause thereof. *Tunc unumquodque scire dicimur, cùm primam causam scire putamus. Scire autem propriè est rem ratione et per causam cognoscere.*

Arist. 1. Metaphys.

Felix, qui potuit rerum cognoscere causas.

Virg. 2 Georg.

And therefore all students of law are to apply their principall indeavour to attaine thereunto, all which is implyed by the words and several *&c.* in this Section.

Here the cause of the entrie of the donor into a moitie in this case is, that in as much as the inheritance is severall, the reversion is severall. Therefore upon the severall determination of the estate in taile, the donor may enter. And the law termeth a reversion to be expectant upon the particular estate, because the donor or lessor, or their heirs, after every determination of any particular estate, doth expect or look for to enjoy the lands or tenements again.

(Post. 191. b. Hob. 33.)

"*The reversion of them in law is several, &c.*" Hereby, and by this *&c.* is implyed, that upon one joint or entire gift or lease there is one joynt or entire reversion, and upon severall gifts or leases there be severall reversions. And this is to be understood of the reversion in the donor or his heires. But albeit the gifts or leases be severall, yet if the donors or lessors grant the reversion to two or more persons and their heires, they are joyntenants of the reversion. And so it is of a remainder. And therefore if a gift be made to two men and the heires of their two bodies begotten, the remainder to them two and their heires, they are joyntenants for life, tenants in common of the state taile, and joyntenants of the ☞ fee simple in remainder; for they are joynt purchasers of the fee simple, and the remainder in fee is a new created estate, but the reversion remaining in the donor or his heirs is a part of his ancient fee simple.

Dyer, 14 El. 300.

(2 Co. 60. b. Post. 299. b.)

[184. a.]

Sect. 284.

AND as it is said of males, in the same manner it is where land is given to two females, and to the heires of their two bodies engendred.

IF a man giveth lands to two men and one woman, and the heires of their three bodies begotten, in this case they have severall inheritances; for albeit it may be said, that the woman may by possibility marry both the men one after another; yet first, she cannot marrie them both *in præsenti*, and the law will never intend a possibilitie upon a possibility, as first to marry the one, and then to marry the other (1); secondly the form of the gift

44 E. 3. tit. Taile, 13. (Aut. 25. b.) (2 Ro. Abr. 48. 1 Co. 120. 156. b. Ant. 46. b. 10 Co. 50. b.)

(1) Yet in fol. 20. b. lord Coke allows a present estate tail in a case of *double* possibility equal to that here supposed; namely, the case of a gift to the husband of *A.* and the wife of *B.* and the heirs of their bodies. See further on this head, Vin. Abr. tit. *Possibility*, and Fearne on Conting. Rem. 3d ed. 176.—[Note 63.]

gift is, to the heires of their three bodies, which is not possible, and therefore they shall have several inheritances. And so it is, if a gift be made to one man and to two women, *mutatis mutandis*. In the same manner, if a gift in taile be made to a man and his mother, [*m*] or to a man and his sister (2), or to him and his aunt, &c. in this and like cases, albeit the gift is made to a man and a woman, yet they have severall inheritances; because they cannot marry together, and are within the rule and reason of our author.

[*m*] 18 E. 3. 39. 7 H. 4. 16.

Sect. 285.

ALSO, if lands be given to two and to the heires of one of them, this is a good joynture, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entiertie by survivor for terme of his life. In the same manner it is, where tenements be given to two and the heirs of the body of one of them engendred, the one hath a freehold, and the other a fee taile, &c.

BY this Section, and the *&c.* in the end of it, they are joyntenants for life, and the fee-simple or estate taile is in one of them; and because it is by one and the same conveyance, they are joyntenants, and the fee-simple is not executed to all purposes as hath been said before (3).

(2 Co. 60. b.)

(Sect. 283.)

If a fine be levied to two, [*n*] and to the heires of one of them, by force whereof he is seised, he that hath fee dieth, and after the joyntenant for life dieth, and an estranger abates, in this case the heire may either suppose the fee-simple executed, and have an assise of *Mortdauncester*, the words of which writ be, *Si R. pater fuit seisitus die quo obiit in dominico suo ut de feodo*; which cannot be said of him that hath but a remainder expectant upon an estate for life; but in respect that he is seised of a fee simple, and of a joynt estate in possession, the words in the writ be true, that he was seised *in dominico suo ut de feodo* (4). Likewise the heir may have a writ of right, which also in some sort proves the fee simple executed; or the heire may have a *scire facias* to execute the fine, by which the heir supposeth that the fee was not executed, or he may maintaine a writ of intrusion where the heire maketh the like supposition, and shall terme it a remainder (1). And yet when land is given to two and to the heires of one of them, he in the remainder cannot grant away his fee simple, as hath been said (2).

[*n*] 42 E. 3. 9, 10. 11 H. 4. 55. 31 E. 3. Scire facias, 19. 29 H. 8. Mortd. B. 59. 4 E. 3. 37. F. N. B. 196. 219. 4 E. 3. Itinere Derby. 24 E. 3. 70. (2 Co. 61.) (1 Ro. Abr. 686.)

(Post. 281.)

[184. b.]

Sect.

(2) See Dy. 326. a.

(3) Ant. 182. b. See also post. 297. b. Fearne on Conting. Rem. 23, 24. 26. 28, 29. Bro. Nouv. Cas. pl. 260. 303. 387. These references will introduce the reader to most of the learning on this curious point.

(4) See however Bro. Nouv. Cas. pl. 115. which is *contra*.

(1) Acc. F. N. B. 204. E. So also such heir shall have a writ of entry *in consimili casu*, where the surviving tenant for life aliens in fee. F. N. B. 207. B. —[Note 64.]

(2) See ant. 182. b.—There is a seeming difficulty in this passage. But I conceive lord Coke's meaning to be, that, though for some purposes the estate for life of the jointenant having the fee is distinct from and unmerged in

Sect. 286.

ALSO, if two joyntenants be seised of an estate in fee simple, and the one grants a rent charge by his deed to another out of that which belongeth to him (3), *in this case during the life of the grantor the rent charge is effectuall; but after his decease the grant of the rent charge is void, as to charge the land, for he which hath the land by survivor shall hold the whole land discharged. And the cause is, for that he which surviveth claimeth and hath the land by the survivor* (4) *and hath not, nor can claime any thing by descent from his companion, &c. But otherwise it is of parceners, for if there be two parceners of tenements in fee simple, and before any partition made the one chargeth that which to her belongeth by her deed with a rent charge, &c. and after dieth without issue, by which that which*

in his greater estate, yet for granting it is not so, but both estates are in that respect consolidated notwithstanding the estate of the other jointenant; and therefore that the fee cannot in strictness of law be granted as a remainder *eo nomine*, and as an interest distinct from the estate for life. This explanation is confirmed by a note in a Coke upon Littleton I have, in which it is strongly observed, that "the two estates, viz. for life and in fee, or rather one knotted "estate, are so confounded together in one person, that he cannot sever them "and make them distinct estates, for he cannot grant the estate for life re- "serving to himself the fee simple, nor can he grant the fee simple and reserve "the estate for life, but he may pass away all his interest by feoffment, or he "may forfeit all." See Bro. Nouv. Cas. pl. 115. It also much agrees with the language of lord Coke's report of Wiscot's case, especially where he observes, that when an estate is made to three and the heirs of one, *he, who hath the fee, cannot grant over his remainder, and continue in himself an estate for life*, for which lord Coke cites 12 E. 4. 2. b. See 3 Co. 61. a. Besides if the passage here should be understood to signify, that the jointenant having the fee could not in *any* form pass away the fee subject to the estate of the other jointenant, it would not only be contrary to the power of alienation necessarily incident to a fee simple, but would be inconsistent with lord Coke's own doctrine in a subsequent part of his commentary. See the case of an estate to father and son and the heirs of the father, post. 367. b. See also post. Sect. 578. Indeed lord Coke's position thus qualified appears to have a strictness in it, which with some may perhaps render it questionable. However he seems justified by the words of the year-book, which he cites as his authority; for they are, that, *if two have land to them and the heirs of one, he who hath fee cannot grant the reversion of his companion to another; but if both alien all passeth.* See further as to grant of a remainder or reversion by one having a present and previous estate, Shepp. Touchstone, 237. and Shepp. Common Assur. 12, 13*.

—[Note 65.]

(3) *&c.* in L. & M. & Roh.

(4) *&c.* in L. & M. & Roh.

* *Where lands were limited to the use of* A. *for life, remainder to trustees during the life of* A. *to preserve contingent remainders; remainder to his sons successively in tail male, and for default of such issue, to the right heirs of* A.; *Mr. Fearne was of opinion that it was doubtful whether* A's. *life estate and remainder or reversion in fee were not so consolidated, as to render it impossible for* A. *to convey his remainder or reversion in fee, separately and distinctly from his life estate. To obviate this doubt he recommended that the land should be conveyed to the proposed releasee and his heirs, to the use of* A. *for life; remainder to the trustees for preserving contingent remainders during his life, remainder to the sons of* A. *successively in tail male; by way of confirmation or establishment of those uses under the settlement; with the proposed remainders over.*

which belongeth to her descends to the other parcener, in this case the other parcener, shall hold the land charged, &c. because she came to this moity by descent, as heir, &c.

"*CLAIME any thing by descent from his companion, &c.*" By which &c. is implyed, that so it is if one joyntenant acknowledge a recognisance or a statute, or suffreth a judgment in an action of debt, &c. and dieth before execution had, it shall not be executed afterwards (5). But if execution be sued in the life of the conusor, it shall bind the survivor. And it is further implyed, that both in the case of the charge and of the recognisance statute and judgment, if he that chargeth, &c. survive, it is good for ever.

F.N.B. 204. 207. 7 H. 6. 2. 13 H. 7. 22. 10 E. 3. 34. 17 R. 2. tit. Charge, 15. 5 H. 5. 8. Vide Sect. 289. (6 Co. 79. a.)

And so it is [*o*] if a man be possessed of certaine lands for term of yeares in the right of his wife, and granteth a rent charge, and dyeth, the wife shall avoyd the charge (6); but if the husband had survived, the charge is good during the terme.

[*o*] 9 H. 6. 32. (Hob. 3. Plowd. 418. b.)

If a villeine purchase lands, and binde himselfe in a recognisance, if the lord enter before [*p*] execution, the lord shall avoyd the same, as hath been said. But otherwise it is if he had made a lease for yeares, for the reason that *Littleton* here yieldeth in this Section (7).

[*p*] 8 E. 3. tit. Execution. Statham.

[185. a.] If two joynetenants be of a terme, [*q*] and the one of them grant to *I. S.* that ☞ if he pay to him ten pound before *Michaelmasse*, that then he shall have his terme, the grantor dyeth before the day, *I. S.* payes the summe to his executors at the day, yet he shall not have the tearme, but the survivor shall hold place; for it was but in nature of a communication (1): but if he had made a lease for yeares, to begin at *Michaelmasse*, it should have bound the survivor (2).

[*q*] 14 H. 8. 22. Pl. Com. 263. b. in dame Hale's case. (Finch's L. 97. 6 Co. 35. 2 Ro. Abr. 88, 89. Cro. Jam. 91, 92.)

And where *Littleton* putteth the case of a rent charge, it is so likewise implyed, that if one joyntenant granteth a common of pasture, or of turbary, or of estovers, or a corody, or such like, out of his part, or a way over the land, this shall not bind the survivor: for it is a maxime in law, that *jus accrescendi præfertur oneribus*; and there is another maxime, that *alienatio rei præfertur juri accrescendi.*

45 E. 3. 13. Vide Sect. 289.

If one joyntenant in fee simple be indebted to the king, and dyeth, [*r*] after his decease no extent shall be made upon the land in the hands of the survivor.

[*r*] 40 Ass. 36. 50 Ass. 5. F.N.B. 149. Q. Pl. Com. 321. (1 Co. 86. Post. 352. a.)

If a recovery be had against one joyntenant, who dyeth before execution, the survivour shall not avoid this recovery: because that the right of the moitie is bound by it.

If one joyntenant in fee take a lease for yeares of an estranger by deed indented and dyeth, the survivour shall not be bound by the conclusion; because he claymes above it, and not under it.

"*And*

(5) See acc. 7 H. 7. 13. b. & 2 Ro. Abr. 88.

(6) Yet the husband's alienation of the term itself, or of any part of it, binds the wife surviving. Post. 351. a. The reason of this difference is explained post. 185. a. It is also well explained in Finch's L. 13 and 98. and in the New Abridgment, tit. *Baron et feme*, C. 2. See further, 1 Vern. 396.—[Note 66.]

(7) See also the reason given in Sect. 289. Plow. 419. See further 466.

(1) See Dy. 337. a.

(2) See post. Sect. 289.

"*And the cause is, for that he which surviveth claimeth and hath the land by the survivor, &c.*" Here again *Littleton* sheweth the reason: and the cause, wherefore the survivour shall not hold the land charged, is, for that he claymeth the land from the first feoffor (3), and not by his companion, which is *Littleton*'s meaning when he saith, (that he claimeth by survivor) for [*s*] the surviving feoffee may plead a feoffment to himself without any mention of his joynt feoffee (4). And this is the reason, that if two joyntenants be in fee, and the one maketh a lease for yeares, reserving a rent and dyeth, the surviving feoffee [*t*] shall have the reversion by survivor, but he shall not have the rent, because he claimeth in from the first feoffor, which is paramount the rent. If there be two joyntenants in fee, and the one joyntenant granteth a rent charge out of his part, and after releaseth to his joynt companion and dyeth, he shall hold the land charged, for that he is out of the reason and cause set downe by *Littleton*, because he claimeth not by survivor, in as much as the release prevented the same. And of this opinion was *Littleton* himselfe [*u*] before the edition of his booke. But all men agree, that if *A. B.* and *C.* be joyntenants in fee, and *A.* chargeth his part and then releaseth to *B.* and his heirs, and dyeth, that the [*w*] charge is good for ever; because in that case *B.* cannot be in from the first feoffor, because he hath a joynt companion at the time of the release made, and several writs of *præcipe* must be brought against them (5). And albeit the release of one joyntenant to the residue of the joyntenants makes no degree in supposition of law, neither is there any severall estate between them, but the estate of him that releaseth is as it were extinguished and drowned in their estate and possession, so as one *præcipe* lyeth against them (7), yet shall they hold the land charged as is aforesaid. As if tenant for life grant a rent charge, and after surrendreth his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet he shall hold it charged (8).

[*s*] 14 E. 4. 1. b. 18 E. 2. Briefe, 830. 8 E. 2. Entry, 77. 18 E. 3. 28. 38 E. 3. 26. 8 H. 6. 25. Vid. 46 E. 3. 77. 35 H. 6. 39.

[*t*] Dier, Mich. 2 & 3 Eliz. 187. lib. 1. fol. 96. Vide lib. 6. fol. 78, 79. (Post. 318. a.)

[*u*] 33 H. 6. 5. a. 9 Eliz. Dyer, 263.

[*w*] 37 H. 8. tit. Alienation, Br. 31. 10 E. 4. 3. b. 40 E. 3. 41. b. 33 H. 6. 5. 22 H. 6. 42. b. per Pole. 35 E. 3. Release, 43. 33 E. 3. Avowry, 195. 14 H. 8. 2. (6) (Cro. Jam. 696. Plowd. 198. 6 Co. 79. a. 8 Co. 145. 9 Co. 107. b. Post. 233. b.)

"*But otherwise it is of parceners, for if there be two parceners, &c.*" This is to be intended as well of parceners by custome as of parceners by the common law; and here is implyed the reason of the diversitie, for that the survivor doth claime above the charge, and the heire by descent under the charge (9).

Sect.

(3) For this same reason a wife shall not have dower out of lands of which her husband was jointenant. Ant. 37. b. See post. 385. a. a case of warranty depending on the same principle.—[Note 67.]

(4) Acc. F. N. B. 219. B.

(5) As to the partial effect of such a release on the jointenancy, see post. Sect. 304.

(6) It should be 12. a.

(7) See the case of waste in Brownl. Rep. 238.

(8) Acc. 338. b. 233. b.

(9) In Calthrope's reading on Copyholds, 64. the doctrine of admission on the death of copyholders being jointenants or parceners is stated according to this diversity.

Sect. 287.

ALSO, if there be two joyntenants of land in fee simple within a borough where lands and tenements are devisable by testament, and if the one of the said two joyntenants deviseth that which to him belongeth by his testament, &c. and dieth, this devise is voide. And the cause is, for that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion, which surviveth, by the survivor; the which he doth not claime, nor hath any thing in the land by the devisor, but in his owne right by the survivor according to the course of law, &c. and for this cause such devise is void. But otherwise it is of parceners seised of tenements devisable in like case of devise, &c. causâ quâ suprâ.

"*BY his testament, &c.*" Either in writing or nuncupative, according to the custome. 1 Bl. R. 476. 3 Burr. 1488. Amb. 617. See also Perk. s. 500. Eq. Ca. Ab. 172.

"*And the cause is, for that no devise can take effect till after the death of the devisor* (10) *and by his death all the land presently commeth by the law to his companion,* ☞ *&c.*" Here both their claimes commence at one instant; and although an instant *est unum indivisibile tempore quod non est tempus nec pars temporis, ad quod tamen partes temporis connectuntur,* and that *instans est finis unius temporis et principium alterius* (1); yet in consideration of law there is a prioritie of time in an instant, as here the survivor is preferred before the devise; for *Littleton* saith, that the cause is that no devise can take effect till after the death of the devisor, and by his death all the land presently commeth by the law to his companion. Whereby it appeareth, that *Littleton* by these words *post mortem et per mortem*, though they jump at one instant, yet alloweth priority of time in the instant which he distinguisheth by *per* and *post*. And the reason of this prioritie is, that the survivour claymeth by the first feoffor (as hath been said) and therefore in judgment of law his title is paramount the title of the devisee, and consequently the devise void, and the rule of law is, that *jus accrescendi præfertur ultimæ voluntati* (2). [185. b.] Pl. Com. in Fulmerston's case. (Plowd. 258. b. Ante 30. a.)

Two fems joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattels reals are given to the husband, if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage (Plowd. 418. Hob. 3. Cro. Eliz. 33.)

(10) Acc. ante 112. a. b. as a reason for the goodness of a devise by husband to wife.

(1) Therefore in Fitzwilliam's case, 6 Co. 32. it was argued, that the indulgence of the law in connecting two times to make one instant time cannot be extended to *three* times. See post. 298. a. a case in which priority of time in an instant is allowed, for sake of saving the remainder in fee of a rent from the effect of a suspension of the particular estate.—[Note 68.]

(2) Acc. as to *goods*, Office of Exec. ed. 1676, p. 26. Perk. sect. 526. Swinb. on Testam. part 3. sect. 6.

marriage the feme continued sole possessed; for, if the husband dyeth, the feme shall have it, and not the executors of the husband (3). But otherwise it is of personall goods.

1 H. 5. Executors, 108.

If a man be seised of a house, and possessed of divers heirlomes, that by custome have gone with the house from heire to heire, and by his will deviseth away the heirelomes, this devise is void; for *Littleton* here saith, the will taketh effect after his death, and by his death the heirlomes by ancient custome are vested in the heire (4), and the law preferreth the custome before the devise. And so it is if the lord ought to have a herriot when his tenant dieth, and the tenant deviseth away all his goods, yet the lord shall have his herriot for the reason aforesaid. And it hath been anciently said, that the herriot shall be paid before the mortuary. [x] *Imprimis autem debet quilibet, qui testaverit, dominum suum de meliore re quam habuerit recognoscere, et postea ecclesiam de aliâ meliore, &c.* wherein the lord is preferred, for that the tenure is of him. This dutie to the lord is very antient; for in the laws before the Conquest it is said, *sive quis incuriâ, sive morte repentinâ, fuerit intestat' mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur herioti nomine) sibi assumito* (6). In the Saxon tongue it is called *heregeat*, as much to say (as I take it) as the lord's [beste]; for *here* is lord, and *geat* is [beste]. But let us returne to *Littleton*.

[1] Fleta, lib. 2. cap. 50. (5) Bracton, lib. 2. fol. 60. Britton, fol. 178. Lamb. fol. 119. 58.

"*But otherwise it is of parceners seised of tenements deviseable in like case of devise, &c.* causâ quâ suprâ.

The reason is evident, for that there is no survivour between coparceners, but the part of the one is descendible, and consequently may be devised.

☞ Sect. 288. [186. a.]

ALSO, it is commonly said, that every jointenant is seised of the land which he holdeth jointly (1) per my et per tout; *and this is as much to say, as he is seised by every parcell and by the whole, &c. and this is true, for in every parcell, and by every parcell and by all the lands and tenements, he is joyntly seised with his companion* (2).

Vide Sect. 697.

"*ALSO, it is commonly said, &c.*" That is, it is the common opinion, and *communis opinio* is of good authoritie in law. *A communi observantiâ non est recedendum* (3), which appeareth here by *Littleton*.

"*Per*

(3) See ante 46. b. post. 351. a. and the case of a purchase by husband and wife jointly, the former being a villein, in 2 Ro. Abr. 733. D. pl. 2.

(4) Acc. ante 18. b.

(5) It should be cap. 57.

(6) See this same passage cited ante 176. b.

(1) *&c.* in L. & M. & Roh.

(2) *&c.* in L. & M. & Roh.

(3) This same maxim is cited post. 229. b. and 364. b. In Wingate's Maxims, 752, there is a variety of cases collected to illustrate the application of this rule. Other rules immediately connected with this are, that *communis error*

"*Per my et per tout.*" *Et sic totum tenet et nihil tenet, scil. totum conjunctim, et nihil per se separatim.* And albeit they are so seised (as for example where there be two joyntenants in fee) yet to divers purposes each of them hath but a right to a moitie; as to enfeoffe give or demise, or to forfeit (4) or lose by default in a *præcipe* (5). If my villein [*y*] and another purchase lands to them two and their heires, I may enter into a moity. (Post. 350. a. 2 Co. 66. b. 2 Ro. Abr. 86.) Vide Bracton, lib. 5. fo. 430. Britton, cap. 35. Fleta, lib. 3. cap. 4. 40 E. 3. 40. 18 E. 2. Bre. 831.

35 H. 6. 39. Vide the second part of the Institutes upon the 6 chapter of the statute de bigamis. Fleta, lib. 1. cap. 28. 40 Ass. 79. 48 E. 3. 16. 7 E. 4. 29. 11 El. Dyer, 183. (2 Co. 58. a. Cro. Jam. 91. 1 Leon. 47.)

[*y*] Vid. 6 E. 3. 4.

And where all the joyntenants joyne in a feoffment, every of them in judgment of law doth give but his part (6). If an alien and a subject purchase lands joyntly, the king upon office found shall have but a moity (7). And *Littleton* afterwards in this Chapter (8) saith, that one joyntenant hath one moity in law, and the other the other moity. And therefore if two joyntenants be [*z*] and both they make a feoffment in fee upon condition, and that for breach thereof one of them shall enter into the whole, yet he shall enter but into a moitie, because no more in judgment of law passed from him (9): and so it is of a gift in taile or a lease for life, &c.

[*z*] Pl. Com. in Browning's case, fol. (133. a.) (Post. 192. a.)

Yet every joyntenant may warrant the whole; [*a*] because a man may warrant more than passeth from him (10).

[*a*] Vide the second part of the Institutes upon the 6 chapter of the statute of bigamis.

If two joyntenants make a feoffment in fee [*b*] and one of the feoffors dye, the feoffee cannot plead a feoffment from the survivor of the whole, because each of them gave but his part; but otherwise it is on the part of the feoffee, as hath been said before.

[*b*] 14 E. 4. 5. and the other bookes above-said.

And where two joyntenants be, the one of them [*c*] may make the other his baylife of his moity, and have an action of account (11) against him. And one joyntenant [*d*] may let his part for yeares or at will to his companion.

[*c*] 21 E. 3. 60. (Post. 200. b.)

[*d*] 11 H. 3. 60. 33. (Post. 193. b. 335. a.)

If two joyntenants be of certaine lands, and the one of them by deed indented [*e*] bargaineth and selleth the lands, and the other

[*e*] 6 E. 6. tit. Faits inroll. 9 Br. (Cro. Cha. 217. 569. 1 Co. 173.)

error facit jus, and *res judicata pro veritate habetur*, and also that *minimè mutanda sunt quæ certam interpretationem habuerunt*, as to which see post. 365. a. Hob. 147. Wing. Max. 758. and ant. 52. b. in the margin.—In a late ecclesiastical case of great importance, in which bonds of resignation were condemned by the supreme court of appellant jurisdiction, these four maxims appear to me to have included the chief topic of argument in favour of such bonds. —[Note 69.]

(4) Acc. as to copyholders being jointenants, Calthrope's Reading, 97. Kitch. French ed. 82. a.

(5) See ant. 125. b.

(6) Acc. 11 H. 7. a. pl. 5.

(7) See ant. 180. and note 2, there.

(8) Post. Sect. 291.

(9) See ant. 47. a. & post. 214. a. the case of a lease by two jointenants with reservation of rent to one, and the difference there taken between such a lease by *parol* and one by *deed indented*. See also Dy. 263. a.

(10) See post. Sect. 700.

(11) See ant. 172. a.

other joyntenant dyeth, and then the deed is inrolled, there shall passe nothing but the moity which the bargainor had at the time of the bargain (12).

Sect. 289.

ALSO, if two joyntenants be seised of certain lands in fee simple, and the one letteth that to him belongeth to a stranger for terme of forty yeares, and dyeth before the terme beginneth, or within the terme, in this case after his decease the lessee may enter and occupie the moitie let unto him during the terme, &c. although the lessee had never the possession thereof in the life of the lessor, by force of the same lease, &c. And the diversitie betweene the case of a grant of a rent charge (1) *[aforesaid, and this case, is this. For in the grant of a rent charge by] a joyntenant, &c. the tenements remaine alwayes as they were before, without this, that any hath any right to have any parcell of the tenements but they themselves, and the tenements are in the same plight as they were before the charge, &c. But where a lease is made by a joyntenant to another for terme of yeares, &c. presently by force of the lease the lessee hath right in the same land,* (videlicet) *of all that which to the lessor belongeth, and to have this by force of the same lease during his terme* (2). *And this is the diversitie* (3).

"*BY force of the same lease, &c.*" By this *&c.* is implyed, [*f*] that where our author speaketh of joyntenants seised in fee, that so it is if two be seised for life, and one make a lease to begin presently or ☞ *in futuro*, and dieth, this lease shall binde the survivor, as it hath been adjudged (4). [*g*] And if one joyntenant grant *vesturam terræ*, or *herbagium terræ*, for yeares, and dieth, this shall binde the survivor; for such a lessee hath right in the land. So it is if two joyntenants be of a water, and the one granteth the several pischary.

[186. b.]

[*f*] Vide Sect. 286. & 660. & Sect. 2. (Dyer, 187. a.) 2 Ro. Abr. 89.)
[*g*] 11 H. 4. 90. 14 H. 8. 6. 17 E. 4. 6. a. 9 H. 6. 52. 21 H. 7. 29. 14 H. 7. 4.

18 E. 3. Execution, 56. 11 El. Dy. 285. Plow. Com. 160. a. Temps. E. 1. Ass. 422. 20 H. 6. 4. 7 H. 7. 13. 10 H. 7. 24. (Ante 4. b.)

"*The one letteth.*" If two joyntenants be of an advowson, and [*h*] the one presenteth to the church, and his clerke is admitted and instituted, this in respect of the privity shall not put the other out of possession (5); but if that joyntenant that presenteth dieth, it shall serve for a title in a *quare impedit* brought by the survivor (6). But yet if one joyntenant

[*h*] 6 E. 3. 38, 39. 52. 7 E. 3. 20, 21. 17 E. 3. 37. b. 22 E. 3. 9. 30 E. 3. 16. 11 H. 4. 54.

15 E. 3. Dar. Presentment, 11. 10 E. 4. 94. 1 H. 7. 1. b. 2 R. 3. Quar. Imp. 102. 9 El. Dy. 259. 36 H. 8. Br. Present. 27 H. 8. fo. 11. 5 H. 7. 8. 6 E. 4. 10. b. Doct. & Stud. 116. 34 H. 6. 40. 20 E. 3. Quar. Imp. 63. F. N. B. 34. V. (2 Ro. Abr. 355.)

or

(12) See ante 147. b.

(1) The following words between brackets not in L. & M. nor Roh.

(2) *life* instead of *terme* in L. & M. & Roh.

(3) *&c.* in L. & M. & Roh.

(4) See acc. Cro. Jam. 91. & 2 Brownl. 175.

(5) See post. 243. a. 249. a.

(6) Acc. more fully, 2 Inst. 365. According to F. N. B. 34. the law is the same between coparceners, which agrees with lord Coke's doctrine about them in 2 Inst. 365. and post. 243. a. See further the case of usurpation of a right of

or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unlesse they joyn in presentation, and after the sixe moneths he may in that case present by lapse (7).

But if two or more coparceners be, [*i*] and they cannot agree to present, the eldest shall present; and if her sister doth disturbe her, she shall have a *quare impedit* against her; and so shall the issue and the assignee of the eldest, and yet he is tenant in common with the youngest (8). And in the same manner the tenant by the curtesie of the eldest shall present. But if there be foure coparceners, and the eldest and the second present, and the other two present joyntly or severally, the ordinary may refuse them all; for the eldest did not present alone, but she and one othor of her sisters. But now let us returne to *Littleton* (9).

[*i*] Bract. li. 4. fol. 238. 245. 247. Brit. fol. 223. 45 E. 3. Fines, 41. 18 E. 2. Quar. Imp. 176. 38 H. 6. 9. 19 E. 3. ib. 50. 5 H. 5. 10. F. N. B. 34. V. (Plowd. 332. b. 333. a. 10 Co. 135. b.

2 Ro. Abr. 346. F. N. B. 33. E. Ante 166. b. Post. 243. a. & Sect. 299.)

[187. a.]

☞ Sect. 290.

ALSO, joyntenants (if they will) may make partition between them, and the partition is good enough; but they shall not be compelled to do this by the law; but if they will make partition of their own will and agreement, the partition shall stand in force.

"*MAY make partition.*" But this partition must be [*k*] by deed, as hath been said before. But joyntenants for yeares may [*l*] make partition without deed.

(Post. 198. b.) [*k*] Vide Sect. 259*. 318. (Ante 169. a. F. N. B. 62. F.) [*l*] 18 El. Dyer, 350. F. N. B. 62. b.

"*They shall not be compelled.*" This is true regularly; but, by the custome of some cities and boroughs, one joyntenant or tenant in common may compell his companion, by writ of partition grounded upon the custome, to make partition (1). But since *Littleton* wrote jointenants and tenants in common generally are compellable to make partition by writ framed upon the statutes [*m*] of 31 & 32 H. 8. as before hath been said (2).

[*m*] 31 H. 8. c. 1. 32 H. 8. cap. 32. Vide Sect. 264. 247. 259†. Mich. 16 & 17 El. 1. 340. inter Harris & Eden, adjudge. acc. 18 El. Dy. 350. b. Vide before in the Chapter of Partition, many bookes cited concerning this matter. (Ante 175. a. Sect. 250. Mo. 29. Dy. 350. Ante 167. b.) 3 E. 3. 48. F. N. B. 9. B. 7 Ass. 10. 7 E. 3. 29. 10 Ass. 17. 10 E. 3. 40. 43. 12 Ass. 15. 17. 12 E. 3. Judgement, 102. 20 E. 3. Ass. 62. 28 Ass. 35. 23 Ass. 10. 7 H. 6. 4. 19 H. 6. 45. 3 E. 4. 10. Vide Sect. 247. Brit. fo. 112. lib. 6. fo. 12 & 13. Morrice's case.

And

of presenting, ante 149. a. See also the case of attornment to one of two jointenants, post. Sect. 566. Add 5 Co. 97. b.—[Note 70.]

(7) See 5 H. 7. 8. a. Burn. Ecc. L. tit. *Advowson*, Wats. Compl. Incumb. c. 8.

(8) See my note on this subject ante 166. b. Hob. 119. Dy. 55. a.

(9) See further on presentation where more than one have an interest in an advowson, 2 Gibs. Cod. 1st ed. 804. ante 17. b. 18. a. 17 Vin. Abr. 325. Mallory's *Quare Impedit*, 71 to 75.

(1) For instances of such custom, see for London, F. N. B. 62. B. and for gavelkind land, ante Sect. 265. and Robins. on Gavelk. 108.

(2) Ante 169. a.—In a Coke upon Littleton I have, there is the following note

* *It should be Sect. 250, as it seems. See the note below.*

† *Probably Sect. 250, and the Comment thereon, were intended to be referred to; for Sect. 259 treats of the period when infants are said to attain their full age, and is quite irrelevant to the subject of partition.*

And albeit they be now compellable to make partition, yet seeing they are compellable by writ, they must pursue the statutes, and cannot make partition by *parol*, for that remaines at the common law. And by *Littleton*'s authoritie herein it seemeth to me, that if one joyntenant or tenant in common disseise another, and the disseisee bring his assise for the moytie, that in this case, though the plaintife prayeth it, yet no judgement shall be given to hold in severaltie, for then at the common law there might have beene by compulsion of law a partition between joyntenants and tenants in common, and by rule of law the plaintife must have judgement according to his pleint or demand.

[n] 29 E. 3. tit. Garr.

If two joyntenants be [n] of land with warranty, and they make partition by writing, the warrantie is destroyed; but if they make partition by writ of partition upon the statute, the warrantie remaines, because they are compellable thereunto (3).

Sect. 291.

ALSO, if a joynt estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moity, (4) [*and the third person shall have as much as the husband and wife, viz. the other moity, &c.*] *And the cause is, for that the husband and wife are but one person in law, and are in like case as if an estate be made to two jointenants, where the one hath by force of the joynture the one moity in law, and the other, the other moity, &c.* (1). *In the same manner it is where an estate is made to the husband and wife and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c.* causâ quâ suprâ.

MORE shall be said of the matter touching jointenancy, in the Chapter of Tenants in Common, and Tenant by Elegit, and Tenant by Statute Merchant.

(Post. 299. b. 351. a. 2 Co. 68.)

"*THE husband and wife have in law in their right but the moity; &c.*" *William Ocle* and *Joane* his wife [o] purchased

Ante 28. b. n. 1. 1 Ro. Abr. 388, 389.

[o] Mich. 33 E. 3. coram rege Salop. in Thesaur. (Post. 326. a. 9 Co. 140.)

lands

note on the extent of the statutes of 31 and 32 H. 8. "Adjudged by St. John "chief justice, and Windham and Archer justices, Hilary 1659 in the common "bench, in the cause between Major and the lord Coventry, that a tenant by "elegit may have a writ of partition by the statute of 32 H. 8, and it is within "the meaning thereof." This is followed with a reference to Cro. Cha. 44. where it is said that the statute doth not extend to copyholds.—[Note 71.]

(3) Acc. ante 165. a. and b. as to parceners, because they are compellable to make partition at common law. See the case of aid between parceners after partition, ante 174. a. and b.

(4) The words following between brackets not in L. and M. or Roh.

(1) No &c. in L. and M. or Roh.

lands to them two and their heires; after *William Ocle* was attainted of high treason for the murther of the king's father, E. 2. and was executed; *Joan* his wife survived him; E. 3. granted the lands to *Stephen de Bitterly* and his heires; *John Hawkins* the heire of the said *Joan* in a petition to the king discloseth this whole matter, and upon a *scire facias* against the patentee hath judgement to recover the lands, for the reason here yielded by our author.

F. N. B. 194. Calth. Co. 92. 2 Bl. 1211. 5 T. R. 652. Com Dig. Baron & Feme, 1 Ro. Abr. 271.

[187. b.]

But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities between them, which is implyed in these words of our author, *husband and wife* (2).

Vide Sect. 665.

"*But one person in law.*" *Bracton* saith, [*p*] *vir et uxor sunt quasi unica persona, quia caro una et sanguis unus* (3). It hath been said, that if a reversion be granted to a man and a woman and their heires, and before attornment they entermarrie, and then attornment is made, that the husband and wife shall have no moieties in this case (4), no more than if a charter of feoffment be made to a man and a woman, with a letter of atturnie to make livery, they entermarry, and then livery is made *secundum formam chartæ*, in which case it is said that they have no moities. But certain it is, that if a feoffment were made before the statute of 27 H. 8. of uses to the use of a man [*q*] and a woman, and their heirs, and they entermarry, and then the statute is made, if the husband alien it is good for a moity; for the statute executes the possession according to such qualitie, manner, forme, and condition, as they had in the use, so as though it vest during the coverture, yet the act of parliament executes severall moieties in them, seeing they had several moities in the use (5).

[*p*] Bracton, lib. 5. fol. 416. 20 H. 3. Discent, 52. lib. 4. fol. 68. Toker's case. Pl. Com. 483. Nichols case.

[*q*] 4 Mariæ, Dyer, 149. 3 Mariæ, Dyer, 122. 29 H. 8. Dyer. 32.

If an estate be made to a villeine and his wife [*r*] being free, and to their heires, albeit they have severall capacities, viz. the villeine to purchase for the benefit of the lord, and the wife for her owne, yet if the lord of the villeine enter, and the wife surviveth her husband, she shall injoy the whole land, because there be no moities between them.

[*r*] 40 Ass. p. 7.

A man makes a lease to *A.* and to a baron and feme, viz. to *A.* for life, to the husband in taile, and to the feme for yeares, in this case it is said, that each of them hath a third part in respect of the severaltie of their estates.

If a feoffment be made to a man and a woman and their heires with warrantie, [*s*] and they entermarrie, and after are impleaded and vouch and recover in value, moities shall not be between them; for though they were sole when the warrantie was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moieties.

[*s*] Pl. Com. 483. Nichols case.

Albeit

(2) See acc. as to this difference between a joint estate to husband and wife *before* marriage and one *after*, Calthrope's Read. on Copyh. 92. F. N. B. 194. B. See further case of Butler and Baker, 3 Co. the case of Margery More, ante 133. a. the case of 4 Ass. 4. cited in 1 Ro. Abr. 271. and the case of Ward and Walthew, Yelv. 101.

(3) See ante 112. a. where the same passage from Bracton is cited.

(4) See acc. post. 310. a. and there the doctrine is more positively expressed. See further the case of a lease for life to baron and feme, and afterwards Confirmation, post. 299. b.

(5) See Dy. 200. a.

10 H. 7. 20.

Albeit baron and feme (as *Littleton* here saith) be one person in law, so as neither of them can give any estate or interest to the other (6), yet if a charter of feoffment be made to the wife, the husband as atturney to the feoffor may make liverie to the wife (7); and so a feme covert, that hath power to sell land by will, may sell the same to her husband, because they are but instruments for others, and the state passeth from the feoffor or devisor.

[*t*] 11 E. 3. Cui in vita, 9. 16 E. 3. ibid. 36 E. 3. ib. 20. 35 Ass. pl. 15. 31 H. 6. tit. Ent. congeable, 54. 19 H. 6. 45. F. N. B. 193. K.

If a husband, wife, and a third person purchase lands to them and their heires [*t*] and the husband before the statute of 32 H. 8. cap. 1, had aliened the whole land to a stranger in fee, and died, the wife and the other joyntenant were joyntenants of the right, and if the wife ☞ had died, the other joyntenant should have had the whole right by survivor (1), for that they might have joined in a writ of right (2), and the discontinuance should not have barred the entrie of the survivor, for that he claymed not under the discontinuance, but by the title paramount above the same by the first feoffement (3), which is worthie of observation. But if the husband had made a feoffment in fee but of the moity, and he and his wife had dyed, their moity should not have survived to the other.

[188. a.]

And for the better understanding of this diversity divers things are worthy of observation.

Vide Sect. 302. (Post. 327. b.)

First, that a right of action and a right of entrie may stand in joynture; for at the common law the alienation of the husband was a discontinuance to the wife of the one moity, and a disseisin of the other, so as after the death of the husband, the wife hath a right of action to the one moity, and the other joyntenant a right of entrie into the other, but they are jointenants of the right, because they may joyne in a writ of right.

Secondly, that a right of action or a bare right of entrie cannot stand in joynture with a freehold or inheritance in possession, and therefore if the husband make a feoffment of the moitie, this was a discontinuance of that moity, * and the other jointenant remained in possession of the freehold and inheritance of the other moity, which for the time was a severance of the jointure (4); and so are all the books, which seemed to varie amongst themselves, clearly reconciled.

* Vide the statute of 32 H. 8. 2. It is no discontinuance at this day.

[*u*] Pl. Com. 419. Bratchbridge's case.

If two joyntenants be of a rent, and the one of them disseise the tenant of the land, [*u*] this is a severance of the joynture for a time; for the moitie of the rent is suspended by unitie of possession (5), and therefore cannot stand in joynture with the other moitie in possession. And this is to be observed, that there shall never be any survivor, unless the thing be in joynture at the instant of the death of him that first dyeth (6): for the rule is, *nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.*

Also if a man demiseth lands to two, to have and to hold to the one for life, and the other for yeares, they are no joyntenants;

(6) Acc. ante 112. a. and observe note 6, there.
(7) Acc. ante 52, a.
(1) Acc. 2 Ro. Abr. 88. D. pl. 3.
(2) See post. 337. a.
(3) See post. 364. b. and ante 185. a.
(4) Acc. post. 337. b.
(5) See ante 148. b.
(6) Acc. post. 193. a.

tenants; for a state of freehold cannot stand in joynture with a terme for yeares: and a reversion upon a freehold cannot stand in joynture with a freehold and inheritance in possession, as shall be said in the next Chapter (7). Neither can a seisin in the right of a politique capacity stand in jointure with a seisin in a natural capacity, as shall be said hereafter (8).

46 E. 3. 21. 19 H. 6. 45. 37 H. 8. 8. 3 E. 4. 10.

If two femes be joyntly seised, and they take barons, and the barons joyne in an alienation and dye, the wives are joyntenants of the right, and may joyne in a writ of right; and yet they may have severall writs of *cui in vitâ* at their election; but when they have recovered in those severall writs, they shall be joyntenants againe. But if the barons had alienated severally, this had been a severance of the joynture for a time, for the reason abovesaid.

If two joyntenants, the one for life, and the other in fee, lose by default, the one shall have a writ of right, and the other a *quòd ei deforceat*; and yet when they have severally recovered, they shall be joyntenants againe (9). So it is if two joyntenants be disseised, and an assise is brought, and the one is summoned and severed, and the other recover the moitie, and after another assise is brought, and he that recovereth * is summoned and severed, and the other recover, albeit they severally recover, yet they are joyntenants againe (10).

And in all cases where the joyntenants pursue one joynt remedy, and the one is summoned and severed and the other recover, he that is summoned and severed shall enter with him; but where their remedies be severall, there the one shall not enter with the other, till both have recovered: and the same law is of coparceners. If lands [w] be demised for life, the remainder to the right heires of *I. S.* and of *I. N.* *I. S.* hath issue and dieth, and after *I. N.* hath issue and dieth, the issues are not joyntenants, because the one moity vested at one time, and the other moity vested at another time (11). And yet in some cases there may be joyntenants, and yet the estate may vest in them at severall times.

Vide Lit. cap. Remitter, the last case. (Post. 364. b.) 10 H. 6. 10. 31 H. 6. tit. Entre congeable. 46 E. 3. 21. b. 3 E. 4. 10. 37 H. 6. 8. [w] 24 E. 3. 29. 18 E. 3. 28. 38 E. 3. (Cro. Jam. 259.)

If a man [x] make a feoffement in fee to the use of himselfe and of such wife as he should afterwards marrie, for terme of their lives, and after he taketh wife, they are joyntenants, and yet they come to their estates at severall times (13).

[x] 17 El. Dyer. Brent's case (12) 1 Ld. Raym. 311.

* "recovereth" *seems to be here inserted for* recovered. *See Mr. Ritso's Intr. p.* 118.

And

(7) Post. Sect. 302. near the end.

(8) Post. Sect. 297.

(9) See post. 214. a. and Bro. Abr. *Jointenants*, 6.

(10) A like case of parceners is stated before, and resolved in the same way. Ante 164. a. See further 19 H. 6. 45. b.

(11) For other cases where *joint* words are construed to operate *severally* for the like reason, see the arguments in Mr. Justice Windham's case, 5 Co. 7. a.

(12) It is in Dy. 339. b. pl. 48. but without any name. It is also much at large in 2 Leon. 14.

(13) See *contra* as to an estate at *common law*, the case of a gift to one and his children, ante 9. a. The reason of the difference is, that in the case of the *use* the estate is vested and settled in the feoffees till the future use comes into *esse*. See further as to this difference and the reason of it, 1 Co. 100. b. 101. a. and Dy. 274. b.—[Note 72.]

And so it is if I disseise one to the use of two, and the one agrees at one time, and the other at another, yet they are joyntenants.

In this Section are three *&c.* The first and second are at large explained before; the last is intended where more parties take than three.

☞ Chap. 4. [188. b.]

(Noy, 13.) ## Of Tenants in Common. Sect. 292.

TENANTS in Common are they, which have lands or tenements in fee simple, fee taile, or for terme of life, &c. and they have such lands or tenements by severall titles, and not by a joynt title, and none of them know of this his severall, but they ought by the law to occupie these lands or tenements in common, and pro indiviso *to take the profits in common. And because they come to such lands or tenements by severall titles, and not by one joynt title, and their occupation and possession shall be by law between them in common, they are called tenants in common. As if a man infeoffe two joyntenants in fee, and the one of them alien that which to him belongeth to another in fee, now the alienee and the other jointenant are tenants in common, because they are in such tenements by severall titles, for the alienee commeth to the moytie by the feoffement of one of the joyntenants, and the other joyntenant hath the other moitie by force of the first feoffement made to him and to his companion, &c.* (1). *And so they are in by severall titles, that is to say, by severall feoffments, &c.* (2)

Fleta, lib. 3. cap. 4.

LITTLETON having spoken of parceners, which are onely by descent, and of joyntenants, which are onely by purchase and by joint title, speaketh now of tenants in common, which may be by three meanes, viz. by purchase, by descent, or by prescription, as hereafter in this Chapter shall appeare (3).

☞ "*Or for term of life, &c.*" Here *&c.* implyeth *pur terme d'auter vie*, or for tearm of yeares, or for any other fixed estate in the land. [189. a.]

And here it appeareth, that the essential difference between joyntenants and tenants in common is, that joyntenants have the lands by one joint title and in one right (1) †, and tenants in common by severall titles, or by one title and by severall rights; which is the reason, that joyntenants have one joint freehold, and tenants in common have severall freeholds. Onely this propertie

Vide Sect. 296.

is

(1) No *&c.* in L. and M. or Roh.

(2) No *&c.* in L. and M. or Roh.

(3) See Sect. 310. which gives an instance of tenancy in common by prescription.

(1) † See post. 299. b. the first line.

is common to them both, viz. that their occupation is individed, and neither of them knoweth his part in severall.

The example that *Littleton* putteth in this Section is perspicuous, and needeth no explication.

Sect. 293.

(Ant. 1. b.) 11 Co. 38.

AND it is to be understood, that when it is said in any booke that a man is seised in fee, without more saying, it shall be intended in fee simple; for it shall not be intended by this word (in fee) that a man is seised in fee tayle, unlesse there be added to it this addition, fee tayle, &c.

THIS is evident, and *secundum excellentiam* it shall be taken for the highest and best fee, and that is fee simple. Vide devant, Sect. 99. (Ant. 73. a.)

"*Addition, fee tayle, &c.*" Here is implyed a maxime in law, viz. that *additio probat minoritatem*, as it is vulgarly said, the younger son giveth the difference (2).

Sect. 294.

ALSO, if three joyntenants be, and one of them alien that which to him belongeth to another man in fee, in this case the alienee is tenant in common with the other two joyntenants: but yet the other two joyntenants are seised of the two parts which remain (3) *joyntly* (5), *and of these two parts the survivor between them two holdeth place, &c.* (4).

THIS needeth no explication, onely the *&c.* in the end of this Section implyeth, that the same law is where there be more joyntenants than three.

[189. b.]

☞ Sect. 295.

ALSO, if there be two joyntenants in fee, and the one giveth that to him belongeth to another in tayle, (1) [*and the other giveth that to him belongs to another in taile,*] *the donees are tenants in common, &c.*

THE *&c.* in the end of this Section implyeth, that so it is when a lease for life or *pur auter vie* is made, for in that case also the lessees are tenants in common. Vide Sect. 300.

Sect.

(2) The difference of arms is meant. See more particularly as to this ant. 140. b.

(3) *which remain* not in L. & M. or Roh.

(4) No *&c.* in L. and M. or Roh.

(5) See Sect. 304 & 312.

(1) The words between brackets not in L. and M. or Roh.

Sect. 296.

BUT if lands be given to two men, and to the heires of their two bodies begotten, the donees have a joynt estate for tearme of their lives; and if each of them hath issue and dye, their issues shall hold in common, &c. But if lands be given to two abbots, as to the abbot of Westminster and to the abbot of St. Albans, to have and to hold to them and to their successors, in this case they have presently at the beginning an estate in common, and not a joynt estate. And the reason is, for that every abbot or other soveraigne of a house of religion, before that he was made abbot or soveraign, &c. was but as a dead person in law, and when he is made abbot (2), *he is as a man personable in law onely to purchase and have lands or tenements or other things to the use of his house, and not to his own proper use, as another secular man may, and therefore at the beginning of their purchase they are tenants in common; and if one of them die, the abbot which surviveth shall not have the whole by survivor, but the successor of the abbot which is dead shall hold the moity in common with the abbot that surviveth, &c.*

"*IF lands be given to two men, &c.*" Of this sufficient hath been spoken in the Chapter [*a*] of Joyntenants.

[*a*] Sect. 285. (Ant. 182. a.)

"*But if lands be given to two abbots, &c.*" In this case of the two abbots in respect of their several capacities, albeit the words be joynt, yet the law [*b*] doth adjudge them to be severally seised (3).

(2 Saund. 319.) [*b*] 7 H. 7. 9. b. 16 H. 7. 15. b. 3 H. 7. 11. 10 E. 4. 16. b. 2 Saund. 319.)

5 H. 7. 25. 18 E. 3. 27. 49 E. 3. 25. b. (2 Ro. Abr. 91.

Vide Sect. 200. [*c*] 4 H. 7. 45. 18 E. 3. 27. b.

The *&c.* in the end of this Section implyeth, that so it is, if any [*c*] body politique or corporate, be they regular as dead persons in law (whereof our author here speaketh) or secular: as if ☞ lands be given to two bishops, to have and to hold to them two and their successours: albeit the bishops were never any dead persons in law, but always of capacitie to take, yet seeing they take this purchase in their politique capacitie, as bishops, they are presently tenants in common, because they are seised in severall rights, for the one bishop is seised in the right of his bishoprick of the one moitie, and the other

[190. a.]

(2) *&c.* in L. & M. and Roh.

(3) Here joint words are construed to make several estates in respect of the *several capacities of the donees.* In a former part *vesting at several times* makes joint words to operate severally. Ant. 88. a.* and Mr. justice Wyndham's case, 5 Co. 7. a. there cited in a note. A few passages farther, lord Coke gives an instance of joint words passing two entire things to two grantees in consequence of the *several quality of the things granted.* Post. 190. the case of a corody. See further as to the effect from several capacities in the grantees, post. 191. b. and ant. 183. b. near the end.—[Note 73.]

* *Wyndham's case is cited in note* 11. *of* 188. *a. which is, probably, the part meant to be referred to, as fol.* 88. *a. being upon guardianship in socage, is quite irrelevant to the subject of jointenants.*

other is seised in the right of his bishoprick of the other moitie, and so by severall titles and in severall capacities, whereas joyntenants ought to have it in one and the same right and capacitie, and by one and the same joynt title. The like law is, if lands be given to two parsons and their successors or to any other such like ecclesiasticall bodies politique or incorporate, as hath been said. (5 Co. 8. a. justice Wyndham's case.)

If a corodie be granted to two men and their heires, in this case, because the corodie is incertaine and cannot be severed, it shall amount to a severall grant to each of them one corodie; for the persons be severall, and the corodie is personall (1).

Sect. 297.

ALSO, if lands be given to an abbot and a secular man, to have and to hold to them, viz. to the abbot and his successors, and to the secular man to him and to his heires, they have an estate in common, causâ quâ suprâ.

AND so it is, if lands be given to the parson of *Dale* and to a lay man, to have and to hold to them, that is to say, to the parson and his successors, and to the lay man and his heires, they are presently tenants in common for the causes abovesaid. So of a bishop, &c. *Et sic de similibus.* F. N. B. 49. I. 16 E. 3. Joindre en action, 27. 16 Ass. pl. 1. 2 R. 3. 16. 7 H. 7. 9. 13 H. 8. 14. (5 Co. 8.)

If lands be given to the king and to a subject, to have and to hold to them and to their heires, yet they are tenants in common, and not joyntenants; for the king is not seised in his naturall capacitie, but in his royall and politique capacitie, *in jure coronæ*, which cannot stand in joynture with the seisin of the subject in his naturall capacitie. So likewise if there be two joyntenants, and the crowne descend to one of them, the joynture is severed, and Pl. Com. in seig. Barkley's case. (Ant. 16. a.)

(1) Lord Coke cites no authority for this. But in 8 E. 4. 17. there is a case which tends to confirm and explain his doctrine as to a corody not being grantable to more than one. The case arose on grant of a corody by Hen. 6. to two and the longer liver, where one was dead, the question being, whether during the life of the survivor this was sufficient to justify the prior of Friswith, on whom the corody was chargeable, in refusing a new grantee sent by Edward the fourth. Upon this case NELE serjeant argued for the king, that a *corody which is for one man cannot be given to two, for two men cannot have the maintenance of one man*; and thence he inferred that the grant to the two was void. But the judges distinguished; for they all said, *that if the corody be to have certain bread and certain service, this may be granted to twenty men, &c. as to have 20 breads or 6 gallons of ale, &c. but that a corody to sit every day in the hall of the prior and to be served as the men of the prior are, this cannot be granted to many, for every one of them would have as much as one had heretofore, which would not be reason, &c.*—I was carried to this case in the year-book of E. 4. by a reference in Fitzherbert's *Natura Brevium*, which in the commentary on the writs *de corrodio habendo et de annuâ pensione* contains a great variety of learning on this antiquated subject. See F. N. B. 230. F.—[Note 74.]

and they are become tenants in common. But if lands be given to *A. de B.* bishop of *N.* and to a secular man, to have and to hold to them two and to their heires, in this case they are joyn. tenants; for each of them take the lands in their naturall capacitie.

(Post. 310. b. 2 Ro. Abr. 91.) [d] 13 H. 8. 14. 16 H. 7. 15. 9 H. 6. 25. 45 E. 3. 25.

If lands be given to *John* bishop of *Norwich* and his successors and to *John Overall* doctor of divinity and his heires, being one and the same person, he is tenant in common [d] with himselfe. But our author's rules do not hold in chattels reals or personals; for if a lease for yeares be made or a ward granted to an abbot and a secular man, or to a bishop and a secular man, or if goods be granted to them, they are joyntenants, because they take not in their politique capacity (2).

☞ Sect. 298. (1) [190. b.]

ALSO, if lands be given to two to have and to hold, scil. *the one moity to the one and to his heires, and the other moity to the other and to his heires, they are tenants in common.*

(Cro. Cha. 75. Ant. 183. a. b.)

AND the reason is, because they have severall freeholds and an occupation *pro indiviso.*

(2 Ro. Abr. 89, 90. Ant. 183. b.)

Here is to be observed, that the *habendum* doth sever the premises that *primâ facie* seemed to be joynt; for an expresse estate controlls an implyed estate as hath been said.

Sect. 299.

ALSO, if a man seised of certaine lands infeoffe another of the moitie of the same land without any speech of assignement or limitation of the same moity in severaltie at the time of the feoffment, then the feoffee and the feoffor shall hold their parts of the land in common (2) †.

AND

(2) In a former part lord Coke explains the reason of this to be, that no chattel can go in succession in the case of a sole corporation, no more than a lease for years to one and his heirs can go to heirs. Ant. 46. b. But there are exceptions to this rule. The king is mentioned as one by lord Coke ant. 90. a. Another is, where there is a special custom, as the care * of the chamberlain of London, for orphanage monies. Fulwood's case, 4 Co. 65. a. to which add Arundel's case, Hob. 64. and ant. fo. 9. a. note 1, there, 90. a. and the case of a bond to a lay person and an abbot in F. N. B. 120. B.—[Note 75.]

(1) In L. & M. and Roh. this Section is placed immediately after Sect. 300.

(2) † Brooke in his Abridgment, title *Feoffements de Terres*, pl. 75. cites this Section of Littleton, and in support of it refers to various cases in Fitzherbert's Abridgment. See further Bro. Nouv. Cas. 154. 124. 6 Co. 1. and Dy. 187. a. pl. 5.

* "care" *seems to be here inserted for case.*

AND the like law is, if the feoffment be made of a third part or a fourth part, &c. And if there be an advowson appendant, they are also tenants in common of the advowson (3). And albeit it is said, that such a feoffment of a moitie or third part, &c. is not good without writing, for that (as they say) a man cannot create an uncertaine estate in land by parol; yet is the law clear, that such a feoffment is good by parol without writing, and such an uncertaine estate shall passe by livery, and so it appeareth in our bookes.

11 Ass. pl. 16. 45 E. 3. 12. 44 Ass. 11. 21 E. 4. 22. b.

If a verdict finde, that a man hath *duas partes manerii, &c. in tres partes divisas*, this shall not be intended to be in common; but if the verdict be *in tres partes dividendas*, then it seemeth that they are tenants in common by the intendment of the verdict (4).

21 E. 4. 22. b. 5 E. 3. 23. 67. Temps E. 1. Feoffments, 115.

But if a man be seised of a mannor whereunto an advowson is appendant, and maketh a feoffment of three acres parcell of the mannor together with the advowson to two, to have and to hold the one moity together with the moitie of the advowson to the one and his heires, and the other moity together with the other moity of the advowson to the other and his heires, this cannot be good without deed; for the feoffor cannot annex the advowson to these three acres, and disannex it from the rest of the mannor, without deed (5).

34 E. 1. Quar. imped. 179. 10 Eliz. Dyer 28. 22 E. 3. 6. Feoffments, 116. 6 E. 3. 50. 39 E. 3. 38. 9 E. 3. 16. 17 E. 3. 3. 18 E. 3. 43. 43 E. 3. 26. 33 H. 6. 5. a. (Post. 333. b. Cro. Cha. 473. Cro. Jam. 15.) 23 Ass. 8.

Sect.

(3) See post. 307. a.

(4) In a case in the king's bench during lord Holt's time, the question was, how the surrender of a copyhold to the use of three sons and two daughters *equally to be divided* and their *respective* heirs ought to be construed; and this passage of the Coke upon Littleton was much relied upon by two of the judges as an authority to show, that the words *equally to be divided* imply a *tenancy in common*. But lord Holt, who was for a *jointenancy*, observed, that no such matter appears in the case of 21 E. 4, here cited by lord Coke in the margin as his authority, and that he was not positive therein, but only wrote it as his conjecture. 1 P. Wms. 19, in the case of Fisher *v.* Wigg, which is also reported in Salk. 391. Com. 88. 92. 12 Mod. 296. and 1 L. Raym. 622. In the two latter books and in P. Williams this case is reported very much at large; and as the arguments on each side are very elaborate, it is an authority fit to be resorted to, wherever the doubt is, whether there shall be a tenancy in common or jointenancy. See also the case of the earl of Anglesea *v.* Ram, in Dom. Proc. Sept. 1727. Barker *v.* Gyles, 2 P. W. 280. and 3 Bro. P. C. 297. Hall *v.* Digby and others, 4 Bro. P. C. 224. Hawes *v.* Hawes, 1 Wils. 165, and Gaskin *v.* Gaskin, M. 18 G. 3. B. R. in Mr. Henry Cowper's Rep. just published. In this last case the word *equally* was deemed sufficient to create a tenancy in common in a *will*; and lord Mansfield declared the opinion of the two judges who differed from Holt to be the better and more liberal one; and Mr. justice Aston noticed, that *equally to be divided* had been adjudged a *tenancy* in common even in a *deed*. I am happy in having this early opportunity of citing a collection of Reports, which promises so much new and useful information to the Profession. See further as to the words sufficient to make a tenancy in common, particularly the cases in equity on the subject, 2 Com. Dig. 175. and Continuation* to the same work, 201. 2 Bro. C. C. 233.—[Note 76.]

As to tenancy in common or jointenancy of personal estate, more particularly see 1 Atk. 495. 2 Bro. C. C. 220. 6 Joddrell's MS. R. 169. 3 Bro. C. C. 215. 324. 3 Ves. 628. 1 Taun. 234.

(5) Besides the references in the margin, see Dy. 48. b. pl. 3. and Doddridge on Advowsons, 30.

* *In the editions subsequent to that cited by Mr. Hargrave the "Continuation" here mentioned is incorporated into the original work.*

Sect. 300.

AND it is to be understood, that in the same manner as is aforesaid of tenants in common, of lands or tenements in fee simple, or in fee taile, in the same ☞ manner may it be of tenants for terme of life. As if two joyntenants be in fee, and the one letteth to one man that which to him belongeth for terme of life, and the other joyntenant letteth that which to him belongeth to another for terme of life, &c. the said two lessees are tenants in common for their lives, &c.

[191. a. See Note.]

Vide Sect. 295, where this is sufficiently explained before.

[191. a.] [At this page Mr. BUTLER's Notes commence.]

IN the concluding paragraph of the preface to the 13th edition of this work, the present Editor requested the attention of the public, to the circumstances, under which he engaged in it: with a renewal of the same request, he now presents the Reader with the following *Attempt to complete Mr. Hargrave's Annotation on Feuds,* at the beginning of the Second Book. doing this, he will endeavour,

I. To give a succinct account of the different nations, by whom they were established:

II. A succinct account of their nature, and particularly of those peculiar marks and qualities, which distinguish them from other laws:

III. Some account of the principal written documents, which are the sources, from which the learning respecting them is derived:

IV. Some account of the principal events, in the early history of the feuds of foreign countries:

V. Some account of the States-General, Parliaments and Nobility of the nations on the continent, in which the feudal policy has been established; and of the difference between the Parliament and Nobility of those nations, and the Parliament and Nobility of England.

VI. And an historical view of the revolutions of the feud in England.

But, as his researches are intended merely by way of supplemental annotation on Littleton, and, as the work of that author treats of real property only, his observations will be principally directed, through every branch of his inquiry, to the influence of the feudal law on that species of property. But this, he means, should be particularly the case, when he treats of the feudal jurisprudence of England. Under that head, he will offer some generall observations.

(1st,) On the time when feuds may be supposed to have been first established in England; (2dly,) On the fruits and incidents of the feudal tenure; and, (3dly,) On the feudal polity of this country, with respect to the inheritance and alienation of land: Under this head he will attempt to state the principal points of difference between the Roman and Feudal Jurisprudence, in the articles of heirship. (4thly,) The order of succession, and, (5thly,) the absolute and unqualified property of the subject of the civil law, and the limited and qualified property of the feudal tenant, in their respective possessions. (6thly,) He will then attempt to show the means, by which some of the general restraints upon the alienation of real property, introduced by the feud, have been removed. (7thly,) He will treat of entails. (8thly,) He will endeavour to show the means by which the restraints created by entails were eluded or removed. Having thus treated of that species of alienation, which, being

being the act of the party himself, is termed voluntary alienation: (9thly), He will afterwards treat of that species of alienation, which being forced on the party, is termed involuntary. Under this head he will briefly consider the attachment of lands for debt; first, in regard to its effect upon them, while they continue in the possession of the party himself; then, in regard to its effect upon them, when in the possession of the heir or devisee; and afterwards, in regard to the prerogative remedies for the recovery of crown debts. (10thly), He will then offer some observations on testamentary alienation; and (11thly), conclude by a detail of some of the principal circumstances in the history of the decline and fall of the feud in this country.

I. THE FEUDAL LAW WAS ESTABLISHED by the nations which overturned the Roman empire. The first of these were the Vandals, the Suevi, and the Alani. They inhabited the countries bordering on the Baltic. About the year 406, they made an irruption into Gaul; from Gaul, they advanced into Spain; about the year 415, they were driven from Spain by the Visigoths, and invaded Africa, where they formed a kingdom. About the year 431, the Franks, the Allemanni, and the Burgundians, penetrated into Gaul. Of these nations, the Franks became the most powerful; and having either subdued or expelled the others, made themselves masters of the whole of those extensive provinces, which, from them, received the name of France. Pannonia and Illyricum, were conquered by the Huns; Rhætia, Noricum and Vindelicia, by the Ostrogoths; and these were, some time after, conquered by the Franks. In 449, the Saxons invaded Great Britain. The Herulians marched into Italy, under the command of their king Odoacer, and in 476, overturned the empire of the West. From Italy, in 493, they were expelled by the Ostrogoths. About the year 568, the Lombards issuing from the Mark of Brandenburgh, invaded the Higher Italy, and founded an empire, called the kingdom of the Lombards. After this, little remained in Europe of the Roman empire, besides the Middle and Inferior Italy. These, on the final division of that empire, between the sons of Theodosius, in 395, had fallen to the share of the emperor of the East, who governed them by an officer called the exarch, whose residence was fixed at Ravenna, and by some subordinate officers, called dukes. In 743, the exarchate of Ravenna, and all the remaining possessions of the emperor in Italy, were conquered by the Lombards. This, as it was the final extinction of the Roman empire in Europe, was the completion, in that quarter of the globe, of those conquests which established the law of the feud.

The nations by whom these conquests were made, came, it is evident, from different countries, at different periods, spoke different languages, and were under the command of separate leaders; yet they appear to have established, in almost every state, where their polity prevailed, nearly the same system of laws. This system is known by the *appellation of the feudal law.*

II. Sir Henry Spelman, after Cujus, defines a fief to be, "A right which "the vassal hath in land, or some immovable thing of his lord's, to use "the same, and take the profits thereof, hereditarily, rendering unto his "lord such feudal duties and services, as belong to military tenure; the mere "propriety of the soil always remaining to the lord." This definition appears accurate and comprehensive: and an analysis of it may point out those PECULIAR AND CHARACTERISTIC MARKS, WHICH DISTINGUISH THE FEUDAL LAW FROM EVERY OTHER.

1st, *Where the soil, and the right to the profits of the soil, meet in the same person,* he may be said to have an absolute and unmixed estate in his lands. This absolute and unmixed estate, the subject of every kingdom, not governed by the feudal polity, so far as respects the relation between sovereign and subject, appears to possess. But, by the feudal law, with respect to the relation between the sovereign and the subject, the right to the soil and the right to

the profits of the soil, were separate; the tenant being invested with the latter, the sovereign continuing to be entitled to the former. This right to the profits was of the most extensive nature; it gave the tenant, except for the purpose of alienation, the complete power or dominion over the land, during the term of his tenure. Thus his estate and interest, as to the right of ownership, far exceeded that of the usufructuary in the civil law, to which it has sometimes been compared, as the usufructuary had a mere right to the ordinary profits of the usufruct, and was not permitted to make any change in it, even for its amelioration. It approached nearer to the estate of the *emphyteuta*, in the same law, as the *Dominium directum* was absolutely vested in him. It approached, perhaps, still nearer to the estate of a *cestui que trust* in the actual law of England, which has been termed a feudal idea, grafted on Roman jurisprudence. The precise nature of it, is no where, perhaps, better explained, than in lord Stair's Institutes. "It is," says his lordship, "essential to a fee, "and common to all kinds thereof, that there must remain a right in the "superior, which is called *Dominium directum*, and withal a right in the vassal, "called *Dominium utile:* the reason of this distinction, and terms thereof, is, "because it can hardly be determined, that the right of property is either in "the superior or vassal alone, so that the other should only have a servitude "upon it; though some have thought superiority but a servitude, to wit, "the perpetual use and fruit; yet the conciliation and satisfaction of both "have been well found out in this distinction, whereby neither's interest is "called a servitude; but by the resemblance of this distinction in law between "*jura et actiones directæ*, and those, which for resemblance, were reductive "thereto, and therefore called *utiles*, the superior's right is called *Dominium* "*directum*, and the vassal's *Dominium utile*, and without these the right "cannot consist." This right in the vassal to the use and profits of the land, while the direct dominion of the land remained in the lord, was, with respect to the relation between the sovereign and the subject, a new and original point of connection, and one of those marks which distinguish the feudal from every other law.

2. Another of these marks, is, that *immovable or real property only, was admitted to be held in feudality, or in other words, to be the substance of a fief.* Wherever the conquerors, we speak of, established themselves, they seized whatever they desired, of the property of the conquered, and the general allotted it to the superior officers of the army, and these again divided it, in smaller parcels, among the inferior officers. The moveable, as well as the immovable, property of the conquered, was seized and divided by the conquerors; but moveable property, from its fluctuating and perishable nature, was ill calculated to serve, either as the sign, or the subject, of a permanent connection. This was particularly the case in those days, when it had in no point of view acquired, or was considered susceptible of those artificial modifications, or other durable qualities, in the intendment of law, which it now possesses. Land, therefore, or immovable property, alone, became the subject of feudal tenure. As the notions of men respecting property increased, the modifications of it were also multiplied, and all of them were considered as susceptible of feudality. Thus every species of right or servitude, to which land is subject, was given in fee. At an early period of the feudal law, we find mention of fiefs *de camera* and *cavena*. The former was a pension granted by the lord to be paid out of his treasury; the latter was a quantity of corn, or other grain, granted by the lord, to be delivered out of his granary. In progress of time, money charged upon land was, in some countries, held to be feudal; and even mere money was, at last, in some countries, held by the feudal obligation, and treated as a fief. Whether money thus held, be, strictly speaking, a fief, has been the subject of much discussion. Thomasius, whose writings, in the course of this inquiry, have been found highly valuable, treats a pecuniary feud as a chimera and seems inclined to doubt its existence. Sir Thomas Craig

Craig thus expresses himself on this question. "The *dominium directum* of "a fief must necessarily remain in the lord; the *dominium utile* must neces- "sarily be granted to the feudatory. When the *dominium utile* of a "moveable is granted, the profits of it must necessarily belong to the usu- "fructuary. But the profits of a moveable proceed from the use which is "made of it. Now the use which is made of a moveable, either consumes "it or not. In the first case, the fief is necessarily extinguished; for it is "impossible that a moveable in continual use should not, by that very use of "it, be consumed, and the lord thereby deprived of it, without any fault on "his part, against his will, and even without his knowledge. But if the "moveable be not consumed by use, but may be preserved, the vassal has no "profit from it. I know many writers of great authority hold, that there "may be a fief of moveables, by way of analogy to an usufruct of those things "which are consumed by use, where the fruit and the profits belong to the "vassal, the propriety remains with the lord. But in this case, the propriety "(to use the expression,) is not of the individual thing, but of a thing of the "same genus or species. And therefore Cujas justly observes, that properly "speaking, these are not fiefs. For natural reason cannot be altered by civil "power. We are therefore of opinion, that there cannot be a fief, though "there may be a *quasi* fief of a moveable. But even a *quasi* fief is not allowed "by the law of Scotland. For though stipulations are frequent amongst us, "that, for the use of money, a certain yearly sum, or a certain quantity of "grain be allowed, yet this should not be honoured with the name of fief, as "he to whom the payment is to be made, can never be said to die seised of the "fee of that money." But at the first establishment of fiefs, land or immovable property, in the narrowest sense of that word, was the subject of a fief. That this species of property, to the utter exclusion of every species of moveables, should be a point of connection between the sovereign and the subject, is another distinctive mark of feudality. To this it is owing, that while in this country, and in every other country whose jurisprudence is of a feudal extraction, the difference between real and personal, or immovable and moveable property, is so strongly marked, and the legal qualities and incidents of the two species of property, are, in so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable.

3. The remaining point of difference between the feudal polity and the polity of other states is, the *nature of the relation between the chief and the vassals.* This is particularly distinguishable by six circumstances: 1stly, The relation between them was purely of a military nature; 2dly, Behind the sovereign and his immediate feudatories there followed a numerous train of arrere vassals, or sub-feudatories, between whom and the first or immediate feudatory there subsisted a relation nearly similar to that between him and the first or chief lord; 3dly, This relation was territorial, and was not considered to arise from the general allegiance due from a subject to a sovereign, but from an implied obligation supposed to be annexed to the tenure of the fee; 4thly, The right of administering justice was an appendage of this military relation, and originally commensurate to it in its territorial extent; 5thly, The lord was not allowed to alien the fee without his tenant's consent, nor the tenant, without the consent of his lord; and 6thly, Though in point of dignity, of rank, and of honour, the lord, according to the ideas of those times, enjoyed a splendid pre-eminence over his vassals, his power over them was, comparatively speaking, extremely small. Thus, therefore, the supposed preservation of the *dominium directum*, or real ownership, to the lord, after he had parted with the beneficial ownership, or *dominium utile*, to the tenant; the exclusion of moveable property, from serving either as the sign or the subject of the relation between the sovereign and the feudatory; and the military nature of this relation, including in it the other circumstances before noticed, should be considered as three principal points which distinguish the law of feuds from every

other law. To these the book of fiefs, and Cujas, and after them sir Henry Spelman, add the hereditary nature of fiefs; and it is observable, that Littleton in his explanation of the word *fee*, says it is the same as inheritance, without adverting to any other quality of a fief. But, as fiefs were not allowed to go in a course of descent, till after a considerable period of time, from their first introduction, and, as they might always be granted for a less estate, than an estate of inheritance, there seems to be no reason to suppose this descendible quality is essential to their nature. We have therefore omitted it.

Besides these, (which may be considered as the *essentials* of a fief,) there are qualities, which every fief should possess, to answer the notions originally entertained of this species of property. Thus, fiefs should be granted without price; to persons duly qualified; and the services should not be fixed to any particular mode or time of service. A fief possessing the essential and secondary qualities, we have noticed, was considered to be a *proper* fief. The absence of any of the qualities, reckoned essential, necessarily precluded the feudal tenure. But any, or all of the qualities reckoned merely proper, might be dispensed with, at the discretion of the parties, without precluding the tenure, according to the maxim, *Modus et conventio vincunt legem.* This introduced the distinction between proper and improper fiefs. But, wherever the feudal tenure was admitted, the fief was presumed to be a proper fief, till the contrary was shown, and it could only be shown by referring to the original investiture. Thence the maxim, in these cases, *Tenor investituræ est inspiciendus.*

III. With respect to the PRINCIPAL WRITTEN DOCUMENTS, WHICH ARE THE SOURCES, FROM WHICH THE LEARNING OF FOREIGN FEUDS IS DERIVED: These may be divided into *CODES OF LAWS, CAPITULARIES, AND COLLECTIONS OF CUSTOMS.* It was long after the first revival of letters in Europe, that the learned engaged in the study of the laws or antiquities of modern nations. When their curiosity was first directed to them, the barbarous style in which they are written, and the rough and inartificial state of manners they represent, were so shocking to their classical prejudices, that they appear to have turned from them with disgust and contempt. In time, however, they became sensible of their importance. They were led to the study of them, by those treatises on the feudal laws, which are generally printed at the end of the Justinianean collection. These are of Lombard extraction. This naturally gave rise to the opinion, that, fiefs appeared first in Italy, and were introduced there by the Lombards. From Italy, the study of jurisprudence was imported into Germany: this opinion accompanied it there. At first it appears to have universally prevailed. But, when a more extensive knowledge of the antiquities of the German nations was obtained, there appeared reason to call it in question. Many thought the claims of other nations, to the honour of having introduced the feudal polity, were better founded. Some ascribed them to the Franks; others, denying the exclusive claim of any nation in particular, ascribed them to the German tribes in general; and asserted, that the outline of the law of feuds is clearly discoverable in the habits, manners, and laws of those nations, whilst still inhabitants of the Hercynian wood. The *time* when feuds first made their appearance, has equally been a subject of controversy. The *word* itself is not to be found in any public document, of acknowledged authenticity, before the 11th century.

III. 1. The most ancient, and one of the most important *CODES OF LAW*, in use among the feudal nations, is the *Salic law*. It is thought to derive its appellation from the Salians, who inhabited the country from the Leser to the Carbonarian wood, in the confines of Brabant and Hainault. It was written, probably in the Latin language, about the beginning of the 5th century, by Wesogastus, Bodogastus, Salogastus, and Windogastus, the chiefs of the nation. It received considerable additions from Clovis, Childebert, Clotaire, Charlemagne, and Lewis the Debonnaire. There are two editions of it. These differ so considerably, that they have been treated as distinct codes. The

Franks

Franks who occupied the country upon the Rhine, the Meuse and the Scheldt, were known by the name of the Ripuarians, and were governed by a collection of laws, which, from them, was called the *Ripuarian law*. These laws seem to have been first promulgated by Theodoric, and to have been augmented by Dagobert. The punishments inflicted by the Ripuarian law are more severe than the punishments inflicted by the Salic; and the Ripuarian law mentions the trial by judgment of God, and by duel. Theodoric also appears to have first promulgated the law of the *Alemanni*. The law of the *Burgundians* is supposed to have been promulgated about the beginning of the 5th century; that nation occupied the country which extends itself from Alsace to the Mediterranean, between the Rhone and the Alps. This was the most flourishing of the Gallic provinces invaded by the Germans; they established themselves in it, with the consent of the emperor Honorius. An alliance subsisted, for a considerable time, between them and the Romans; and some parts of their law appear to be taken from the Roman law. One of the most ancient of the German codes is that, by which the *Angliones* and the *Werini* were governed. The territories of these nations were contiguous to those of the Saxons; and the Angliones are generally supposed to be the nation, known in our history by the name of the Angles. A considerable portion of the law of the *Saxons* has reached us. The *Goths* also had their laws, which were promulgated by the Ostrogoths, in Italy; by the Visigoths, in Spain. The Goths were dispossessed of their conquests in Italy by the Lombards. No ancient code of law is more famous than the *law of the Lombards*; none discovers more evident traces of the feudal polity. It survived the destruction of that empire by Charlemagne, and is said to be in force, even now, in some cities of Italy. These were the principal laws, which the foreign nations, from whom the modern governments of Europe date their origin, first established, in those countries, in which they formed their respective settlements. Some degree of analogy may be discovered between them, and the general customs, which, from the accounts of Cæsar and Tacitus, we learn to have prevailed among them, in their supposed aboriginal state. A considerable part also of them is evidently borrowed from the Roman law, by which, in this instance, we must understand the Theodosian code. This was the more natural, as, notwithstanding the publication of the Ripuarian and Salic codes, the Roman subjects in Gaul were indulged in the free use of the Theodosian laws, especially in the cases of marriage, inheritance, and other important transactions of private life. In their establishments of magistrates and civil tribunals, an imitation of the Roman polity is discoverable among the Franks; and, for a considerable time after their first conquests, frequent instances are to be found, in their history, of a deference, and in some instances, even of an acknowledgment of territorial submission to the emperors of Rome.

III. 2. In the course of time, all these laws were, in some measure at least, superseded by the *CAPITULARIES*. The word capitulary is generic, and denotes every kind of literary composition divided into chapters. Laws of this description appear to have been promulgated by Childebert, Clotaire, Carloman and Pepin. But no sovereign seems to have promulgated so many of them, as Charlemagne. That monarch appears to have wished to effect, in a certain degree, an uniformity of law throughout his extensive dominions. With this view, it is supposed, he added many laws, divided into short chapters or heads, to the existing codes, sometimes to explain, sometimes to amend, and sometimes to reconcile or remove the difference between them. They were generally promulgated in public assemblies, composed of the sovereign and the chief men of the nation, as well ecclesiastics as secular. They regulated, equally, the spiritual and the temporal administration of the kingdom. The execution of them was intrusted to the bishops, the counts, and the *missi regii*. Many copies of them were made, one of which was generally preserved in the royal archives. The authority of the capitularies was very extensive; it prevailed in every kingdom, under the dominion of the Franks, and was submitted

to, in many parts of Italy and Germany. The earliest collection of the capitularies, is that of Angesise abbot of Fontenelles. It was adopted by Lewis the Debonnaire and Charles the Bald, and was publicly approved of in many councils of France and Germany. But, as Angesise had omitted many capitularies in his collection, Benedict the Levite, that is, the deacon of the church of Mentz, added three books to them. Each of these collections was considered to be authentic, and, of course, appealed to, as law. There have been subsequent additions made to them. The best edition is that of Baluze in 1677. A splendid republication of this edition was begun by Monsieur de Chiniac in 1780: he intended to comprise it in four volumes. Two only have yet made their appearance. In the collections of ancient laws, the capitularies are generally followed by the *Formularia*, or forms of forensic proceedings and legal instruments. Of these, the formulare of Marculphus is the most curious. The formularia generally close the collections of ancient laws. With the Merovingian race, the Salic, Burgundian, and Visigothic laws expired. The capitularies remained in force, in Italy, longer than in Germany; and in France, longer than in Italy. The incursions of the Normans, the intestine confusion and weakness of government under the successors of Charlemagne, and, above all, the publication of the decretum of Gratian, which totally superseded them in all religious concerns, put an end to their authority in France.

III. 3. They were, in some measure, succeeded by the *CUSTOMARY LAW*. It is not to be supposed, that the codes of law, of which we have been speaking, entirely abrogated the usages or customs of the countries in which they were promulgated. Those laws only were abrogated by them, which were contrary to the regulations they established. In other respects, the codes not only permitted, but, in some instances, expressly directed, that the ancient usages should remain in force. Thus, in all the countries governed by the ancient codes, there existed, at the same time, a written body of law, sanctioned by public authority, and usages or customs, admitted to be of public authority, by which those cases were governed, for which the written body of law contained no provision. After the ancient codes and capitularies fell into desuetude, these customs multiplied. By degrees, written collections were made of them. Some of these were made by public authority; others were the collections of individuals, and depended therefore, for their weight, on the private authority of the individuals by whom they were made, and the authority, which they insensibly obtained, in the courts of justice. Collections of this nature, committed to writing by public authority, form a considerable part of the law of France, and are a striking feature of the jurisprudence of that kingdom. The origin of them may be traced to the beginning of the Capetian race. The monarchs of that line, in the charters, by which they granted fiefs, prescribed the terms upon which they were to be held. These they often abridged, enlarged and explained, by subsequent charters. They also published charters of a more extensive nature. Some of these contained regulations for the possessions of their own domain; others contained general regulations for the kingdom at large. In imitation of these, the great vassals of the crown granted their charters, for the regulation of the possessions held of them. In the same manner, when allodial land was changed to feudal, charters were granted for the regulation of the fiefs; and, when villeins were enfranchised, possessions were generally given them, and charters were granted to regulate these possessions. Thus each seigniory had its particular usages. Such was their diversity, that, throughout the whole kingdom, there could hardly be found two seigniories, which were governed, in every point, by the same law. With a view more to ascertain, than to produce an uniformity in, these usages, though the latter of these objects was not quite neglected, Charles the Seventh and his successors caused to be reduced to writing, the different local customs, which prevailed throughout the kingdom. In 1453, some time after Charles the Seventh had expelled the English from France, he published an ordonnance, by which he directed, that all the customs and

usages

usages should be committed to writing, and verified by the practitioners of each place, then examined and sanctioned by the great council and parliament: and that the customs, thus sanctioned, and those only, should have the force of laws. Such were the obstacles in the way of this measure, that forty-two years elapsed before the customs of any one place were verified. From that time, the measure lingered, till the reign of Lewis the Twelfth; it was then resumed. About the year 1609, it was completed. The customs of Paris, Orleans, Normandy, and some other places, were afterwards reformed. Those of Artois and Saint Omer were reformed within the last hundred years. The manner of proceeding, both in reducing the customs, and reforming them, was, generally speaking, as follows. The king, by his letters patent, ordered an assembly of the three states of each province. When this assembly met, it directed the royal judges, greffiers, maires and syndics, to prepare memoirs of all the customs, usages, and forms of practice, they had seen in use, from of old. On receiving these memoirs, the states chose a certain number of notables, and referred the memoirs to them, with directions to put them in order, and to frame a cahier, or short minute of their contents. This was read at the assembly of the states, and it was there considered, whether the customs were such, as they were stated to be, in the cahier. At each article, any deputy of the state was at liberty to mention such observations as occurred to him. The articles were then adopted, rejected, or modified, at the pleasure of the assembly. They were then taken to parliament and registered. The customs of each place, thus reduced to writing and sanctioned, were called the *coutumier* of that place. These coutumiers were formed into one collection, called the *Coutumier de France*, or the *Grand Coutumier*. The best edition of this is by Richebourgh, in four volumes in folio. It contains near one hundred collections of the customs of provinces, and two hundred collections of the customs of cities, towns or villages. Each coutumier has been the subject of a commentary. Five-and-twenty commentaries have appeared, (some of them voluminous,) on the coutumier of Paris, alone. Of these commentaries, that of Dumoulin has the greatest celebrity. *Les Etablissements de St. Louis*, hold a high rank for the wisdom, with which they are written, and the curious matter they contain. The *Coutumier de Normandie*, for its high antiquity, and the relation it bears to the feudal jurisprudence of England, is particularly interesting to an English reader. Basnage's edition, and his learned commentary upon it, are well known. But the most curious of all collections of feudal law, is that intitled, *Assizes de Jerusalem*.—In 1099, Jerusalem was taken by the Crusaders, under the command of Godfrey of Bouillon. He established, for the administration of justice in that city and the adjacent territory, two tribunals; one, the Haute Cour, for the nobility; the other, the Cour de la Bourgeoisee, for the commonalty. The sovereign presided over the former, the viscount over the latter: each had its code of law; the former was compiled, with the council of the patriarch, the barons, and the sages; the latter, with the council of the freemen and burghers. As these collections were made by persons governed by the feudal polity, as it prevailed in the principal states of Europe, they may be supposed to have contained some of its most important principles and regulations; but, as the principal Crusaders came from France, the collections may be supposed to contain more of the laws and usages of that country than of any other. The collection was called the *Assizes de Jerusalem*; they were composed in the French language; and the autograph, written in uncial letters, with gilt initials, was signed by the sovereign and the patriarch, and deposited in the church of the Holy Sepulchre. It became the prey of Saladin, when he retook Jerusalem. Partly from tradition, and partly from its scattered fragments, a new edition of it was made, towards the middle of the 13th century, by Jean de Ibelen, count of Joppē and Ascalon, and lord of Rama. A third edition of it was made in 1369 by the direction of Peter of Lusignan, king of Cyprus, and deposited in the church of Nicosia, in a chest, with four seals. All the Christian possessions of the crusaders were governed

governed by it; and, when Baldwyn conquered Constantinople, he promulgated it, in that city, for the government of his European subjects. When Cyprus fell under the dominion of the Venetians, the copy, deposited at Nicosia, fell into their hands. It was found difficult to understand the language of the text: the Venetian government, in 1535, caused it to be translated into the Italian language, and the translation to be magnificently printed; the manuscript was deposited in the church of St. Mark. La Thaumassiere published a French translation of it in 1670; but, having been made from an imperfect copy, Lewis the 16th obtained a magnificent transcript of the original from the senate of Venice. M. Bernardi, *(De l'origine et des progrés de la legislation Française, Paris* 1816, *octavo,)* from whom this account of the Assizes de Jerusalem is taken, speaks of it as a work of great merit, and thinks it superior to the *Codes Napoleon:* these are five in number, the *Code Civil*, the *Code Criminelle*, the *Code de Commerce*, the *Code de Conscription*, and the *Code de Procedure.* It is allowed that the first possesses great merit, that the third is very faulty, and that, whatever is good in any of them is rendered almost entirely useless by the last, which has completely confounded and paralysed all the judicature of the country.

Such are the principal sources of the feudal jurisprudence of the kingdom of France. It remains to take notice of some of the chief compilations by which the feudal polity of other kingdoms is regulated. The authority, or at least the influence, which the capitularies, had on these, has been already noticed. After these, the attention is naturally directed to that collection, which, probably in the reign of Frederick the second, Hugolinus, a Bononian lawyer, compiled from the writings of Obertus of Otto and Gerhardus Niger, and from the various customary laws, then prevailing in Italy, and added under the title, Decima Collatio, to the Novels. It is to be found in most editions of the *Corpus Juris Civilis.* In the edition of Cujas it is divided into five books; the first contains the treatises of Gerhardus Niger; the second and third those of Obertus of Otto; the fourth is a selection from various authors; the fifth is a collection of constitutions of different emperors respecting feuds. To these is added the golden Bull of the emperor Charles the fourth. Authors are by no means agreed, either in the order, or division, of this collection. Several editions have been published of it. In that published by Joannes Calvinus or Calvus at Franckfort, in 1611, there is a collection of every passage, in the canon law, that seems to relate to the law of feuds. As this edition is scarce, and it may happen that some English reader may be desirous of seeing all these passages, the following short account of Calvinus or Calvus's selection of them, is transcribed from Hoffman's *Dissertatio de Unico Juris feudalis Longobardici Libro.—Jurisprudentiam feudalem, sex libris comprehensam, sive potius consuetudines feudorum, secundum distributionem Cujacianam, edidit, et sub titulo libri feodorum VI. addidit, quidquid alicujus de hac materia momenti, in universo corpore juris canonici expressum invenerat; hoc est totum titulum decretalium Gregorii IX. sive capitula, Insinuatione* 1. *Et ex parte tua,* 2. *X. de feudis, porro cap. cæterum,* 5 *et novit,* 13 *de Judiciis, cap. Quæ in Ecclesiarium,* 7 *de Constitutionibus, cap. Ad aures,* 10 *In quibusdam,* 12 *et Gravem,* 13 *De Pœnis, cap. Gravem,* 53 *de Sent. excomm. cap. Ex transmissa,* 6 *et verum,* 7 *de foro competente eorumque summaria.* The next treatise to be mentioned is, the Treatise de Beneficiis, generally cited under the appellation of, *Auctor vetus de Beneficiis.* It was first published by Thomasius, at Halle, 1708, with a dissertation on its author, and the time when it was written. He considers it to be certain, that it was written after the year 800, and before the year 1250, and conjectures, that it was not written before the emperor Otho, and that it was written before the emperor Conrad the second. To these must be added the *Jus Feudale Saxonicum*; which seems to be part of, or an appendix to, a treatise of great celebrity in Germany, intitled the *Speculum Saxonicum.* The *Jus Feudale Saxonicum,* is said by Struvius, to have been translated, by Goldastus, from the German, into the Latin language, for the benefit of the Poles.

Poles. It is supposed to have been published, between the year 1215 and the year 1250. The *Speculum Suevicum* seems to have been composed, in imitation of the Speculum Saxonicum, probably, between the year 1250 and the year 1400. To this is added the *Jus Feudale Allemanicum*, composed about the same time, and probably by the same author. But none of these collections acquired the same authority, as the books of the fiefs. They were known by the name of the Lombard law. By degrees they were admitted, as authority, by most of the courts, and taught in most of the academies of Italy and Germany. Like the civil and canon law, they became the subject of innumerable glosses. Those of Columbinus were so much esteemed, that, no one, it is said, ventured to publish any after him. About the end of the 13th century, James of Ardezene published a new edition of the Gloss of Columbinus, and added, under the title of *Capitula Extraordinaria*, a collection of adjudged cases, on feudal matters. This was inserted in some of the latter editions of the Corpus Juris. About the year 1430, Minuccius de Prato veteri, a Bononian lawyer, by the orders of the emperor Sigismond, gave a new edition of the Books of the Fiefs, with the Gloss of Columbinus. These were confirmed by the emperor Sigismond, and afterwards by the emperor Frederick the 3d, and publicly taught in the university of Bononia. Such are the principal sources of the feudal jurisprudence of foreign countries.

IV. The early history of the feuds of foreign countries is involved in a considerable degree of obscurity. That in the time of Pepin the feudal polity arrived at a degree of maturity and consistence, is certain. It must, therefore, have previously had its rise and progress. Some vestiges of these are discoverable in the scanty materials which have reached us, of the history and antiquities of those early times. We find mention in them of the feuds,—of lands intrusted (commendati) by the king to his followers;—of estates, which, on account of the infidelity, or the cowardice of the proprietary, or his placing himself under another lord, the king takes from him, and restores to the fisc. There is also mention of the pares comitum, and the fideles, and of reinvesting the feudes, who had been unjustly deprived of their possessions. At first kings alone granted fiefs. They granted them to laymen only, not to ecclesiastics; and to such only who were free, and probably to the most important only of their followers. They were not granted for any certain or determinate period of time; they were not transmissible to the descendants of the grantee; they were resumable on the bad conduct of the vassal, without the sovereign's being obliged to show the cause of the resumption, or having recourse to any judicial process. The vassal had no power to alienate them. Every freeman was subject to the obligation of military duty; this was the case, in a more particular manner, of the feudal tenants; they were to attend the sovereign on horseback, and in complete armour, that is, with the breastplate, the shield, the spear, the helmet, and the sword. They were to guard his life, member, mind, and right honour. They were first called *homines, fideles, feudes, antrustiones*; to all these the appellation of *vassals* succeeded. It appears, that, in early times, the feudal tenants were numerous. A considerable part however of the subjects were free from the feudal tenure. The lands held by these, were called allodial. The proprietors of them, were under the general obligation of military service, and were subject to general taxation. Their particular nature was chiefly discernible in this, that they differed from the villeins, as they were freemen; and from the feudal tenants, as their possessions were from the first hereditary. For, originally, the crown itself was not, in the sense in which we now use the word, hereditary. A marked preference was always shown, both by the sovereign and the nation, to the royal lineage. But by each, the strict line of hereditary descent, was occasionally interrupted, by calling to the throne a remote relation, to the prejudice of the actual heir. The government was monarchical; but strongly controlled by the people. Twice a year, the people, or as they were afterwards called, the

the states, assembled. The first of these general assemblies, was held originally in the month of March, afterwards in the month of May; and always in open air. Hence from the time of meeting, the expression *le champ de Mars*, afterwards *le champ de Mai*. The second assembly was held in the autumn. It was divided into two classes. The first comprised the bishops, the abbots, the dukes, the counts, and the elders of the nation; and all of them had deliberative voices in the assembly. The second contained the magistrates, and the inferior officers; but these attended only to receive the orders of the assembly. The king proposed the subjects of debate, by his referendary; the members of the first class deliberated upon them; the king pronounced the decision. The acts were reduced to writing, under the name of capitularies, and the execution of them was intrusted to the members of the second class. The governors of provinces were called dukes; the counts were subordinate to them, and administered justice, in the districts committed to their care. The missi regii, were commissaries appointed by the king to attend to the general administration of justice throughout the nation. Next to the counts were the barons, or the chief land-owners; then followed the general body of freemen; after these came the artisans, the labourers, and the villeins. The general administration of affairs was intrusted to the almoner, who was at the head of the clergy. The referendary and chancellor were the chief counsellors of state: then followed the chamberlain, the count of the palace, the high steward, the butler, the constable, the marshal, the four first huntsmen, and the grand falconer.

Such appears to be the general outline of the feudal government, during the Carlovingian line. That line was extinguished, in France, by the accession of the Capetian line; in Germany, by the accession of the House of Saxony; and in Italy, by the usurpation of the dukes. Soon after, or perhaps some time before this event, fiefs became hereditary. Even the offices of duke, count and margrave, and the other high offices of the crown, were transmitted in the course of hereditary descent: and not long after, the right of primogeniture was universally established. It first took place in the descent of the crown, but was soon admitted by every branch of the feud. This stability of possession was an immense addition to the power of the crown vassals. It enabled them to establish an independency of the crown. They usurped the sovereign property of the land, with civil and military authority over the inhabitants. The possessions, thus usurped, they granted out to their immediate tenants, and these granted them over to others, in like manner. By this means, though they always professed to hold their fiefs from the crown, they were in fact absolutely independent of it. They assumed, in their territories, every royal prerogative; they promulgated laws; they exercised the power of life and death; they coined money; fixed the standard of weights and measures; granted safeguards; entertained a military force; and imposed taxes, with every other right supposed to be annexed to royalty. In their titles, they styled themselves, Dukes, &c. "by the grace of God," a prerogative avowedly confined to sovereign power. It was even admitted that, if the king refused to do the lord justice, the lord might make war against him. In the ordonnances of St. Lewis, ch. 50, is this remarkable passage: "If the lord says to his liege "tenant, Come with me, I am going to make war against my sovereign, who "has refused me the justice of his court; upon this, the liegeman should "answer in this manner to the lord; I would willingly go to the king to know "the truth of what you say, that he has denied you his court. And then he "shall go to the king, saying to him in this manner; Sir, the lord in whose "liegeance and fealty I am, has told me you have refused the justice of your "court; and upon this I am come expressly to your majesty, to know if it is "so; for my lord has summoned me to go to war with you. And thereupon, "if the king answers, that he will do no judgment in his court, the man shall "return immediately to his lord, and his lord shall equip him, and fit him out at "his own expense; and if he will not go with him, he shall lose his fief by

"right.

" right. But if the king answers, that he will hear him, and do justice to " the lord, the man shall return to him, and shall say: Sir, the king has said " to me, that he will willingly do you justice in his court. Upon which, if the " lord says, I never will enter into the king's court, come therefore with me, " according to the summons I have sent you; then the man shall say, I will " not go with you; and he shall not lose his fief for his not going." This shows how powerful and absolute the great vassals were. The same motive which induced the vassals of the crown to attempt to make themselves independent of the crown, induced their tenants to make themselves independent of them. This introduced an ulterior state of vassalage. The king was called the *Sovereign Lord*; his immediate vassal was called the *Suzereign*; and the tenants holding of him were called the *arrere* vassals. Between these and the sovereign, the connection was very small. In those reigns, even, when the power of the monarch was greatest, his authority over the arrere vassals was faint, and indirect. Of this the history of Joinville presents a striking instance: Previously to the departure of St. Lewis on the crusade, he summoned an assembly of his barons to attend him, and required them to swear, that, on the event of his decease during the expedition, they would be loyal and true to his son. Joinville his historian, a feudatory of the count of Champaigne, though he possessed a most enthusiastic veneration for the king, and the warmest attachment to his person, refused, on account of his vassalage to the count, to take the oath; his words are " *Il le me demanda, mais je ne vox faire point de serement, car je n'estoie pas son home.*" The consequence was, that in every kingdom there were as many sovereigns, with the power and ensigns of royalty, as there were powerful vassals. With respect to *France*, Hugh Capet acquired the crown of that kingdom, by availing himself of the extreme weakness, to which it was reduced by the system of subinfeudation. After he acquired the throne, he used his utmost efforts to restore it to its ancient splendor and strength. His successors pursued his views with undeviating attention and policy; and with so much success, that, previously to the accession of Lewis the 13th, the seventy-two great fiefs of France were united to the crown, and all their feudal lords attended, at the states general in 1614, the last that were held, till the late memorable assembly of them in 1789. This system of re-union was completed by the accession of the provinces of Lorraine and Bar to the crown of France, in 1735. See *Abrégé Chronologique de grands Fiefs de la Couronne de France.* Paris, 1729. Like France, *Spain* was broken into as many principalities as it contained barons. In the course of time, they were all absorbed in the more powerful kingdoms of Arragon and Castile; and, by the marriage of Ferdinand, the sovereign of Arragon, with Isabella, the sovereign of Castile, they were all united to descend in the same line. No such re-union took place in the empire. Under the immediate successors of Charlemagne, it was broken into innumerable principalities, never to be re-united. If we allow for the difference of public and private manners, it presents the same spectacle at this day, as the other states of Europe presented formerly, but, which is now peculiar to itself—a complex association of principalities more or less powerful, and more or less connected, with a nominal sovereignty in the emperor, as its supreme feudal chief. In England no such dismemberment as that we have been speaking of, took place; nor did the nobles ever acquire, in England, that sovereign or even independent power, which they acquired in Spain, Germany, or France. The power and influence of some of the English nobles were certainly great, and sometimes overshadowed royalty itself. But it is evident, that Nevil the great earl of Warwick, and the nobles of the house of Percy, the greatest subjects ever known in the country, were, in strength, dignity, power and influence, and in every other point of view, greatly inferior to the dukes of Brittany or Burgundy, or the counts of Flanders. The nature of this note neither requires nor allows a further deduction of the public history of the feuds of Europe: the four circumstances we have mentioned,—the heirship of fiefs, the right of primogeniture,

primogeniture, the intermediate sovereignty of the crown vassals, and the introduction of subinfeudation, completed the triumph of the feud over monarchy. Here the historical deduction naturally closes. The Carlovingian family is the important link, which connects ancient with modern history, Roman jurisprudence with the codes of the German tribes, and the law of civil obligation with the law of tenure.

V. Before we quit the subject of foreign feuds, it may not be unacceptable to the reader, that we should state, in a few words, the nature, first, OF THE STATES GENERAL; secondly, OF THE PARLIAMENTS; thirdly, OF THE NOBILITY OF THE NATIONS ON THE CONTINENT, where the feudal polity has been introduced; and, fourthly, some observations on THE DIFFERENCE BETWEEN THE PARLIAMENT AND NOBILITY OF ENGLAND, AND THE PARLIAMENT AND NOBILITY OF THE COUNTRIES ON THE CONTINENT.

V. 1. It appears, from what has been already mentioned in this annotation, that the National Assembly on the *Champ de Mars*, and the *Champ de Mai*, consisted of a body of individual chieftains, convened by their prince. After the chieftains had made their governments independent and hereditary, the National Assembly was a convention of hereditary chiefs of particular states, bringing to it their own vassals. To this assembly, the Commons, who had no place in the national assembly, as it was originally constituted, obtained, by degrees, a right of admittance. Then, the national assembly became constituted, not of the three orders of the state,—for it is anticipating events, to give them this appellation,—but of *the three states*, of which the nation was composed. The first, were those, governed by the great ecclesiastical vassals; the second, were those, governed by the great lay vassals; the third, were civil communities, governed by municipal officers. The two former attended in person, bringing, as we have said, their own vassals with them; the last, attended by deputies. Afterwards, the great ecclesiastical and great lay vassals sinking in power, the general body of the clergy arose into consequence, and became the order of the clergy. On the similar depression of the great lay vassals, the general body of the nobles rose into consequence, and became the order of the nobility; the commonalty retained their place, but increased in consequence. Thus constituted, the three bodies became the three orders of the state, and in the course of time, the first and second as well as the third order, appeared by deputies.

V. 2. But, in the mean time, a new power rose in the kingdom. In most countries on the Continent, and particularly in France and Germany, the sovereign had a large patrimonial territory, which had its plaids or *parliament*, for trying the causes of its occupants. This territory descended to his successors; and, as the great fiefs were re-united to the crown, the plaids or parliament of the original patrimonial territory of the sovereign became the plaids or parliament of the land-owners of these estates. At first, particularly while judicial combats lasted, the parliaments administered justice, by a species of military law; insensibly, the parliament became a court of civil justice and civil forms, and the king's supreme council. By degrees, it superseded the national convention of the states, so far, that the national convention was less frequently called, and at length fell into such desuetude, that the assembly of the states, in 1614, was the last that was held, before the memorable assembly of the states in 1789.

V. 3. With respect to *foreign nobility*,—in France, soon after the accession of the Capetian line; in Germany, soon after the house of Hapsburgh became imperial, the distinction was introduced, of lineage royal, lineage noble, and lineage purely free. The first was composed of princes, or those, who claimed a royal descent, through royal descents: the second was composed of dukes, counts, marquises, and barons, or those, who claimed a noble descent, through noble descents:—after these, came the knights and their esquires; with the esquire, the class of nobility ended; and then came the mere freeman. This distinction

distinction has been preserved in Germany. In France, all the great fiefs were re-united to the crown, and the inferior nobility lost much of their territorial power and influence; so that, towards the end of the reign of Lewis the 13th, they were little more than a privileged and favoured order, but wholly dependent on the king, and subject to the law.—But, it must be remarked, that dukes, marquises, counts, viscounts and barons, *as such*, were not noble. Those only were noble, who could prove their nobility, from the time when fiefs became hereditary, these were said to be *noble of name and arms*; or those, who could prove a century of nobility in their family; these were said to be *noble of race and extraction*. To these must be added the *ennobled* in consequence of grant or office.

V. 4. *The difference between the English nobility and English parliament, and the nobility and parliaments of the nations on the Continent*, is very remarkable. The three states and three orders of the state on the Continent have been mentioned. In almost every country on the Continent, the third state, or third order of the state, was originally distinguished from the nobility, and consisted of the commonalty only. In England, all the barons or lords of those manors, which were held immediately of the king, were entitled to a seat in the national council. In the course of time, they became numerous, and the estates of many of them became very small. This introduced a difference in their personal importance. In consequence of it, the great barons were personally summoned to parliament by the king; the small barons were summoned to it, in the aggregate, by the sheriff. They assembled in distinct chambers. The king met the great barons in person; but except, when he summoned their personal attendance, left the latter to their own deliberations. These, and some concurrent circumstances, elevated the great to a distinct order from the smaller barons, and confounded the latter with the general body of the freeholders.

In the mean time, a considerable revolution took place in the right to the English peerage. From being territorial, it became personal;—in other words, instead of conferring on a favoured subject a territory, which, being held of the king, made him a baron, and, of course, a peer of parliament, it often happened that the king conferred on him the peerage, with reference to a territory, but without conferring on him any interest in the territory. The same revolution took place, in respect to the high offices of dukes, marquises, earls, and viscounts. These were originally territorial offices, which were exercisable within certain districts, and entitled the possessors of them to a seat in the national council. By degrees, these also became mere personal honours, the king frequently granting them to a person and his heirs, with a nominal reference to a district; but, without the slightest authority within it: and, when they were granted in this manner, if the party had not a baronial dignity, the king conferred it on him, and thus entitled him to a seat in the higher house.—Where the dignity was hereditary, if he had more than one male descendant, his eldest son only took his seat in the house; and the brothers and sisters of that son were commoners. Thus, a separate rank of nobility, unknown to foreigners, was introduced in England; and thus, in opposition to a fundamental principle of the French law, that every gentleman in France is a nobleman,—it became a principle of the English law, that no English gentleman is a nobleman, unless he is a peer of the upper house of parliament.

In the manner which we have mentioned, the parliament of England became divided into two houses, the Lords and Commons, and, together with the king, constituted the legislature of the nation; but its judicial power generally fell into disuse, except in causes which are brought before the House of Lords by appeal. The reverse of this happened, in every other country on the Continent,—there, the parliament subsided into a high court of justice for the last resort, and a court of royal revenue.—The nature of Roman, German, French, and English nobility, is more fully explained in the writer's *Succinct account of the Geographical and Political Revolutions of Germany, or the Principal States, which composed the Empire of Charlemagne, from his Coronation in 800, to its dissolution*

dissolution in 1806; *with some account of the Genealogies of the Imperial House of Hapsburgh, and of the Six Secular Electors of Germany; and of Roman, German, French, and English Nobility.*

VI. It remains to say something of the REVOLUTIONS OF THE FEUD IN THE JURISPRUDENCE OF OUR OWN NATION.

VI. 1. *AS TO THE TIME WHEN IT WAS INTRODUCED.* Whether feuds prevailed in England, before the Norman conquest, has been the subject of much dispute. In 1607, an event happened, which occasioned the question to be discussed, with a profusion of learning. Several estates within the counties of Roscommon, Sligo, Mayo, and Galway, being unsettled as to their titles, king James the 1st, by commission, under the great seal, authorized certain commissioners, of whom Sir Henry Spelman was one, to make grants of these estates. In exercise of this authority, the commissioners made a grant of lands in Mayo to lord Dillon. King Charles the 1st issued a commission, to inquire into defective titles: and orders were given, that all persons, who had any of the estates in question by letters patent from the crown, should produce the letters, or an enrolment of them, before the lord deputy and council. In pursuance of these orders, the letters patent to lord Dillon were produced. It was found, that the lands were granted to them "to the lord Dillon and his "heirs, to hold by knight service, as of his majesty's castle of Dublin." It was admitted, that the commissioners had exceeded their commission, in reserving a *mean* tenure, to the prejudice of the crown, when they ought to have reserved, either an express tenure, by knight service, in capite, or not to have mentioned any tenure; in which case, the law would have implied a tenure in capite. The question, therefore, was, whether the deficiency of the tenure so far affected the grant, as wholly to destroy the legal effect of it; or, whether the letters patent might not be good, as to the land, and void only as to the tenure. The case was argued, several days, by counsel, on both sides, and was afterwards referred to the judges. They were required by the lord deputy and council, to consider of it, and to return their resolution. The judges disagreeing in opinion, it was thought necessary, for public satisfaction, to have it argued solemnly by them all. This was done, accordingly. Those who contended for the validity of the letters patent, urged, among other arguments, that tenures in capite were brought into England by the conquest, but, that grants were by the common law; and, being more ancient than tenures, must, of necessity, be distinct from the thing granted. From this, they inferred, that, though the reservation were void, the grant itself might be good. In the course of their arguments, on this point, they observed, that Sir Henry Spelman was mistaken, when, in his Glossary, under the word *Feudum*, he referred the original of feuds to the Norman conquest. This drew from him a reply. He published it under the title, "Of the Original Tenure by Knight Service in England." In this work, he argues, with great learning and strength of argument, that tenures, such as they were granted, in the letters patent, by himself and the other commissioners, in Ireland, were not in use before the conquest. He distinguishes between what he calls the *servitia militaria* and the *servitutes militares*. He contends, that the grievances and servitudes of fiefs, as wardships, marriages, &c. which to that day, he says, were never known to other nations, governed by the feudal law, were introduced by the conqueror. But he seems to concede, that, in a general sense, military service and feuds, were known to the Saxons. In this middle opinion, he appears to be followed by two very great authorities, lord Hale and sir William Blackstone. Almost all writers, however, are agreed, that, in the reign of the conqueror, the feudal law was completely established. Upon the whole, the most probable conjecture appears to be, that evident traces of something similar to the feud, may be traced in the Saxon polity; that it was established, with its concomitant appendage of fruits and services, by the Norman barons, in the possessions, which were parcelled out among them, by the conqueror; and that, about the middle of his reign, it was

formally,

formally and universally established by law. This universality of tenure, is, perhaps, peculiar to England. In other kingdoms, those parts of the lands, which were permitted to remain in the hands of the natives, and a considerable part of those, which the conquerors parcelled out among themselves, were not originally subject to tenure. In the earliest age, however, of the feudal law, some advantages attended tenure, and frequently occasioned the conversion of allodial into feudal property. But in the anarchy, which followed the removal of the Carlovingian dynasty, there was an end of all political government: so that almost all persons found it advantageous to enter into the feud. To effect this, they delivered up their lands sometimes to the sovereign, sometimes to some powerful lord, and sometimes to the church, on condition to receive it back in feudality. Lands thus delivered and returned, received the appellation of *feuda data et oblata*. Some portion of lands, however, still remained free. Of this the proportion differs in the countries on the continent. In some, the courts presume it to be feudal, till it is proved to be allodial. In others, the presumption is in favour of its allodiality. See before 63. a. note 1. But with us, in the eye of the law, tenure is universal; that is, the *dominium directum* of all the lands in the kingdom is in the crown; the *dominium utile* of them is in the tenant.

VI. 2. *AS TO THE FRUITS AND INCIDENTS OF THE FEUDAL TENURE.* These, in the original simplicity of the feud, were reducible to two: on the part of the lord, to the obligation of warranty, that is, to defend the title of his tenant against all others, and, when subinfeudation was introduced, to the further obligation of acquittal, that is, to keep the tenant free from molestation, in respect of the services due to the lords paramount: on the part of the tenant, to an obligation, of giving his lord his aid, that is, his military assistance, and services in defence of the feud. But this primitive simplicity of reciprocal obligation, was soon destroyed. Different sorts of tenures were established, and the fruits and incidents of them were multiplied. A detail of these does not seem to be required in this place; especially as a full and masterly account of them has been already given by Mr. justice Blackstone.

VI. 3. The branches of feudal jurisprudence, which principally concern the tenures of Littleton and sir Edward Coke's commentary, and which, therefore, may be thought such as at once call for and limit the present investigation, are those which relate to the inheritance and alienation of the feud.—With respect to the *INHERITANCE OF THE FEUD*, it may be observed, that, at the same time, that succession itself prevails in every civilized country, the principle, by which it is governed, and the order in which it proceeds, are, every where, different. The principle and order of the feudal succession, are peculiar to that system of polity. Nothing, perhaps, will show these in so strong a light, as bringing them into contrast with the doctrines of inheritance in the civil law. It has been already observed, that, in the Roman law, the distinction between real and personal property, except in the term of prescription, is seldom discoverable; but that in the feudal law, the legal incidents and qualities of the two kinds of property are entirely dissimilar. This is no where more striking, than in the article of inheritance. The Roman law of inheritance embraces both kinds of property, equally; the feudal law of inheritance, is, most strictly, confined to real property, and, (it was almost said,) turns with disdain, from all property of the personal kind. By the Roman law, the heir was a person instituted by the party himself, or, in default of such institution, appointed by the law, to succeed both to his real and personal property, and to all his rights and obligations. In the feudal law, he is a person related in blood to the ancestor; and, in consequence of that relationship, entitled, either, merely by act of law, or, by the concurrent effect of law and the charter of investiture, to succeed, at the ancestor's decease, to his real or immovable property, not given away from him by will. In the civil law, he was considered, as representing the person of the deceased; in consequence of that supposed representation, the law cast on him the property and rights of the deceased. and fixed on him all the deceased's

succession, than is to be found in the law of almost any other country, governed by the feudal polity. To us also, it seems to be peculiar, to exclude the parent and all others in the ascending line, from the immediate succession to the fief. But, the most striking point of difference between the Roman, and the feudal, course of succession, is, the prerogative allowed by the latter to primogeniture. To the eldest son, the Roman law showed no preference; wherever the feudal polity has been established, he has been allowed several important prerogatives. In England primogeniture obtained in military fiefs, as early as the reign of William the Conqueror, but, with this qualification, that, where the father had several fiefs, the *primum patris feudum*, only, belonged to the eldest son. In the reign of Henry the 2d, primogeniture prevailed absolutely in military fiefs, and in the reign of Henry the 3d, or soon afterwards, the same absolute right to the succession by primogeniture, obtained in socage lands. Thus, in all countries, where the feud has been established, a marked distinction in the order of succession, has, in direct opposition to every principle and practice of the Roman law, been shown to primogeniture. *Usu*, says Zoesius, *ad omnia feuda serpsit, ut vel ex asse majori cedant, vel major præcipuum aliquod in iis habeant.* But, it is observable, that a total exclusion of the younger sons is, perhaps, peculiar to England. In other countries, some portion of the fief, or some charge upon it, is in many cases, at least, secured by law, to the younger sons. In some places, this is secured to them for their lives only; in others, their descendants succeed to it. Still, the eldest son, in the eye of the law, represents the fee. In Spain, the patrimony is divided into fifteen shares. Three shares, that is, a fifth of the whole, are first subtracted; afterwards, four shares, or a third of the remaining twelve shares. This fifth and third, as they are called, are termed a *majoratus*, and are at the free disposition of the parents; the remaining shares are appropriated to the children. The majoratus, may be, and generally is, entailed upon the eldest son of the family, but a greater portion of the patrimony cannot be settled on him, without leave from the crown. The singular nature of this provision, has occasioned a particular mention of it by most feudal writers; it was therefore thought proper to notice it, in this place. Any further mention of the particular customs respecting primogeniture, appears unnecessary.

VI. 5. Another striking point of difference *between the Roman* and the *feudal polity*, with respect to real property, is, the contrast between *THE ABSOLUTE DOMINION OVER THE INHERITANCE*, with which the Roman law invested the heir, and the numerous and intricate fetters, with which the feudal jurisprudence (of England particularly) has permitted it to be bound. The Roman law, (it has been already stated at some length,) permitted a person to appoint his heir, and invested him, on the testator's decease, with all his rights and obligations. Before Justinian introduced the benefit of the inventory, as the heir, by accepting the inheritance, subjected himself to all the testator's debts, the office was sometimes refused, as dangerous. This gave rise to the vulgar, the pupillar, and the quasi-pupillar substitution. The vulgar substitution was, where the testator appointed one to be his heir, and, if he refused, substituted another in his place. These conditional substitutions might be extended to any number of heirs. When they were made, the heirs instituted under them, were called, in succession, to accept or refuse, the inheritance. When once an heir accepted the inheritance, it vested in him absolutely, and all the subsequent substitutions then entirely failed. The pupillar substitution was, where a father substituted an heir to his children, under his power of disposing of his own estate and theirs, in case the child refused to accept the inheritance, or died before the age of puberty. The quasi-pupillar substitution was, where the children past puberty, being unable, from some infirmity of mind or body, to make a testament for themselves, the father, in imitation of the pupillar substitution, made a testament for them. In all these cases, it is evident the dominion over, and substance of, the inheritance were preserved entire and unqualified.

unqualified. In two instances, and in these only, the Roman law admitted an exception to their integrity. The first was, in the case of an usufruct; where a right was given to one person, to use and enjoy the profits of a thing belonging to another. The second was, the case of a *fidei commissum*, when the inheritance was disposed, in whole, or in part, to an heir, in trust, that he should dispose of it to another. But neither of these devises suspended the absolute vesting of the inheritance. An usufruct could not be extended beyond the life of the usufructuary. The *fidei commissarius*, (the person beneficially interested in the inheritance,) could compel from the *hæres fiduciarius*, (the trustee,) a transfer of the inheritance immediately on the accruer of his right. Thus the property and dominion of the inheritance absolutely vested in him in equity, with an immediate right to compel a legal transfer of it. In this manner, by the Roman law, the heir succeeded, in every case, to the absolute property of the inheritance, and to all the rights and obligations of the ancestor. It should, however, be observed, that this account of the simplicity of the Roman law, with respect to the tenure, if it may be so called, of property, applies to it only, in the state of simplicity, in which it was placed, by the Trebellian and Pegasian decrees. In a further part of this annotation, we shall have occasion to mention the alteration occasioned by the introduction of fidei-commissary substitutions. These are to be considered, as a departure from the genuine spirit of the Roman law, in the doctrines respecting inheritances. See *Huberi Prælectiones ad Inst. lib.* 2. *tit.* 23. § 18. From that spirit, nothing could be more different, with respect to the tenure and modifications of property, than the regulations of the feudal law. According to these, the heir derived his title, no otherwise through his ancestor, than from the necessity of mentioning him in his pedigree. This enabled him to describe himself, as an object, to whom the succession was originally limited. Thus he was a nominee in the original grant; he took every thing from the grantor, nothing from his ancestor. The consequence was, that, while the absolute or ultimate ownership was supposed to reside in the lord, the ancestor and the heirs took equally as a succession of usufructuaries, each of whom, during his life, enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property. Thus, while, by the Roman law, and the law of almost every other country, property is vested in the possessor solely and absolutely, every species of feudal property is necessarily subject to the three distinct and clashing, though concurrent, rights of the lord, the tenant and the heir. It follows, that, by the original principles of the feudal law, *fiefs could neither be aliened* nor charged with debts, and in direct contradiction to almost every other system of law, the feudal system of polity made land unalienable, and absolutely took it out of commerce.

VI. 6. *THE VARIOUS MODES WHICH HAVE BEEN USED, IN THE COUNTRIES WHERE THE FEUD HAS BEEN ESTABLISHED, TO ELUDE, OR OVERTHROW, THE RESTRAINTS UPON ALIENATION*, form one of the most important parts of feudal learning. The mode, by which this has been effected in England, is peculiar to itself. It has been the principal occasion of the striking difference, to be observed, in the feudal jurisprudence of England, and that of other countries. One artifice to elude the feudal restraint upon alienation, seems to have been resorted to, by every nation where the feudal policy has been established,—that of *subinfeudation*. Its effect, in aggrandizing the vassals, and rendering them independent of the throne, has been already noticed. It also served as an indirect mode of transferring the fief. It was inhibited in England, to all but the king's vassals, by the statute *quia emptores terrarum*, 18 Edward 1st; and this inhibition was extended to the king's vassals, by the statute *de prerogativa regis*, 17 Edw. 2. c. 6. In most other countries, it is still allowed, under some restrictions. The chief of these are, 1st. That it must be a real subinfeudation, and not a sale, or other transaction, under the appearance or colour of a subinfeudation; 2d. That the sub-vassal must be of

equal, or at least, of suitable rank and circumstances. And, 3dly. The conditions, so far as the lord is interested in them, must be the same, as those, upon which the original investiture is granted. In other respects, the feudal history of alienation has varied. As it now stands, in almost every country, the lord's consent must be had. But in some, it still continues a matter of favour, in others, it is a matter of right, to which the tenant is always entitled, on paying certain fines to the lord. The principal of these are the *quint* and the *lods et ventes*. These the lord claims on every sale. In other cases, where the fief is transferred from one to another, the lord claims the *relevium* or *droit de rachat*, which, generally, is one year's produce of the fief. In many countries, where the tenant sells his fief, the lord has a *jus retractus*, or *retrait feodal*, by which, he has a right to become, himself, the purchaser of the fief, on reimbursing the stranger the price paid by him, for the purchase of it, and the costs attending the purchase. In many countries, also, the right of the heir is consulted by giving him the *retrait lignager*, by which, when a fief is sold, a relation of the vendor, within a certain degree of parentage, may entitle himself to repurchase the fief by an offer of the purchase money, interest, costs, and expenses, or as it is termed in the writ, *offre de bourse, deniers, loyaux courts a parfaire*. Such is the general history of alienation in foreign countries. The history of alienation in England is very different. A liberty of alienating lands of purchase, at least where the party had no son, is allowed by a law of Henry the 1st, and expressly recognized by a law of Henry the 2d. Some time afterwards, it obtained generally, with little or no limitation. The indirect mode of aliening, through the medium of subinfeudation, the restraint of it, by *magna charta*, and its total abolition by the statutes *quia emptores*, and *de prerogativa regis*, have been already noticed.

VI. 7. But while the restraints upon alienation, so far as it was contrary to the general principles of the feudal tenure, were thus gradually removed. the policy and private views of individuals, found means to impose new restraints upon it. This was done by the introduction of conditional fees at the common law, and afterwards by the *INTRODUCTION OF ENTAILS*. We shall consider this species of limitation of property, with a view to the different modes of it, which have been admitted by the Roman law, and by the laws of France, Spain, Germany, Scotland, and England. With respect to the *Roman law*, we have already had occasion to notice its simplicity, in the inheritance of property, as it was settled by the Trebellian and Pegasian decrees, and its alteration, in this respect, by the introduction of the fidei-commissa. These gave rise to successive fidei-commissary substitutions. By multiplying these, and by prohibiting each substitute from aliening the inheritance, property was absolutely taken out of commerce, and fixed, in a settled and invariable course of devolution, in particular families. There is reason to suppose this mode of settling property was never common, and the policy of Justinian soon interfered to check it. By the 159th Novel, he restrained fidei-commissary substitutions to four degrees, including the party himself, who instituted the substitution. With the third substitute, therefore, the power of the testator expired, the absolute dominion vesting absolutely in him. This, in some measure, restored the law to its primitive simplicity. A similar progress is discoverable in the history of *French* Jurisprudence respecting Substitutions. The law of France appears to have generally admitted perpetual substitutions. The ordonnance of Orleans, in 1560, restrained them to two degrees, exclusive of the instituant. That ordonnance not having a retrospective operation, and the inconvenience arising from prior substitutions being greatly felt, the ordonnance of Moulins, in 1566, restrained all substitutions, anterior to the ordonnance of Orleans, to the fourth degree of the instituant. The ordonnance of 1747 fixed the law on this important branch of real property. It was framed with great deliberation, by the chancellor d'Aguesseau, after taking the sentiments of every parliament in the kingdom, upon forty-five different questions proposed to them on the subject.

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These questions, and the answers of the parliaments, have been published under the title, *Questions concernant les Substitutions*, Toulouse, 1770. The ordonnance of 1747 confined substitutions, with some exceptions, to two degrees, and directed the degrees to be computed, by the individuals, in whom the substitution vested. Upon this, it was held, that if the testator appointed several persons, jointly, to the inheritance, they formed, together, but one degree; if he appointed to it several persons successively, though in the same degree of kindred, as brothers or sisters, each person in whom the succession vested, formed one degree. The mode of settlement used *in Spain*, by what is termed a Majoratus, has been already noticed. In *Germany*, the restraints imposed by the feudal law, on the alienation of property confined by the original investiture, to a particular channel of descent, still prevail; so that the same intricate entails subsist with them, as with us; without those modes of eluding them which the laws of England have sanctioned. *The tailzies or entails of Scotland* appear still more intricate. The least restrictive of these is called a Simple Destination. It is defeasible and attachable by creditors, so that it amounts to no more than a designation who is to succeed to the estate, in case the temporary possessor neither disposes of it, nor charges it. The next degree of tailzie, is a tailzie with prohibitory clauses. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by creditors. The substitutes, however, as creditors by virtue of the prohibitory clause, may by a process in Scotland, termed an inhibition, secure themselves against future debts or contracts. The third and strictest degree of tailzie, is a tailzie guarded with irritant and resolutive clauses. This is a complete bar to every species of alienation, voluntary or involuntary. The efficacy of these clauses, both against the heir, and the creditors of the tenant in tail, aliening, was established in 1662, by a solemn decision of the judges of Scotland, in the case of the viscount Stormont against the creditors of the earl of Anandale; and that decision was sanctioned by a statute of the Scottish parliament in 1685. This mode of entail appears to be greatly discouraged by the judicature of the country; and modes of eluding it have been discovered, and allowed in their courts of justice. With respect to *English entails*, we have taken notice of the maxim of the Roman law, that no man can name an heir to succeed to his heir; and, of the opposite maxim of our law, that God only can make an heir, not man. The latter maxim was understood, with this qualification, that, though the party could not introduce a person into the heirship of the fief, who was not originally capable of inheriting the fief, by being of the blood of the donee, still he might give a preference to a particular class of persons, falling within that description, and might exclude others. Thus, in England, according to sir William Blackstone, (lib. 2. c. 7. s. 2.) as in all other countries, where fiefs have prevailed, they might originally be limited to the male, either in preference to, or in utter exclusion of, the female descendants of the party. In the same manner, they might be limited to a male and his descendants, by a particular wife, or to a female and her descendants, by a particular husband, or to both the parents and the heirs of both their bodies. These, at the common law, were all termed *Estates in fee-simple conditional*. The condition, from which these estates took their appellation, did not prevent the fee from vesting in the donee, immediately upon the gift; it only authorized the donor to re-enter, if the party had not issue, or, if, having issue, the issue afterwards failed, and neither the donee nor the issue aliened. Upon this principle, it was considered to suspend the power of absolute alienation, till the birth of issue. But upon the birth of issue, the party had the same power of alienation over the conditional fee, as he had over an absolute fee. The statute *de donis conditionalibus* took away this power. It did not, however, affect the estate of the donee, in any other respect. The consequence of this was, that, a tenant in tail was as much seised of the inheritance, after the statute *de donis*, as a tenant in fee simple

conditional, was, before it. Thus, therefore, an estate of inheritance remained in the donee; but, a particular description of heirs only being entitled to take under it, it received the appellation of an *estate tail*, that is, an estate docked, cut off, or abridged, in contradistinction from the estate in fee simple absolute. Thus, the fee was preserved to the issue, while there was issue to take it, and was preserved to the donor, when the issue failed. This reversionary right of the donor was soon found to be susceptible of the same modifications, as a present estate, and, therefore, limitations, either of the whole reversion, or of partial estates out of it, were made to strangers. It frequently happened, that, after a limitation to one series of heirs, another series of heirs was substituted, to take the fief, on the failure of the first series. The first person then, to whom this subsequent series was limited, was made the stock, or *terminus*, of this subsequent line of inheritance. In these cases, the substitute did not take in quality of heir to the last taker, but as a new purchaser under the original donor. Thus, in direct opposition to every genuine principle of the Roman law, endless substitutions were introduced, not only of individuals, but of whole lines of descendants, and the estate being thus unalienably preserved to the issue, there was still a more pointed opposition, to the maxim of the Roman law, that the heir necessarily succeeded to the obligations of the deceased.

VI. 8. These new restraints upon property were never favourably received, and various *ARTIFICES WERE USED TO ELUDE THEM.* One of these, was carried into execution, through the medium of a *discontinuance.* It has been observed, that, though the statute *de donis* took away the power of lawful alienation, it did not suspend the vesting of the fee. The alienation, therefore, of the donee tenant in tail, was no forfeiture; and the alienee, as he took his conveyance from a person seised of the fee, was considered as coming in, under a lawful transfer of the inheritance. Now, it was an established rule of law, that, whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry. The consequence of this was, that, in these cases, the alienation was unimpeachable during the life of the alienor, and, after his decease, the heir could not assert his title by the summary process of entry, but, was driven to the expensive and dilatory process of a formedon; this was termed a discontinuance. The expense and delay attending a formedon frequently prevented the tenant in tail from resorting to it, to assert his right. In the course of time the period for asserting it elapsed, and thus, therefore, virtually, the discontinuance proved a bar to the entail. Another mode of eluding estates tail was, by *warranty.* When lands were conveyed from one to another, the grantor, for the greater security of the grantee, usually warranted, that is, entered into a covenant to defend the possession to the grantee, and, in case of eviction, to make him a recompense. This obligation of the ancestor was considered to be a covenant real, and therefore, on his decease, descended on the heir. Thus, it frequently happened, that, on the death of the ancestor, his contract of warranty descended on the person, who would, otherwise, be entitled, as his heir, to the lands warranted, so that, the obligation of warranty, and the right to the lands warranted, met in the same person. The consequence of this was, that, as heir in tail, he was entitled to the lands; as heir general, he was bound to defend the title of his ancestor's alienee: thus, if, on the one hand, he was entitled to recover the lands, the alienee was entitled, on the other, to recover an equivalent recompense from him. To prevent this circuity, it was held, that the obligation to warranty, precluded him from claiming the lands warranted. Against this, in some cases, the statute *de donis*, provided. The general doctrine was, that where the heir claimed, as heir, the lands warranted, he was bound by the warranty, in those cases only, where he inherited, from the ancestor, fee simple lands of equal value; but, where he claimed as purchaser, he was bound by the warranty, though no such lands descended upon him. This is the meaning of the maxim, that warranty. when lineal, is a bar with assets; and when collateral

collateral, is a bar without assets, to the right of the tenant in tail, on whom it devolved. By these artifices, the force of entails was eluded. In the progress of time, methods were discovered, by which the law allowed them to be absolutely destroyed. The first of these has received the name of a *common recovery*. In the language of the courts, a recovery is the effect of a sentence, in a solemn judgment, whereby the party is restored to a former right. In the particular language of our courts, when applied to judgments in adversary actions, it is the effect of a sentence, by which, in a suit instituted for the recovery of an estate claimed by the party, judgment is given him, that he shall recover it, according to his claim. In a suit of this nature, when really adversary, the judgment, whether given after defence, or upon default, equally bound the right to the land. Of this, tenants in tail availed themselves, to deliver their estates from the entails to which they were subject. They permitted the entailed lands to be recovered against them, on a fictitious process, but, with a secret confidence, reposed in the recoveror, that, after the recovery was completed, he should reconvey the lands to the party in fee simple; and in the mean time, permit him to take the profits of them. Another mode, by which the destruction of entails was allowed to be effected, was the application of the legal operation of *fines*. In the notion of our courts, a fine is a compromise, with the leave, and under the sanction of the court, of a real action, for the recovery of land. It is common to all courts of justice, to permit suits commenced in them, to be compromised, and to give their sanction to the compromise. In the civil law, and in the feudal law of other countries, this species of compromise is termed a transaction. The process itself, therefore, we have in common with them. But, it is peculiar to our law, to use it as a mode of eluding the restraints imposed by the law of the land on the alienation of real property. A writ is brought against the tenant in tail, by which the party suing out the writ, demands the lands, against the tenant, on his supposed previous agreement or covenant, to convey the land to him. The tenant is understood to be satisfied with the justice of the claim, and therefore applies for the license of the court, to make the matter up. This is granted. The parties thereupon enter into a concord or agreement. By this, the tenant acknowledges the lands to be the right of the demandant. This acknowledgment, being made with the leave, and under the sanction, and entered on the records, of the court, had the effect of a judgment. Of this process, tenants in tail availed themselves, to bar their estates tail, in the same manner they did of judgments: they procured a fictitious suit to be instituted against them, and settled it, by a fictitious compromise, in which they acknowledge the right to be in the demandant; with the same secret confidence reposed in him, that he should hold the estate in trust for them, and convey it according to their directions. Thus, through the medium of a collusive suit and judgment, which are now called a common recovery, in one instance, and of a collusive suit and compromise, which are now called a fine, in the other, entails were totally defeated. It is unnecessary, here, to trace the steps by which this has been effected. Common recoveries were originally a deceit upon courts of justice. When the sanction of the courts was first given them, it was done indirectly, with great caution, and some degree of artifice. It was not till the reign of Edward the 4th, that they obtained the unequivocal sanction of a solemn decision of a court: and it was a much later period, before their effects were recognized by the legislature of the country. The introduction of fines, was effected in a much bolder manner. The statute *de donis* had said fines should be null; the statute of the 4 of Henry 7, or at least that of the 32 of Henry 8, said they should be valid. The different effects of a fine and a recovery do not fall within this inquiry. (Mr. Cruise's valuable treatises upon them are well known.) It seems sufficient to observe, generally, that, a fine is binding on the issue in tail only; a recovery is binding both on the issue and those claiming in reversion or remainder. A still more summary and easy opening of entails has been granted by the legislature, in favour of the crown, by

33 Hen. 8.

33 Hen. 8. c. 39. in favour of the creditors of traders, by the 21 Jac. 1. c. 19. whereby the commissioners are authorized to sell the bankrupt's entailed lands; in favour of general creditors, by the acts for the relief of insolvent debtors; and in favour of charitable donations, by the 43 Eliz. c. 4.

VI. 9. The alienation hitherto spoken of, except that referred to in the last observation, has been confined to cases where it is the act of the party himself; and is, therefore, termed voluntary alienation. But, in many cases, it is produced by the act of law against the party's own will. In these cases, it is termed *INVOLUNTARY ALIENATION.* Here its effects must be considered, with respect to the party himself, his heir, and the special prerogative of the king. In every instance the genius of the feud appears. *With respect to the party himself,* the tendency of the feud to secure to the lord the services of the tenant, and to take landed property from commerce, has been noticed. It was a consequence of those principles, that the party was not at liberty to subject either himself, or his lands, to the payment of his debts. When, therefore, at the common law, a person sued a recognizance, or judgment for debt, or damages, he could neither take the body, nor the lands of the debtor, except in some special instances, into execution. He could only take in execution his goods and chattels, and the profits of his lands. For those the law gave him the *fieri facias*, by which the sheriff was commanded to cause the sum, or debt recovered, to be made out of the goods and chattels of the debtor; and the *levari facias*, by which the sheriff was ordered to seize the debtor's goods, and receive the rents and profits of his lands, till the creditor was satisfied. Thus, at the common law, neither the person nor the lands of the debtor could be attached for debt. But, by the 25th of Edw. 3d. c. 17. the body of the debtor was made liable, by a writ of *capias ad satisfaciendum*, to imprisonment, till the debt was satisfied; and the statute of Westminster 2. 13th Edw. 1st. ch. 18. granted the writ of *elegit*, by which the defendant's goods and chattels are delivered, to the creditor, at an appraised value; and, if these are not sufficient, then the moiety or one-half of the freehold lands of the debtor, are delivered to the creditor, to be retained till the debt is levied, or the debtor's interest in the land is expired. Afterwards, under the statute *de mercatoribus*, 13 Edw. 1. the merchant might cause his debtor to appear before the mayor of London, or any of the other persons mentioned in the act, and there acknowledge his debt. This was called a recognizance. If the debt was not paid at the time appointed, the recognizance was held to be forfeited, and the body, lands and goods of the debtor, were to be delivered to the merchant creditor, in execution, to compel payment of the debt. The process by which this was done, was called an *extent*, because the sheriff was to cause them to be appraised, to their full or extended value, before he delivered them to the creditor. By the statute of the 27 Edw. 3. c. 9. a similar process for the recovery of debts was provided for those, whose debts were acknowledged before the mayor of any of the towns, where the staple was held. These securities are generally known by the short appellation of statutes merchant and statutes staple. From their nature, they were, at first, appropriated to the commercial part of the community. By the 23d Hen. 8. a similar security, by a recognizance in the nature of a statute staple, was extended to the community at large. The laws, respecting bankrupts, seem now, to have made the landed property of merchants and other tradesmen, generally subject to their debts. The statutes respecting fraudulent conveyances and devices have proceeded, some way, towards making lands generally liable. It may not be improper to close this account of involuntary alienation by an account of involuntary alienation in the Roman law, as it is succinctly stated in the Digest, lib. 42. tit. 1. *Primo quidem res mobiles animales pignori capi jubentur, mox distrahi; quarum pretium si suffecerit, bene est; si non suffecerit, etiam soli pignora capi jubentur et distrahi. Quod si nulla moventia sint, a pignoribus soli initium faciunt. Quod si nec quæ soli sunt, sufficiant, vel nulla sint soli pignora, tunc pervenietur etiam ad jura. Si pignora quæ capta sunt, emptorem non inveniant,*

inveniant, rescriptum est ut addicantur ipsi cui quis condemnatus est. Addicantur autem ea quantitate qua debetur.

With respect to the heir,—it has been observed, as one of the most striking peculiarities of the feudal system, that the heir claimed nothing from the ancestor, but came in under the original feudal contract. The consequence was, that, originally, though on the decease of the debtor, the executor was answerable, as far as he had assets, the heir was not answerable in respect of the lands descended. But, after the free alienation of land was allowed, the attachment of it, in the hands of the heir, for the debt of his ancestor, followed as a necessary consequence. But, here again, the principle of the feudal law introduced a distinction, which, with some qualifications, prevails at this day; that, the assets in the hands of the executor, are liable generally to the ancestor's debts of every kind, but the assets in the hands of the heir, are liable only to debts of record, and debts by specialty, in which the heir is named; to the former, in respect of the lien, which the process of the court created, on the lands themselves; to the latter, on the supposition, that the heir was comprehended in the original contract. For the ancestor's debts by simple contract, in opposition to the Roman law, and to the most obvious principles of natural justice, the heir still remains not liable. As to involuntary alienation, *in respect to the king*, it has been observed, that, in the case of a common person, the body of the debtor was not liable to execution; but, in the case of the king, it was different; for, at the common law, the body of the king's debtor is generally supposed to have been always liable to execution. Yet it seems singular, that, when the statute of *magna charta* restrained the king from seizing a man's land for debt, it should leave him at liberty to seize his person. In the course of time, however, it is certain, that the body of the debtor might be seized, and that, after the law made it liable for the debts of the subject, the king had these special prerogatives, that he could protect his debtor against the suits of his other creditors; and that, at the common law, he had a right to the custody of his debtor's person, in another prison, at the suit of the subject. By the common law also, all the goods and chattels of the king's debtor might be sold for the payment of his debts. But the most important of the prerogatives of the crown, at the common law was, that, in the king's case, execution issued, not only against the goods and chattels, but against the lands of the debtor. Another important prerogative was, in the case of rent, for which the king might distrain on any of the lands of the debtor. He had other important prerogatives, with respect to priority and preference in execution, and satisfaction of his debts, a minute investigation of which does not fall within the subject of this discussion. These extensive prerogatives have been considerably increased by the statute law of the realm. By the 33d Henry 8. c. 39. all obligations made to the king, are to have the same force, and to be attended with the same remedies, to recover them, as a statute staple. By the 13 Eliz. c. 4. the lands of treasurers, receivers, and other accountants to the crown, were made liable to execution for debts to the crown, in the same manner as if the party had acknowledged a recognizance, under the statute of Henry 8. A doubt arose upon this statute, whether a sale might be made under it, after the death of the accountant or debtor. To remedy this, the explanatory statute of the 27th Eliz. c. 3. was passed, by which a power of sale, after the death of the debtor, was expressly given. Afterwards, by an act made in the 39th year of queen Elizabeth, this explanatory act was repealed, and a new exposition was made of the statute of the 13th Eliz. with various new provisions. But the act of the 39th Eliz. being only temporary, and having expired early in the reign of James the 1st, the explanatory act of the 27th of Eliz. was revived; but it fell into disuse, and when it came to be examined, on occasion of the late exertions made for the recovery of the crown debts, it was found defective. This gave rise to the act of the 25th of his present majesty, c. 35, by which the court of exchequer is authorized, on the application of his majesty's

majesty's attorney general, in a summary way, by motion, to order the estates of crown debtors, which should be extended by any writ of extent, or diem clausit extremum, to be sold for the payment of the debts. Thus the law appears to stand at present, on the involuntary alienation of land, with respect to the debts due to the crown.

VI. 10. As to *TESTAMENTARY ALIENATION*; the influence of feudal principles, on this branch of alienation, is still strongly felt. It has been observed, that, by the Roman law, a will was an appointment of an heir; and he was considered, at the death of the testator, as universal successor to all the property, rights, and obligations, of the deceased. Testamentary alienation, like every other alienation, was prohibited by the genius and law of the feuds. By what steps it prevailed here, is so happily, and so concisely explained, in a note of the present Editor's most learned predecessor in this work, (note 1 to page 111. b.) as to render any deduction of it unnecessary in this place. To a perusal of that note, the reader is therefore invited. It remains to observe, that, after the testamentary power over land, was introduced, *a devise of lands* was not considered to operate as an appointment of a party to be a general heir of the testator, as in the Roman law; but *was considered to operate as a legal conveyance of the lands themselves.* See lord Mansfield's argument in Hogan *v.* Jackson, Cowp. 299. In consequence of this, many of the requisites to other legal instruments are requisite in wills. Thus, as to the efficacy of a deed, for the transfer of real property, it is necessary, that the grantor should have the seisin of the lands conveyed; so, to the efficacy of a will, it is necessary, that, at the time of making his will, the devisor should have the seisin of the lands devised, or at least that kind of inchoate seisin or title, which is conferred by a contingent remainder. The consequence of which is, that, while a Roman will operates on all the property of the deceased, without any regard or distinction, as to property acquired by the testator, before or after, the making of his will; by the law of England, a will cannot operate on any freehold lands, of which, at the time of making of the will, the party has not this species of seisin. Another consequence of the notion, that, a will affecting lands, is merely a species of conveyance, is, that, as by the law of England, a fee simple cannot be created without words of inheritance in the original donation or grant, so by the same law, *words of inheritance are* equally *necessary to the creation of a fee by will.* The only difference is, that certain technical words are required by law, to the creation of an estate in fee, by deed; but in wills, they may be dispensed with, and supplied, by any words, sufficiently denoting the intention of the testator. Here the subject appears to draw to a conclusion.

VI. 11. The reader has been presented with some of the most striking circumstances in the history and principles of the feudal law, particularly so far as they affect the landed property of this country. It remains only to state some of the most striking circumstances, *IN THE GENERAL HISTORY OF ITS DECLINE.* It has been shown, that the peculiar ingredient of the feud was, the connection between, and the reciprocal obligations of, the lord, and the tenant. Whatever interrupted or relaxed this connection and reciprocity of obligation, had a direct tendency to overturn the feud.

One of the earliest circumstances of this tendency was, the *general introduction of the practice of subinfeudation.* This, however salutary, in a general view, loosened the tye, which united the feudal association, by preventing the chain of dependence and subordination, consequent to the practice of subinfeudation; and which, it is evident from the general principles of the feudal law, and the history of other nations, operated in the strongest manner to cement and perpetuate the feud.

Another circumstance of the same tendency, was, the *introduction of the tenure of escuage.* This enabled the tenants by knights service to send persons to serve in the king's armies in their stead, and in process of time to make a pecuniary

pecuniary satisfaction to the lord, in lieu of it. This substitution of money, for personal attendance, was diametrically opposite to every feudal principle. Accordingly all writers have considered it, as a degeneracy of the tenure of knight service. A further circumstance of the tendency we are speaking of, was, *the prevalence of the socage tenure*. It is probable, that the number of these tenures was not great, till a considerable time after the Norman conquest; and perhaps the increase of them was not rapid, till some time after the introduction of escuage. From a comparative view of the different natures of the military and socage tenures, it is easily seen, how much stronger the feudal connection was under the former, than it was under the latter. The tenure in burgage was a species of socage tenure. Under this, chiefly, the commercial part of the community classed themselves. Nothing could be more opposite to the nature of the feudal tenure, than the wealth, the independence, and the peaceful habits of life, which usually attend the pursuits of commerce. Thus, as the general tenure of socage prevailed, the connection between the lord and the tenant proportionally relaxed.

But one of the most important circumstances, in the history of the decline of the feud, is, the *introduction of uses*. By these the legal estate of the land was in the feoffee. In fact, therefore, there never was a vacancy in the tenure. But the ownership and beneficial property of the land being absolutely vested in the *cestui que use*, there was no point of connection between him and the lord. Besides, when a feoffment was made to uses, it seldom happened, that the feoffment was made to a single person. The feoffees were numerous, and when their number was reduced to that of one or two persons, a new feoffment was made to other feoffees, to the subsisting uses. In the mean time, the ownership of the land was transmitted and aliened, at the will of the *cestui que use*. It is evident that, while the fief was held in this manner, there was a wide separation between the lord and the tenant. It must also be observed, that, where there was a feoffment to uses, the fruits of tenure incident to purchase, became seldom due, and those incident to descent almost never accrued to the lord. Now, where a person took by purchase, the lord was only entitled to the trifling acknowledgment of relief: when he came in by descent, the lord was entitled to the grand fruits of military tenure, wardship, and marriage. From these observations, it is clear, how great a fraud was practised upon the lord, by the introduction of uses. A fief thus circumstanced, presented an apparent tenant to the lord, but it was almost barren of every fruit and advantage of tenure, and the land itself was entirely subtracted from the feud. Hence, we find, that, among the mischiefs recited in the preamble to the statute of uses, the loss to the lord, of the fruits of tenure, is particularly insisted on. It does not fall within the nature of these observations, to mention the steps which were taken to extirpate uses. One of them was the statute of the 1 Richard the 2d. cap. 9. which gave an action to the disseisee, both against the feoffee, and the *cestui que use*. It is observable, that the *senatus consultum Trebonianum*, gave the same right of action against the *hæres fidei commissarius*. Unquestionably the object of the statute of the 27 of Henry 8. was to effect a total extirpation of uses.

But uses were preserved under the appellation of *Trusts:*—the consequence has been, that more than half the landed property in the kingdom is, in some form or other, charged, in the hand of the legal tenant, with a trust for the benefit of some other person. A court of law, from its constitution, could not take notice of such a charge: in fact, such charges originally were almost always frauds on tenure; but there were reasons (perhaps rather specious than substantial) for contending, that, as between the legal owner and the person entitled to the benefit of the trust, the legal tenant was under a moral obligation to execute the trust. Now, the only means of compelling the legal tenant to execute the trust, which the judicial policy of the times afforded, was, by a resort to the chancellor. The common law allowed him to compel the attendance

attendance of any person by the writ of subpœna; and to enforce obedience to his directions by sequestration of the property, and imprisonment of the party. These enabled him to summon the legal tenant to his court, to order him to execute the trust, and, if he refused, to compel him to execute it, by sequestration and imprisonment. Too great praise cannot be given to the sound policy and discretion, with which the chancellors successively exercised this nice and important jurisdiction. If they had considered that trusts, charged on lands, should be governed by the rules of the civil law, which, when they first came under their notice, seemed the natural course, the discordancy between tenure and trust must have produced infinite confusion: but, by subjecting trusts, as far as the nature of the case allowed, to the established rules of the feud, they preserved an analogy between feuds, and trusts, in their most important bearings, as the order of descent, the estates into which property may be modified, entails, and the mode of barring them; at the same time, that they preserved inviolate, the relation between the lord and the tenant, the great principle of feudalism. Hence, where one person held land in trust for another, though the chancellor would decree the trustee to convey to the beneficial owner, still, the trustee remained tenant to the lord.—In the same manner, where land was conveyed to a person and his heirs on a particular trust, and the trust was performed, the land, by the rules of the civil law, was instantaneously revested in the grantor; but the chancellor considered it to continue in the trustee. Thus, in each case, the feudal relationship remained till the tenant himself, by a legitimate conveyance, introduced another into the tenure.—The same principles, (allowing for its different nature), were received into personal property, when the legal ownership of it was vested in one person, charged with a trust in favour of another. By this excellent arrangement, while trusts were made subservient to the general wants and purposes of society, an analogy between them and legal estates and interests in property was established, and, so far as real property was concerned, the great principles of the common law of tenure were respected and preserved.—Perhaps, the propriety of this arrangement, and the undeviating wisdom of the great personages, by whom it was adopted and completed, has not been sufficiently noticed.

It remains to observe, that the immense quantity of property of every description, which in consequence of these circumstances was brought under the jurisdiction of the chancellor, gave rise to the great difference between the office of chancellor in this country, and the office of chancellor on the continent. In all countries of Europe, the chancellor is the highest dignitary of the state, the guardian of the sovereign's conscience, and generally the keeper of his seal; the visitor of hospitals and colleges of the king's foundation, and the general superintendent of charitable foundations.—Over these, the chancellor of England exercises chiefly, in consequence of the introduction of trusts, a vast and extensive jurisdiction, partly as a court of common law, but principally as a court of equity. On the continent, the chancellors have no such exclusive court; but have the universal superintendence over all that relates to the administration of justice in the kingdom, a controlling power to correct any abuses, which find their way into courts of judicature, to form new regulations for their proceedings, to determine questions of jurisdiction between them, to settle differences among the members of them, to appoint the higher offices of justice, and form the royal ordinances and edicts, which in any wise related to the legal polity of the kingdom, or the administration of justice.—In most countries, the administration of common law and equity is committed to the same courts; in England, the courts are separate:—Lord Bacon, *De Augmentis Scientiarum*, *l.* 8. *c.* 3. *app.* 46. has pronounced a decisive opinion in favour of their separation.

While the relation between the lord and the tenant was great, the separation of the beneficial interest from the legal tenure was a serious mischief. As the relation

relation is now exceedingly small, it is, in this respect, scarcely felt. In the case of Burgess *v.* Wheate, 1 Blackst. Rep. 123. lord Mansfield endeavoured to establish the right of the crown to the benefit of a trust, which failed for want of an heir, by attempting to fix on trusts, the feudal incident of an escheat. In the discussion of the question the analogy appeared unnatural, and the case was decided against the crown. A better ground in favour of the claim of the crown, might, perhaps, have been found, by resorting to its acknowledged prerogative, of being entitled to the *bona vacantia*, or every species of property of which no owner is discoverable. At length it became evident to general observation, that, the principle of military tenure was gone; and that its incidents were more burthensome than advantageous, either to the lord, or the tenant, so that all ranks of men seem to have desired its abolition. The legislature of England proceeded in it with the circumspection, which the magnitude of the object required. It was brought regularly before parliament, in the 18th year of king James the first, at his majesty's recommendation. In the 4th Inst. 203, lord Coke mentions this circumstance, and particularizes the outlines of the plan then in agitation. It bears a striking similitude to that, which was afterwards adopted. At length the 12 Cha. 2. c. 24. was passed; which enacts "That the court of wards and liveries, and all wardships, liveries, "primer seisin, and ousterlemains, values, and forfeitures of marriages, by "reason of any tenure of the king or others, should be totally taken away; "and that all fines for alienation, tenures by homage, knights service, and "escuage, and also aids for marrying the daughter, of knighting the son, and "all tenures of the king in capite, should be likewise taken away: and that "all sorts of tenures held of the king or others, should be turned into common "socage; save only tenures in frankalmoign, copyholds, and the honorary "services (without the slavish part) of grand serjeanty."

It remains to make some mention of the writers, of whose assistance, the author, in framing this note, has principally availed himself. Some of these, he has noticed in the course of the annotation; and to sir Henry Spelman, he must here repeat his acknowledgments. With respect to the other writers, to whom he is under obligations;—at the head of these, he must notice the feudal writers of his own country, particularly, sir William Blackstone, lord Kaims, sir John Dalrymple, sir Martin Wright, Doctor Robertson, and Doctor Gilbert Stuart.—After these, he must acknowledge a general obligation to three foreign works, which in every part of the annotation, have been highly useful to him, the *Thesaurus Feudalis* of Jenichen, in three quarto volumes, published at Frankfort on the Main, in 1750: the *Historica Juris* of Struvius, in one quarto volume, published at Jena in 1728; and Voet's *Digressio de Feudis*, subjoined to his Commentary on the 38th book of the Pandects.—Under the first division of the annotation, he has been greatly assisted by Koch's *Tableau des Revolutions de l'Europe dans lo Moyen Age*, 4 vols. octavo, Strasburgh, and Paris 1814; the early parts Pfeffell's *Abregé Chronologique de l' Histoire* and *du Droit Public d'Allemagne*, 2 vols. octavo, Paris, 1788; and in a particular manner, by D'Anville's *Etats formés en Europe, apres la Chute de l'Empire Romain*, 1 vol. quarto, Paris, 1771. Under the 2d division, he is principally indebted to lord Stair's Institutions of the law of Scotland, lib. 2. tit. 3. and to a dissertation of Lynkerus *de Feudo Pecuniario*, published in Jenichen's Collection, 3d vol. sect. 38th.—Under every part of the 3d division, he has particular obligations to the *Selecta Feudalia* of Thomasius, octavo, published at Halle in 1728. In his account of the German codes, he has received great assistance from Brunquellus's *Historia Juris Romano-Germanici*, octavo, Amsterdam, 1728, part 4; and Heinneccius's *Historia Juris*, lib. 2. His account of the capitularies is taken from these works, and from Baluzius's preface to his edition of the capitularies. His account of the customary law is taken from Fleury's *Histoire du Droit François*, and the article, Coutume, sent by Mons. Henrion, to the French Encyclopedia. Mr. Gibbon, (3d vol. page 583. note

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ALSO if a man let lands to two men for terme of their lives, & the one grants all his estate of that which belongeth to him to another, then the other tenant for terme of life, and he to whom the grant is made (et † celuy a que le graunt est fait), *are tenants in common during the time that both the lessees be alive.*

And memorandum, *that in all other such like cases* (que en touts ‡ auters tiels cases), *although it be not here expressly moved or specified, if they be in like reason, they are in the like law* (sont en ‖ semblable ley).

AND

† Mesme *added in L. and M. but not in Roh.*

‡ les *added in L. and M. but not in Roh.*

‖ semble *L. M. and Roh.*

note 1.) has, with his usual energy, thus mentioned and characterized four writers, the three last of whom, the editor has frequently had occasion to consult, under the 4th division; " In the space of thirty years, (1738—1765) " this interesting subject, (the history of the invasion of Gaul,) has been " agitated by the free spirit of the count de Boulainvillers (*Memoire historique* " *sur l' Etat de la France*, particularly tom. 1. page 15. 40.); the learned " ingenuity of l'abbé Dubos (*Histoire critique de l'Etablissement de la Monar-* " *chie Française dans les Gaules*, 2 vols. 4to.); the comprehensive genius of the " president de Montesquieu (*Esprit des Loix*, particularly l. 28. 30, 31); and " the good sense and diligence of the abbé de Mably (*Observations sur* " *l' Histoire de France*, 2 vols. 12mo.). The last work, being considered as unfavourable to monarchy, was opposed, by a work intitled *Principes de Morale, de Politique, et de Droit Public, puisés dans l'Histoire de notre Monarchie, ou Discours sur l' Histoire de France, dediés au Roi, par M. Moreau, Historiographe de France. A Paris, de l' imprimerie royale*, 1777, 24 vols. 8vo.—Under this head, he has also received great assistance on the subject of the history of France, from the president Henault, and from the *Theorie des Matieres Feodales et Censuelles, par Monsr. Hervé*, 5 vols. 8vo. Paris, 1785:—For what he has said, respecting the feudal history of Germany, he is chiefly indebted to Mr. Dornford's excellent translation of Professor Pütter's *Historical Development of the present Constitution of the Germanic Empire*, and Struvius's *Elementa Juris Feudalis*, Jena, 8vo. 1745.—In his account of the substitutions of the civil law, he found, what is said on these subjects, in the *Prælectiones* of Huberus, 3 vols. 8vo. *Trajecti ad Rhenum*, particularly useful.—The little he has said on the Spanish fiefs, he has taken from Molina *de Hispaniorum Primogeniis, fol. Coloniæ*, 1601: and Zoesius's *Juris Feudalis analytica Expositio*, 8vo. *Lovanii*, 1663. He might perhaps have said something more satisfactory on this head, had he been able to procure *Girardus Ernestus de Frankinau's Sacræ Themidis Hispaniæ Arcanâ*, Hanover, 170 $\frac{4}{4}$. In the present edition of this work the writer has availed himself of a work of great merit, *De l'Origine et des Progrès de la Legislation Française, ou, Histoire du Droit public et privé de la France, depuis la Fondation de la Monarchie, jusques et compris la Revolution*; *par M. Bernardi*, 1 vol. 8vo. 1816. In a few instances, he has taken, what he hopes will be thought, a pardonable liberty, of inserting, in the present annotation, some passages, from his notes to the subsequent part of the work. These, however, will be found preserved in their original situation.—[Note 77.]

AND so it is if lands be letten to two for terme of their lives, *et eorum alterius diutiùs viventi* (1), and one of them granteth his part to a stranger, whereby the joynture is severed, and dyeth, here shall be no survivour, but the lessor shall enter into the moity, and the survivour shall have no advantage of these words, *et eorum alterius diutiùs viventi*, for two causes. First, for that the joynture is severed. Secondly, for that those words are no more than the Common Law would have implyed without them, and *expressio eorum quæ tacitè insunt nihil operatur*. Hereby it appeareth (2 Roll. Abr. 89, 90. 1 Rep. 84. b.) 30 Ass. 18. (4 Rep. 72. b, 2 Cro. 378. 417. 696.) (Post. 205. a. Hob. 170. 208.)

(1) Here lord Coke speaks only of a jointenancy for life; in which case, the words *and the survivor of them* are merely words of surplusage; as, without them, the lands, upon the death of one jointenant, go to the survivor. But, in the creation of a jointenancy in fee, particular care must be taken not to insert these words. For the grant of an estate *to two and the survivor of them, and the heirs of the survivor*, does not make them jointenants in fee; but gives them an estate of freehold, during their joint lives, with a contingent remainder in fee to the survivor.—Whether, during their joint lives, the fee continues in the grantor, or is in abeyance*; and whether the grantees can convey their estate; and what is the proper mode of conveyance to be used for this purpose; are points which have been much agitated, and which, perhaps, are not yet quite settled. They were all mentioned in the case of Vick *v.* Edwards, 3 P. Will. 372. In that case lands were devised to *B.* and *C.* and the survivor of them, and the heirs of such survivor, in trust to sell: lord chancellor Talbot held, that the fee was in abeyance; that the trustees, joining in a fine of the premises, might make a title to a purchaser, by way of estoppel; and, that the heirs joining might be of use, as it would supply the want of proving the will; but that, in every other respect, it would be void. Five years before this case was heard, the duchess of Marlborough, having contracted to purchase an estate from the devisees in trust of sir John Wittewronge's will, where the devise was worded in a manner similar to that upon which the case of Vick *v.* Edwards arose, application was made to parliament for an act to enable the trustees to convey the estate to her. In the preamble of the act it is mentioned, "That the devise of the premises by the will of sir John Wittewronge "was not effectual in the law to vest the absolute fee simple thereof in the "trustees therein named, there being, by the words of the will, no fee vested, "but upon a contingency of survivorship, and which could not vest or take effect "till after the death of two of the trustees." But notwithstanding the case of Vick and Edwards, it seems now to be the prevailing opinion, that, in these cases, the fee is not in abeyance, but remains, pending and subject to the contingency, in the grantor and his heirs, particularly, if the estate of the trustees is created by a deed deriving its effect from the statute of uses, and that if it be created by will, it descends, at the decease of the testator, upon his heir at law.—In support of which it is said, that the whole fee must be supposed to be in the grantor at the time of the conveyance; that so much of it as he does not part with continues in him; that, in this case, the inheritance is undisposed of, till, by the death of one of the parties, the remainder vests, and is executed in the survivor; that, therefore, the inheritance continues in the grantor, as part of his old reversion; that the law never supposes the fee to be in abeyance, unless where it is necessary to recur to that construction, for preserving some estate or right; and that, in the present case, no such necessity exists. The cases of Carter and Barnardiston, 1 P. W. 505. Purefoy *v.* Rogers, 2 Saund. 380. and many other cases of authority, strongly favour this latter opinion.—The same reasoning goes to prove, that, where there is a devise to the effect in question, the reversion in fee, during the suspense of the contingency, descends on the heir at law.—As to the question,

* Can the fee be in abeyance?

appeareth that in case of leases for life it is more beneficiall for the lessor to have the joynture severed than to have it continue.

Vid. Sect. 1.

"*If they be in like reason, they are in the like law.*" Here Littleton citeth one of the Maximes of the Common Law. That wheresoever there is the like reason, there is the like law. *Ubi eadem ratio, ibi idem jus*; or *ubi eadem ratio, ibi idem jus esse debet*; for *ratio est anima legis*. And therefore *ratio potest allegari deficiente lege*. But it must be *ratio vera et legalis et non apparens*. And here it appeareth that *argumentum à simili* is good

Whether the contingent remainder, in this case, can be conveyed? it may be observed, that, supposing the reversion remains in the donor, if he and the donees join together in a common conveyance, by lease and release, or bargain and sale, the estate for life of the donees will merge in the reversion, the contingent remainder be destroyed, and the fee effectually conveyed to the purchaser.—It will be the same, in the case of a devise to this effect, if the heir at law and the devisees in trust join in the conveyance.—But, supposing the fee to be in abeyance;—or, admitting it to remain in the donor; or, in case of a will, to descend on the heir, and supposing him not to join;—lord Talbot, by what he is reported to have said in the case of Vick *v.* Edwards, seems to have thought, that the trustees joining in a fine might still pass a good title to a purchaser. But this doctrine is open to objection. See Mr. Fearne's Essay on Contingent Remainders, 6th edit. 357. Perhaps, the liberality of succeeding times may think a common conveyance, by lease and release, or bargain and sale, sufficient in these cases to pass the fee, without either a fine or recovery.

In the case of Goodtitle *v.* Layman, in K. B. Trinity Term, 12 Geo. 3, there was a devise to three persons as jointenants and the survivors and survivor of them, and the heirs and assigns of such survivor for ever, the court of king's bench held it to be a jointenancy in fee.—See Mr. Fearne's Cont. Rem. 6th edit. 358.—In the matter of Harrison an infant, 3 Ans. 836, a mortgagee devised all his property to three trustees, and the survivor and survivors of them, and the heirs, executors, and administrators of such survivor, upon certain trusts, the court was of opinion, that the fee descended on the heir, until, by the death of two of the trustees, it should vest in the survivor. But it is observed by the reporter, that there was no trust to sell, nor any trust, which, by necessary implication, carried a fee to the trustees.

A material objection to taking the conveyance by fine from the trustees, lies in those cases, where the heir at law is not a party.—For, if the trustees are supposed to be jointenants for life, with a contingent remainder in fee to the survivor, their fine may be supposed to be a forfeiture of their own estate, to be a destruction of the contingent remainder to the survivor, and to give the heir an immediate right of entry.—To prevent this, it has been advised, that the trustee should demise the estate to the purchaser, or to a trustee for him, for a long term of years; and that each trustee should covenant, that, if he should be the survivor, he will convey the fee;—and to have that agreement established, by a decree of the court of chancery.—If there are outstanding terms, they should be assigned to a trustee for the purchaser.

It may be added, that, whatever doubts were formerly entertained, it now appears to be the settled opinion of the profession, that a devise to two and the survivor of them, and the heirs and assigns of the survivor, enables the trustees to vest the fee in the purchaser; and that titles, under such a devise, are accepted, with a conveyance from the trustees, and without the concurrence of the heir.—[Note 78.]

good in law. *Sed similitudo legalis est casuum diversorum inter se collatorum similis ratio, quod in uno similium valet, valebit in altero, dissimilium dissimilis est ratio.*

[191. b.]

☞ Sect. 302.

ALSO if there be two joyntenants in fee (Item * si deux joyntenants en fee sont), *and the one letteth that to him belongeth to another for terme of his life, the tenant for term of life during his life, and the other jointenant which did not let, are tenants in common. And upon this case a question may arise; as in such case* († si come en tiel case) *admit that the lessor hath issue and die, living the other joyntenant his companion, and living the tenant for life, the question may be this, Whether the reversion of the moiety ‡ which the lessor hath shall descend to the issue of the lessor, or that the other jointenant shall have this reversion by the survivor* (ou que l'auter joyntenant avera ‖ cel reversion per le survivor)? *Some have said in this case, that the other jointenant shall have this reversion by the survivor; and their reason is this,* scil. *That when the jointenants were jointly seised in fee simple* (que quant les joyntenants fueront joyntment seisies § en fee simple), *&c. although that the one of them make an estate of that to him belongeth for term of* ¶ *his life, and although that he hath severed the freehold of this which to him belongs by the lease, yet he hath not severed the fee simple, but the fee simple remains to them jointly as it was before. And so it seemeth to them, that the other joyntenant which surviveth shall have the reversion by the survivor, &c. And others have said the contrary, and this is their reason,* scilicet, *That when one of the join-tenants leaseth that to him belongeth, to another for terme of his life, by such lease the freehold is severed from the joynture. And by the same reason the reversion which is depending upon the same freehold is severed from the jointure. Also if the lessor had reserved to him an annual rent upon the lease, the lessor onely should have had the rent, &c. the which is a proofe, that the reversion is onely in him, and that the other hath nothing in the reversion, &c. Also if the tenant for terme of life were impleaded, & maketh default after default, the lessor shall be only received for this, to defend his right, and his companion in this case in no manner shall be received, the which proveth the reversion of the moitie to be onely in the lessor* (le quel prove ** le reversion del moity d'estre tantsolement en le lessor): *and so by consequent, if the lessour dieth living the lessee for terme of life, the reversion shall descend to the heir of the lessour, and shall not come to the other joyntenant by the survivor.* Ideo quære. *But in this case if that jointenant which hath the freehold hath issue, & dies living the lessor and the lessee, then it seemeth that the same issue shall have this moiety in demesne, and in fee by descent, for that a freehold*

* si deux *not in Roh. but in L. and M.*

† si *not in L. and M. or Roh.*

‡ *&c.* added in L. and M. and Roh.

‖ cel reversion, ceo *in L. and M. and Roh.*

§ en—de *in L. and M. and Roh.*

¶ *his* not in L. and M. or Roh.

** que *added in L. and M. and Roh.*

freehold cannot by nature of joynture be annexed to a reversion (pur ceo que * un franktenement ne poet per nature de joynture estre annexe a un reversion), *&c. And it is certaine, that he which leased was seised of the moitie in his demesne as of fee, and none shall have any joynture in his freehold, therefore this shall descend to his issue, &c.* Sed quære.

"*IF there be two jointenants in fee, &c.*"
This needeth no explanation.

"*And upon this case a question may arise, &c.*"

Vid. 33 H. 6. 4. b.

Here Littleton maketh a question, and sheweth the reasons on both sides, and concludes with a Quære. When Littleton maketh a question, and sheweth the reason on both sides, the latter is ever his own [*a*], and the better. But time hath made this question without question; for now all agree, that the joynture is severed for the time, according to the latter opinion here set down in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes an alteration or change of the reversion. As if tenant in taile, or the husband seised in the right of his wife, or tenant for life, make a lease for life of the lessee, in everie of these cases the lessor doth gaine a new reversion by wrong, as shall be said more at large in the chapter of Discontinuance; and if the elder brother grant the reversion (expectant upon a freehold) for life, it shall cause *possessio fratris*, as hath been sayd.

[*a*] Vide Sect. 340. 375. 439. 440. 462, 463, 464, 482, 483. 648. 720. 729. Vid. Sect. 170.

Vid. Sect. 8. 7 H. 5. (Ant. 15. a.)

"*By the same reason the reversion which is depending upon the same freehold is severed from the joynture, &c.*"

7 H. 7. 9.

If two joyntenants in fee be, and they both joyne in a lease to an abbot and a secular man for term of their lives, here the reversion that is dependant upon severall freeholds is severed. And so it is if they joine in a lease to two secular men, to have and to hold the one moity to the ☞ one for life, and the other moity to the other for life, for both these cases are warranted by the authority of *Littleton*.

(Ant. 189. b.)

[192. a.]

(Post. Sect. 319. 199. a.)

If two joyntenants be of a lease for twenty-one years, and the one of them letteth his part for certaine yeares, part of the terme, the joynture is severed, and survivor holdeth not place, for a terme for a small number of yeares is as high an interest as for many more yeares; and so was it resolved *Hil.* 18 *El. Reginæ*, *in Communi Banco* †, which I myselfe heard.

† Hil. 18 Eliz.

If two coparceners be in fee, and the one make a lease for life, this is no severance of the coparcenary, for notwithstanding the lord shall make one avowrie upon them both.

(Ant. 167. a.)

But if two joyntenants be, and one maketh a lease for life, this is a severance of the joynture, as *Littleton* here taketh it, and several avowries shall be made upon them (1).

"*Also*

* un *not in L. and M. or Roh.*

(1) Upon the death of either of the lessees, one moiety of the estate goes to the surviving lessee or his assignee, and the reversioner may enter upon the other moiety. See Dy. 67. sir W. Jones, 55. 2 P. Will. 740. But this is to be understood where the jointenants are for life; for, if the jointenants are in fee, and the jointure is severed, the right of survivorship is wholly taken away,

"*Also if the lessor had reserved an annual rent, the lessor only should have had the rent, &c.*" But if two joyntenants make a lease for life, reserving a rent to one of them, the rent shall enure to them both, because the reversion remains in jointure, unless the reservation be by deed indented, and then he onely to whom it is reserved shall have it. But if they make a lease by deed indented, reserving or saving the reversion to one of them, that is void, because they had the reversion before, but the rent is newly created. 5 E. 4. 4. 2. 27 H. 8. 16. 2. 7 E. 4. 25. 14 Ed. 3. Br. 282. (Ant. 47. a.) (Post. 214. a.)

And so it is if such a lessee for life should surrender to one of them, it shall enure to them both, for that they have a joynt reversion. But if the lessee grant his estate to one of them, no part of it shall enure to his companion, because for the moity belonging to his companion, it is in *esse* ☞ in him to whom the grant is made, the reversion to the other in fee. 5 E. 4. 4. (2 Rep. 66. Post. 214. a.) (2 Cro. 611. Perk. 31.)

[192. b.]

If two joyntenants make a lease for life, the remainder to his companion in fee, this is a good remainder of his moietie to his companion. 38 H. 6. 24. b. 2 R. 3. tit. Extinguishment, 3. (4 Leo. 187.)

"*The lessor shall be only received for this, &c.*"

"*Received.*" *Receit, Receptio,* is in many cases where a person, partie to a writ, or an estranger thereunto, to whom a reversion or remainder appertaineth, shall in default of another person be received to defend his or her freehold or inheritance, the law saith, *Admittatur, &c.* And this admission or receipt is given by sundry statutes [*f*] (and this is that which the civilians call, *Admissio tertiæ personæ pro interesse*). *Et in casibus prædictis duæ concurrunt actiones: una inter petentem & tenentem, & alia inter tenentem jus suum ostendentem & petentem.* (Post. 352. b.) [*f*] W. 2. cap. 3. 20 E. 1. Statute de defensione Juris. 13 R. 2. cap. 16.

"*For that a frechold cannot by nature of joynture be annexed to a reversion.*" And this is the principall reason, and of this sufficient hath been said in the chapter of Joyntenants, *Sect.* 291.

"*&c.*" This *&c.* in the end of this section, implieth any other heir lineal or collaterall.

Sect.

away, and their shares go to their respective heirs. So, if there be joyntenants of a term of years, and the jointenancy is severed, their shares go to their respective personal representatives. See 1 Salk. 158. It should also be observed, that the case put by Littleton supposes the jointenant to let his estate for his own life only: for if he let it for a longer term than for his own life, or if he let it for the life of any other person, it is a forfeiture. See 4th Leon. 236.—[Note 79.]

☞ Sect. 303. [193. a.]

BUT if it be so that the law in this case be such, that if the lessor die living the lessee, and living the other joyntenant which hath the freehold of the other moity, that the reversion shall descend to the issue of the lessor, then is the joynture and title which any of them may have by the survivor and the right of the joynture taken away, and altogether defeated for ever. In the same manner it is, if that joyntenant which hath the freehold dye living the lessor and the lessee, if the law be so as his freehold and fee which he hath in the moity shall descend to his issue, then the joynture shall be defeated for ever.

"*THEN is the joynture and title, &c. and the right of the joynture taken away, &c.*"

And the reason of this is, for if the joynture be severed at the time of the death of him that first deceased, the benefit of the survivor is utterly destroyed for ever, as hath been said [*] afore in the Chapter of Joyntenants. But in the case aforesaid, if tenant for life dyeth in the life of both the joyntenants, they are joyntenants again as they were before.

[*] Vide Sect. 291. (Post. 214. a.)

If two joyntenants be in fee, and the one letteth his part to another for the life of the lessor, and the lessor dieth, some say that his part shall survive to his companion, for by his death the lease was determined. And others hold the contrary; and their reason is, first, for that at the time of his death the joynture was severed, for so long as he lived the lease continued. And secondly, that notwithstanding the act of any one of the joyntenants there must be equall benefit of survivor as to the freehold. But here if the other joyntenant had first died, there had been no benefit of survivor to the lessor without question.

Sect. 304.

AND, if three joyntenants be, and the one release by his deed to one of his companions all the right which he hath in the land (1), *then hath he to whom the release is made, the third part of the lands by force of the said release, and he and his companion shall hold the other two parts in joynture* (et il et son companion teigneront les auters deux parts* en joynture). *And as to the third part, which he hath by force of the release, he holdeth that third part with himselfe and his companion in common.*

* en jointure—jointment, *in L. and M. and Roh.*

(1) In this case the release passes a fee without the word heirs, because it refers to the whole fee which they jointly took and are possessed of by force of the first conveyance. Tenants in common cannot release to each other; for a release supposes the party to have the thing in demand; but tenants in common have several distinct freeholds, which they cannot transfer otherwise than as persons solely seised.—[Note 80.]

UPON this case these two things are to be observed. First, that in this case this release doth enure by way of *mitter l'estate*, and not [*] by way of extinguishment, for then the release should enure to his companion also, and he is in the *per* by him that maketh the release. [*a*] But if he had released to the other two, then had it wrought no degree (A) ☞ but in supposition of law, for many purposes they to whom the release is made (as hath been said) shall be supposed in from the first feoffor, as they shall deraigne the first warrantie for the whole. [*b*] The second thing to be observed is, that he to whom the release is made hath a fee simple without this word (heires), as hath been touched in the first chapter of the first booke, for that he to whom the release is, is seised *per my et per tout*, of the fee and inheritance, as hath been said in the Chapter of Joyntenants. And note, the like law is between coparceners: and further, if there be two coparceners, and the one hath issue twentie daughters and dieth, the other may release to any one of the daughters, her whole part, albeit she to whom the release is, hath not an equall part; but for the privitie and the individed estate, the release is good.

[193. b.]

But if two joyntenants be of twenty acres, and the one maketh a feoffment of his part in eighteene acres, the other cannot release his entire part, but only in two acres, for that the joynture is severed for the residue.

(Post. 318. a. 6 Rep. 78. b. Ant. 185. a.)
[*] 9 Eliz. Dyer, 263. 19 H. 6. 17.
[*a*] 40 E. 3. 41. 13 E. 3. tit. Garr. 35 E. 3. Release, 43. 22 H. 6. 42. 14 E. 3. Briefe, 28. 19 H. 6. 17. 33 H. 6. 5. 28 H. 6. 2. 37 H. 8. Alienation, 33. 8 H. 4. 8. 10 E. 4. 3.
(Post. 385. a.)
[*b*] 9 Eliz. Dyer, 263. 19 H. 6. 17.
(Ante, 9. b.)

Sect. 305.

AND it is to be observed, that sometimes a deed of release shall take effect (que ascun foits † un releas prendra effect), *and enure to put the estate of him which makes the release to him to whom the release is made, as in the case aforesaid, and also, as if a joynt estate be made to the husband and wife, and of* (B) *a third person, and the third person release all his right which he hath to the husband* (sicome joynt estate soit fait a le baron et sa feme, et a la tierce person ‡, et la tierce person relessa tout son droit que il ad ‖ a le baron), *then hath the husband the moitie which the third had, and the wife hath nothing of this. And if in such case the third release* § *to the wife not naming the husband in the release, then hath the wife the moitie which the third had, &c. and the husband hath nothing of this but in right of his wife, because that in this case the release shall enure to make an estate to whom the release is made, of all that which belongeth to him which maketh the release, &c.*

THIS

(A) *There is a semicolon after the word* "degree" *in the twelfth edition, as the sense of the passage seems to require. In the same edition there is a comma after the words* "for many purposes" *as, it appears, there should be.*

(B) "of" *seems to be here inserted for* to. *See Mr. Ritso's Intr. p.* 111.

† un fait et, *added in L. and M. and Roh.*

‡ que *added in L. and M.*

‖ &c. *added in L. and M. and Roh.*

§ *&c.* added in L. and M. and Roh.

THIS is evident upon that which hath been said before. [c] And it is to be understood, that a release may enure four manner of wayes. First, by way of *mitter l'estate*, as here it appeareth. Secondly, by way of *mitter le droit*. Thirdly, by way of extinguishment. Fourthly, by way of creation or inlargement of an estate, as hereafter in this Chapter shall appeare. And it is to be observed, that upon a release that creates or inlargeth an estate, or enures by way of *mitter l'estate*, a rent may be reserved, but not upon a release that enureth by way of *mitter le droit*, or which enures by way of extinguishment.

[c] 10 Eliz. Bendloes. 9 Eliz. Dier, 263. (2 Roll. Abr. 403.) See more of this in the Chapter of Releases. (Post. 273. b.) 10 E. 4. 3. b. 21 H. 6. 8. b. (Ant. 144. a.)

The *(&c.)* in the end of this Section implieth a diversitie ☞ between a release which enures by way of *mitter l'estate* (whereof *Littleton* here speaketh) and a release that enures by way of extinguishment: for of a release enuring by way of extinguishment made to the husband, the wife shall take benefit, or to the wife, the husband shall take benefit, as hereafter shall more at large be said.

[194. a.]

Sect. 306.

AND in some case a release shall enure to put all the right which he who maketh the release hath to him to whom the release is made. As if a man seised of certaine tenements is disseised by two disseisors, if the disseisee by his deed release all his right, &c. to one of the disseisors, then he to whom the release is made, shall have and hold all the tenements to him alone, and shall oust his companion of every occupation of this. And the reason is, for that the two disseisors were in against the law (pur ceo que les deux disseisors fueront eins* encounter la ley), *and when one of them happeth the release of him which hath right of entry, &c. this right in such case shall vest in him to whom the release is made* (cest droit en tiel cas† vestera en celuy a que le releas est fait), *and he is in like plite, as* (A) *he which hath the right had entered and enfeoffed him* (et est en tiel plyte, sicome ‡ il que avoit droit‖ avoit enter, et luy enfeoffa), *&c. And the reason is, for that he which before had an estate by wrong,* scilicet, *by disseisin, &c. hath now by the release a rightful estate*§.

(2 Roll. Abr. 409. 414. Post. 276. a.)

HERE *Littleton* pursueth the second part of his division, viz. where a release shall enure by way of *mitter le droit*.

"*Disseised by two disseisors, &c.*" The like law is, where there be two joynt abators or intruders, which come in meerely by wrong. But if two men do usurpe by a wrongfull presentation to a church, and their clarke is admitted, instituted and inducted, and the rightfull patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in meerely by wrong, but their clarke is in by admission, and institution, which are

(A) *The word* if *seems to be here requisite to the sense of the passage.*

* ses tenements per tort, per eux fait *added in L. and M. and Roh.*

† vestera—vest *in L. and M. and Roh.*

‡ il—sil *in L. and M. and Roh.*

‖ &c. *added:* avoit enter, et *not in L. and M. nor Roh.*

§ *&c.* added in L. and M. and Roh.

are judiciall acts [*d*]. And therefore an usurpation shall worke a *remitter* to one that hath a former right.

[*d*] Fitz. N. B. 35. in 11 R. 2. Quare Imp. 144. (1 Roll. Abr. 661, 662. Post. 368. a. Ant. 180. b. 181. a.)

"*Then he to whom the release is made, shall have and hold all the tenements, &c.*" Here by operation of law presently upon the deliverie of the release the whole freehold and inheritance is vested in him to whom the release is made, and all the state that the other disseisor had, wholly devested: for right and wrong cannot consist together, but the wrongfull estate giveth place to the rightfull. And the reason hereof is for that, as hath been said, the disseisor to whom the release ☞ was made was seised *per my et per tout*, whereunto when the right commeth it excludeth the wrong [*e*]; for right which is lawfull, and wrong that is contrary to law, cannot stand together.

[194. b.]

[*e*] Brit. fol. 116. 26 Ass. pl. 39. 39 E. 3. 29. 21 H. 6. 41. 22 H. 6. 22. 7 E. 4. 25. 9 E. 4. 6. 11 H. 7. 12. 20 H. 7. 5. 21 H. 7. 18. 12 E. 4. tit. Discontin. 1. 9 H. 6. 37. 21 H. 6. 52.

"*In like plite as if he which hath the right had entered and enfeoffed him, &c.*" This *(&c.)* doth implie that this is true *secundum quid* (1), but not *simpliciter* (2); for as to the holding out of the joynt disseisor, it amounts to as much as if he had entered and infeoffed him to whom the release is made, but it doth not amount to an entrie and feoffment *simpliciter* to all purposes, as shall be said hereafter in his proper place in the Chapter of Releases.

Sect. 307.

AND in some case a release shall inure by way of extinguishment, and in such case such release shall aide the jointenant, to whom the release was not made, as well as him to whom the release was made (et en tiel case tiel releas aydera le joyntenant a que le release ne fuit fait, auxybien come † luy a que le release fuit fait). *As if a man be disseised* (sicome ‡ un home soit disseisie), *and the disseisor makes a feoffment to two men in fee,* § *if* ‖ *the disseisee release by his deed to one of the feoffees, this release shall enure to both the feoffees* (donques ¶ cel release urera a ambideux les feoffees), *for that the feoffees have an estate by the law,* scilicet, *by feoffment, and not by wrong done to any, &c.* (3)

HERE *Littleton* speaketh of the third kind of releases. And the reason of this diversitie (implied in the *(&c.)* in the end of

† luy—a celui *in L. and M. and Roh.*

‡ si *added in L. and M. but not in Roh.*

§ if *not in L. and M. or Roh.*

‖ *and* added in L. and M. and Roh.

¶ cel—tiel *in L. and M. and Roh.*

(1) i. e. in some respects;—as to some persons.

(2) i. e. absolutely.

(3) The 42d and 44th chapters of Britton contain much curious learning on the estate of a disseisor, and on the difference of his situation before and after he acquires an established possession, and before and after he acquires a title to his estate, and on the consequential differences of the situation and remedies of the disseisee in these respects.—These chapters throw some light upon Sir Edward Coke's Commentary on this Section.—[Note 81.]

of this Section) between the disseisors and their feoffees, is for that the feoffees comming in by title and purchase are intended in law to have a warrantie (which is much esteemed in law; and therefore lest the warrantie should be avoided, the release shall enure to both the feoffees in favour of purchasers, and so the right and benefit of every one saved. [f] And in antient time if the disseisor had made a feoffment in fee, or a gift in taile, or a lease for life, and the feoffee, donee, or lessee had continued in seisin quietly a yeare and a day, the entrie of the disseisee had not been lawfull upon him; and the reason was, for the benefit and safegard of the warranty (which was intended by law) should have beene destroyed by the entrie. But hereof also more shall be said in his proper place in the Chapter of Releases.

[f] 2 H. 3. Ass. 432. 1 Ass. 13. 9 Ass. 15. 21. 21 Ass. 28. 27 Ass. 68. 32. 29 Ass. 54. 43 Ass. 17. 40 E. 3. 24. 50 E. 3. 21. 3 R. 2. Entry cong. 38. 13 E. 3. tit. Ass. 9. 12 Ass. 20.

(2 Roll. Abr. 400.)

Sect. 308.

IN the same manner it is, if the disseisor maketh a lease to a man for terme of his life, the ☞ remainder over to another in fee, if the disseisee release to the tenant for terme of life all his right, &c. this release shall inure as well to him in the remainder, as to the tenant for terme of life. And the reason is, for that the tenant for life commeth to his estate by course of law, and therefore this release shall enure and take effect by way of evtinguishment of the right of him which releaseth, &c. And by this release the tenant for life hath no ampler nor greater estate than he had before the release made him, and the right of him which releaseth is altogether extinct. And inasmuch as this release cannot enlarge the estate of the tenant for life, it is reason that this release shall enure to him in the remainder, &c. [195. a.]

More shall be said of releases in the Chapter of Releases.

"*THIS release shall inure as well to him in the remainder as to the tenant for terme of life, &c.*" Of this and the rest of this Section, for avoyding of repetition, more shall be said in his proper place in the Chapter of Releases.

"*All his right, &c.*" Here by this (&c.) is implied, title, demand, and other words which may transfer the right, &c. Also here is implyed of in or to the land.

Sect. 309.

ALSO, if two parceners be, and the one alieneth that to her belongeth to another, then the other parcener and the alienee are tenants in common.

This is evident, and needeth no explication.

Sect.

Sect. 310.

(Ant. 114. a.)

*ALSO, * note, that tenants in common may be by † title of prescription, as if the one and his ancestors, or they whose* [195. b.] *☞ estate he hath in one moitie have holden in common the same moitie with the other tenant which hath the other moity, and with his ancestors, or with those whose state he hath undivided‡, time out of minde of man. And divers other manners may make and cause men to be tenants in common, which are not here exprest, || &c.* (1)

OF

* *note that* not in L. and M. or Roh.
† *title of* not in Roh.
‡ *&c.* added in Roh.
|| *&c.* not in Roh.

(1) When lands are given, in undivided shares, to two or more, for particular estates, so as that, upon the determination of the particular estates, in any of those shares, they remain over to the other grantees, and the reversioner or remainder-man is not let in till the determination of all the particular estates, the grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates, are known by the appellation of cross remainders.—These remainders may be raised both by deed and will: in deeds, when the limitations are legal, they can only be created by express words, but in wills, they may be raised by implication.—In the case of Gilbert *v.* Witty, Cro. Jac. 655. it was said by justice Dodderidge, that cross remainders should never be raised, even in wills, by implication, between more than two persons. This doctrine received some countenance from what was said by the courts in the cases of Cole *v.* Levingstone, 1 Ventris, 224. Holmes *v.* Meynell, sir Thomas Raymond, 452. and some other cases. But it seems entirely exploded by the cases of Burden *v.* Burville, B. R. East. Term, 13 Geo. 3. Duke of Richmond *v.* Earl of Cadogan, determined in the court of chancery in May 1773. Wright *v.* Holford, and others, B. R. Easter Term 1774, Cowp. 31. and some other subsequent cases. It seems however to be admitted in these cases, that, to raise cross remainders between more than two, stronger implication is required, than to raise them between two only.—This general outline of the doctrine of the raising cross remainders by implication, is supported by the late cases of Atherton *v.* Pye, 4 Durn. & East, 710. Doe *v.* Cooper, 1 East, 229. Watson *v.* Foxon, 2 East, 36. —And see Mr. serj. Williams's note, 1 Saund. 185. c. But where the expressions, supposed to import cross remainders, arise on limitations of equitable estates, particularly if they arise in directions for a settlement, or in any other trusts of an executory nature, cross remainders may be raised by implication in deeds, in the same manner as in wills. Green *v.* Stephens, 17 Ves. jun. 64. and the case of the Duke of Richmond *v.* Earl of Cadogan, there cited. In the limitations of cross remainders, two circumstances particularly should be attended to; one, that the clauses by which they are created, should not be so expressed, as to make it necessary, that the party taking under them should be alive at the time of the decease and failure of issue of the other.—The case of Watts *v.* Wainwright, 5 Durn. and East, 427. is important upon this head, —In that case there was a limitation by deed "to such child or children, that "Mary Abell should thereafter have, as tenants in common, if more than "one, in tail general; and, in case any such child or children should die without

"out

11 E. 3. Trans. 212. 13 E. 3. Briefe, 674. 8 H. 6. 16. b. Lib. intrat. 23.

OF this, besides *Littleton*, there is as good authoritie in law, as there is for all his other cases throughout his three bookes; but joyntenants cannot be by prescription, because there is survivor between them, but not between tenants in common.

The two (*&c.*) in this Section are evident.

Sect. 311.

ALSO, in some case tenants in common ought to have of their possession several actions, and in some cases they shall joyne in one action (2). *For if two tenants in common be, and they be disseised, they must have* ‡ *two assises, and not one assise; for each of them ought to have one assise of his moity, &c. And the reason is, for that the tenants in common were seised, &c. by severall titles. But otherwise it is of jointenants; for if twenty jointenants be, and they be disseised, they shall have in all their names but one assise, because they have not* (A) *but one joynt title* (pur ceo que ils n'ont forsque un joynt title).

IN

(A) *The word "not" should be left out, as this mode of expression, though good in French, does not suit the idiom of the English language. See Mr. Ritso's Intr. p.* 111.

‡ *against the disseisor* added in Roh.

"out issue of his, her, or their body or bodies issuing, then the part or parts "of him, her, or them so dying without issue, should go and remain to the "use of the surviving child or children of the said Mary Abell, and the heirs "of his, her, or their respective bodies issuing: And so, *toties quoties*, as any "of the said children should die without issue, till there should be only one "child left: And in case all the said children should die without issue, or, "if the said Mary Abell should have no issue of her body, then, to the use of "Robert Abell, his heirs and assigns for ever." Mary Abell married Mr. John Wainwright, and died leaving three children, John, Mary and Robert. Mary married Mr. Watts, and died leaving issue, an eldest son, and two other children. John married, and afterwards died without issue. The question was, Whether, as Mary died in her brother's life-time, and consequently did not at his decease sustain the description of a surviving child, her eldest son became entitled to a share of John's third part?—The court thought the word "surviving" was referrible, not only to the children, but, to the whole line of the heirs of their bodies; and, upon that ground, held the eldest son entitled. In Foquett *v.* Worsley, 1 East, 416, the general doctrine, that, in deeds, cross remainders can only be raised by proper words of limitation, was confirmed. Another circumstance to be attended to in these limitations, is, that they should be so expressed, as to pass, not only the original share of the party, but the shares surviving or accruing to him, or his issue, on the decease, and failure of issue of any other of them. For the surviving or accruing share may be considered as a distinct limitation, and may consequently be thought not to remain over, unless this is signified. The same observations apply to the trusts of personal estate. On the last head, see Perkins *v.* Micklethwaite. 1 Peere Williams, 274. and the cases there collected by Mr. Cox.—[Note 82.]

(2) The reader will find what Littleton and his commentator say on this subject confirmed and exemplified by the cases cited in Viner and Bacon's Abridgments, and Comyn's Digest, under the proper Titles.

IN this Section we learne two things: first, that in reall actions, and in actions also that are mixt with the personalty, tenants in common shall sever in action, because they have several freeholds, and claime in by severall titles; and therefore as they shall be severally by others impleaded, so shall they severally implead others in all real and mixt actions, unlesse it be in case of necessity for a thing entire, as hereafter in this Chapter shall appeare. And *Littleton* here putteth the case of the assise which is mixt with the personaltie, and therefore he needeth not to put any case of any *præcipe quòd reddat*; for if it be so in case of assise, *à fortiori* in writs of higher nature, which is necessarily implyed in the *(&c.)* Now of suits that sound in the realty, and of personall actions, *Littleton* speaketh hereafter in this Chapter. The second thing here to be learned, is the diversitie between tenants in common and joyntenants, which both of it selfe, and upon that which hath been said, is apparent.

(Post. 200. Cro. Jac. 231. Noy. 13. Post. Litt. Sect. 314.)

4 E. 4. 18. b. (Ante 180. b.)

[196. a.] ☞ Sect. 312.

(Noy, 13. Ante 193.)

*ALSO, if three joyntenants be, and one release to one of his fellowes all the right which he hath, &c. and after the * other two be disseised of the whole, &c. in this case the two others shall have † several assise, &c. in this manner, viz. they shall have in both their names an assise of the two parts, &c. because the two parts they held jointly at the time of the disseisin. And as to the third part, he to whom the release was made, ought to have of that an assise in his own name, for that he (as to the same third part) is thereof tenant in common* (pur ceo que ‡ il (quaunt a meme le tierce part) est de ceo tenant in common), *&c. because he commeth to this ‖ third part by force of the release, and not only by force of the joynture.*

This is put for an example (which ever doth illustrate the rule) and is evident of itselfe, and the *(&c.)* in this Section needeth no further explication.

Sect. 313.

(Ante 164. a.) (8 Rep. 86. b.)

ALSO, to the suing of actions which touch the realty (quant a suer des actions que touchant § le realty), *there be diversities between parceners which are in by divers descents, and tenants in common. For if a man seised of certain land in fee hath issue two daughters and dyeth, and the daughters enter, &c. and each of them hath issue a son, and die without partition*

* *other* not in Roh.
† *&c.* added in Roh.
‡ il *not in Roh.*
‖ *third* not in Roh.
§ en *added in Roh.*

partition made between them (car si ¶ home seisie de certaine terre en fee ad issue deux ** files †† et morust, et les files entront, &c. et chescun de eux ad issue un fits, et devieront sauns partition fait enter eux), *by which the one moity descends to the son of the one parcener, and the other moity descends to the* ☞ *son of the other parcener, and they enter and occupie in common and be disseised,* [196. b.] *in this case they shall have in their two names one assise, and not two assises. And the cause is, for that albeit they come in by divers descents, &c. yet they are parceners, and a writ of partition lieth between them. And they are not parceners, having regard or respect only to the seisin and possession of their mothers* (eyant regarde ou respect tantsolement a * le seisin et possession de lour meres), *but they are parceners rather, having respect to the estate which descended from their grandfather to their mothers, for they cannot be parceners if their mothers were not parceners before, † &c. And so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a title in parcenarie, the which makes them parceners. And also they are but as one heire to their common ancestor, viz. to their grandfather, from whom the land descended to their mothers. And for these causes, before partition between them, &c. they shall have an* (B) *assise, although they come in by severall descents* ‡.

(Ante 164. a.) Vide Sect. 241.

This, upon that which hath been said in the Chapter of Parceners, is evident: where you may reade excellent points of learning, and diversities concerning this matter; all which are here either expressed or implyed, as the studious and diligent reader will observe.

Sect. 314.

ALSO, if there be two tenants in common of certaine land in fee, and they give this land to a man in taile, or let it to one for terme of life, rendring to them yearely a certaine rent, and a pound of pepper, and a hawke or a horse, and they be seised of this service, and afterwards the whole rent is behind, and they distraine for this, and the tenant maketh rescouse. In this case as to the rent and pound of pepper they shall have two assises, and as to the hawke or the horse but one assise. And the reason why they shall have two assises as to the rent and pound of pepper is this, insomuch as they were tenants in common in severall titles, and when they made a gift in taile or lease for life, saving to them the reversion, and rendering to them a certaine rent, &c. such reservation is incident to their reversion; and for that their reversion is in common, and by severall titles, as

(B) an *seems to be here inserted for* one. *See Mr. Ritso's Intr. p.* 111.

¶ home—deux parceners *in Roh.*
** files—fites *in Roh.*
†† et morust, et les files entront, &c. et chescun de eux ad issue un fits, *not in Roh.*
* le—lour *in Roh.*
† *&c.* not in Roh.
‡ *&c.* added in Roh.

as their possession was before the rent and other things which may be severed, and were reserved unto them upon the gift, or upon the lease, which are incidents by the law to their reversion, such things so reserved were of the nature of the reversion. And in as much as the reversion is to them in common by severall titles, it behoveth that the rent and the pound of pepper, which may be severed, be to them in common, and by severall titles. And of this they shall have two assises, and each of them in his assise shall make his plaint of the moitie of the rent, and of the moitie of the pound of pepper. But of the hawke or of the horse, which cannot be severed, they shall have but one assise, for a man cannot make a plaint in an assise of the moitie of a hawke, nor of the moitie of a horse, &c. In the same manner it is of other rents and of other services which tenants in common have in grosse by divers titles, &c.

"*IN this case as to the rent and pound of pepper, they shall have two assises, and as to the hawke or the horse but one assise.*"

But for the better understanding hereof it is to be

[197. a.] known, that if two ☞ tenants in common be, and they grant a rent of 20 shillings *per annum* out of their land, the grantee shall have two rents of 20 shillings, for that every man's grant shall be taken most strongly against himselfe, and therefore they be several grants in law. (Ante 147. b.) Pl. Com. Hill & Grange's case, 171. Vide Sect. 219. (5 Rep. 7. b.) Plowd. 289. b.)

But if they two make a gift in taile, a lease for life, &c. reserving twenty shillings rent to them and their heires, they shall have but one 20 shillings, for they shall have no more than themselves reserved: and the donee or lessee shall pay but 20 shillings according to their own expresse reservation: and albeit the reservation of rents severable be in joynt words, yet in respect of the several reversions the law make thereof a severance. Now for the rent, as namely 20 shillings or a pound of pepper may be severed, the one tenant in common may have an assise for the moity of 20 shillings, and the moitie of a pound of pepper, *de medietate unius libr' piperis*, but he cannot have an assise of ten shillings, or *de dimidio libræ piperis*. But for the hawke or horse, albeit they be tenants in common, they shall joyne in an assise, for otherwise they should be without remedie, for one of them cannot make his plaint in assise of the moitie of a hawke, or of a horse, for the law will never suffer any

[197. b.] man to demand any thing against the order of ☞ nature or reason, as before it appeareth by *Littleton*, Section 129. *Lex enim spectat naturæ ordinem.* Also the law will never enforce a man to demand that which he cannot recover, and a man cannot recover [*l*] the moytie of a hawke, horse, or of any other entire thing; *Lex neminem cogit ad vana, seu inutilia.* But in that case they shall joyne in an assise, and the reason is, *Ne curia Domini Regis deficerit in justitiâ exhibendâ*, or *Lex non debet deficere conquerentibus in justitiâ exhibendâ.* And if they should not joyne, they should have *damnum et injuriam*, and yet should have no remedie [*] by law, which should be inconvenient, but the law will, that in every case where a man is wronged, and endammaged, that he shall have remedie. *Aliquid conceditur ne injuria remanerit impunita quod aliàs non concederetur.*

[*m*] And tenants in common shall joyne in a *quare impedit*, because the presentation to the advowson is entire.

Vide 16 Ass. pl. 1. 16 E. 3. Joyndre en action, 27.

Regula. Vide Sect. 129.

[*l*] Lib. 5. fo. 21. Regula. (2 Cro. 159. Ante 137. a. Hob. 43. 267.)

[*] 3 E. 3. 19. a. (1 Roll. Abr. 107. Noy, 184. Ante 137. 2 Rep. 68.)

38 E. 3. 35. Regula.

[*m*] 5 H. 7. 8. 13 E. 2. Quare imp. 170. 33 H. 6. 11. 6 E. 4. 10. 15 E. 3. Darr. presentment, 10.

Also

[n] 6 H. 4. 6, 7. 45 E. 3. 10. 30 H. 6. Ass. 39. 18 E. 3. 56. (Moor, 184. 1 Roll. Rep. 243.)

[n] Also tenants in common of a seigniory shall joyne in a writ of right of ward, and ravishment of ward for the bodie, because it is entire.

If two tenants in common be of the wardship of the bodie, and one doth ravish the ward, and the one tenant in common releases to the ravisher, this shall go in benefit of the other tenant in common, and he shall recover the whole, and this release shall not be any bar to him. And so it is if two tenants in common be of an advowson, and they bring a *quare impedit*, and the one doth release, yet the other shall sue forth, and recover the whole presentment.

Two tenants in common shall joyne in a detinue of charters, and if the one be nonsuit, the other shall recover.

18 E. 3. 56. It is said that tenants in common shall joyne in a *Warrantia Chartæ*, but sever in voucher.

"*Moitie of a horse, &c.*" Here is implyed or any other entire rent or service.

"*By divers titles, &c.*" That is by severall titles, and not by one joynt title, as hath beene said.

Sect. 315.

ALSO, as to actions personals tenants in common may have such actions personals joyntly in all their names, as of trespasse (* sicome de trespas), *or* † *of offences which concerne their tenements in common, as for breaking their houses, breaking their closes, feeding, wasting, and defowling their grasse, cutting their woods, for fishing in their pischary* (sicome de bruser ‡ lour measons, ‖ de enfreinder de lour closes, de pasture, degaster, et de fouler § des herbes, de couper lour bois, ** de pischer en lour pischarie), *and such like. In this case* (†† Et en cest cas) *tenants in common shall have one action joyntly, and shall recover joyntly their damages, because the action is in the personalty, and not in the realtie,* ‡‡ *&c.*

29 E. 3. 51. 43 E. 3. 24. 46 E. 3. 27. 5 H. 4. 3. 14 H. 4. 31. 3 H. 6. 57. 12 H. 6. 22. 22 H. 6. 14. 18 E. 4. 30. 2 R. 3. 16. 10 H. 7. 27. 21 H. 7. 22. 37 H. 6. 35. 21 E. 4. 12. (1 Sid. 157. Cro. Jac. 231. 1 Sid. 49. 2 Roll. Abr. 91. 10 Rep. 134. a.)

"*MAY have such actions personals joyntly in all their names, &c.*" By this ☞ it appeareth that tenants in common shall have personall actions joyntly. [198. a.] And it is to be observed, that where damages are to be recovered for a wrong done to tenants in common, or parceners in a personall action, and one of them die, the survivor of them shall have the action; for albeit the property or estate be severall between them, yet (as it appeareth here by *Littleton*) the personal action is joynt.

"*And*

* sicome—cest assavoir *in Roh.*
† *of* not in Roh.
‡ de *added in Roh.*
‖ de *not in Roh.*
§ des—de lour *in Roh.*
** et *added in Roh.*
†† Et *not in Roh.*
‡‡ *&c.* not in Roh.

"*And such like.*" Hereby is implied a diversity between a chattel in possession, and a personall *chose* in action belonging unto them. As if two tenants in common be of land, and one doth a trespasse therein, of this action they are jointenants, and the survivor shall hold place. So it is if two tenants in common be of a mannor, and they make a bailife thereof, and one of them dieth, the survivor shall have the action of account, for the action given unto them for the arrerages upon the account was joint. So it is if two tenants in common sow their land, and one doth eate the same with his cattle, though they have the corne in common, yet the action given to them for trespasse in the same is joynt, and shall survive. For the trespasse and damage done to them was joynt, all which here is implyed by *Littleton*, who saith, that they shall have an action joyntly, and the same law is of coparceners.

Vide Sect. 319, 320, 321.

(2 Cro. 19.) 22 H. 6. 12. 38 E. 3. 7. 13 E. 3. Account, 126. 45 E. 3. 13, 14. 37 H. 6. 32, 38. (1 Noy, 135. 2 Roll. Abr. 90.) Moor, 40. 71.) 667.)

But if two tenants in common be of goods, as of an horse or of any other goods personall, there if one dye, his executors shall be tenant in common with the survivor.

(Post. 200. a. 7 Rep. Hall's case, sub fin. 10 Rep. 134.

Ante 185.) 38 E. 3. 5. 17 E. 3. 11. 3 H. 5. Quare Imp. 71. 14 H. 4. 12. 9 H. 6. 30. 22 H. 4. 14. 37 H. 6. 9. b. 10 Eliz. Dyer, 279. F. N. B. 35. 9 E. 3. 36, 37. Pl. Com. Seignior Barcley's case.

"*And not in the realtie, &c.*" If two tenants in common be of an advowson, and a stranger usurpe, so as the right is turned to an action, and they bring a writ of *Quare impedit* which concernes the realtie, the sixe months passe, and the one dyeth, the writ shall not abate, but the survivor shall recover, otherwise there should be no remedie to redresse this wrong. And so it is of coparceners, and this is one exception out of our author's rule.

[a] But if three coparceners recover land and damages in an assise of *Mordancester*, albeit the judgement be joynt, that they shall recover the land and damages, yet the damages being accessory, though they be personall, do in judgement of law depend upon the freehold being the principal, which is severall. And though the words of the judgement be joint, yet shall it be taken for distributive. And therefore if two of them dye, the entire damages do not survive, but the third shall have execution according to her portion; and this is another exception out of our author's rule. But if all three had sued execution by force of an *Elegit*, and two of them had dyed, the third should have had the whole by survivor, till the whole damages be paid.

[a] 14 E. 3. Execution, 75. 45 E. 3. 3. b. (5 Rep. 7. 2 Roll. Abr. 86. 3 Rep. 14. b. Ante 154. b. 1 Roll. Abr. 888.)

If the aunt and niece join in an action of waste, for waste done in the life of the other sister, the aunt shall recover the damages only, because the same belongs not by law to the niece. And some hold the damages in that case to be the principall.

45 E. 3. 3. b. 48 E. 3. 14. 11 H. 4. 16. b. 35 H. 6. 23. b. 11 E. 2. Wast. 115. 2 Cro. 19. Ante 53. b.

Sect. 316.

(Cro. Jac. 231. 1 Sid. 49.)

[198. b.] *ALSO, if two tenants in common make a lease of their* ☞ *tenements to another for terme of yeares, rendring to them a certaine rent yearely during the terme, if the rent be behind, &c. the tenants in common shall have an* (A) *action of debt*

(A) *an* seems to be here inserted for *one*. See Mr. Ritso's Intr. p. 111.

debt against the lessee, and not divers actions, for that the action is in the personalty (pur ceo que l'action est en * la personalty).

This upon that which hath been said is evident.

Sect. † 317.

BUT in an avowry for the said rent they ought to sever, for this is in the realty, as the assise is above.

Vid. 9. 3. 36,37. Pl. Com. Seignior Barkley's case.

This being an addition to *Littleton*, albeit it be consonant to law yet I omit it.

(Stat. 32 H. 8. Ante 167. a. 187. a.)

Sect. 318.

ALSO, tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the law (coment que ils ‡ ne serront compelles de faire partition per la ley); *but if they make partition betweene themselves by their agreement and consent, such partition is good enough, as is adjudged in the book of assises* ‖.

*Vid. Sect. 259. 290. 247. 264. 19 Ass. p. 1. 30 Ass. p. 8. 47 E. 3. 22.

Of this sufficient hath beene said in * the Chapter of Parceners and Joyntenants.

"*In the book of assises.*" This booke is of great authoritie in law, and is so called because it principally containeth the proceedings upon writs of assise of *novel disseisin*, which in those dayes was *festinum et frequens remedium.*

Sect. 319.

ALSO, as there be tenants in common of lands and tenements, &c. as aforesaid, in the same manner there be of chattells reals and personals (sicome y sont tenants en common de terres et tenements, &c. come est avantdit, en mesme le manner y sont § de chattels reals et personals). *As if a lease be made* (sicome ** lease soit fait) *of certaine lands to two men for terme of* 20 *yeares, and when they be of this possessed, the* ☞ *one of the lessees grant that which to him belongeth to another during the terme, then he to whom the grant is made and the other shall hold and occupie in common.* [199. a.]

"*GRANT*

* la *not in L. and M. or Roh.*

† No part of this Section in L. and M. or Roh.

‡ ne *not in Roh. but in L. and M.*

‖ *&c.* added in L. and M. and Roh.

§ possessions et proprietors *added in L. and M. and Roh.*

** si *added in L. and M. and Roh.*

"*GRANT that which to him belongeth.*" The same law it is if the one lessee in this case make a lease for part of the terme, the second lessee and the other are tenants in common, as hath been said in the Chapter of Joyntenants (B). The *(&c.)* in this Section, implyeth other hereditaments whereof men may be tenants in common, whereof sufficient hath been said before. Vide Sect. 315. (Cro. Eliz. 33. Ante 192. a.)

(B) *The same case is also mentioned ante* 192. *a.*

Sect. 320.

*ALSO, if two * have † joyntly the wardship of the body and land of an infant within age, and the one of them grant to another that which to himselfe belongeth of the same ward, then the grantee, and the other which did not grant, shall have and hold this in common, &c.*

HEREBY it appeareth, that there may be tenants in common as well of chattels reall entire, as wardship of the body, &c. as of chattels personal, as a hawke or a horse. If two tenants in common be of a seigniory, and a ward fall, they are tenants in common of the wardship aswel of the body as land. And so it is if the land it selfe escheat to them, they shall be tenants in common thereof, and so it is of parceners. 16 E. 3. tit. Aid.

"*In common, &c.*" Here *(&c.)* implyeth any other entire chattell. Vide devant, Sect. 315.

Sect. 321.

IN the same manner it is of chattels personals. As if two have ‡ joyntly by gift or by buying a horse or an oxe, &c. and the one grant that to him belongs ‖ of the same horse or oxe to another, the grantee, and the other which did not grant, shall have and possess such chattels personals in common §. And in such cases, where divers persons have chattels real or personall in common ¶, and by divers titles, if the one of them dieth, the others which survive shall not have this as survivor, but the [199. b.] *☞ executors of him which dieth shall hold and occupie this with them which survive, as their testator did or ought to have done in his life time, &c. because that their titles and rights in this were severall, &c.*

This is evident enough, and hereof sufficient hath been said before. Vide devant, Sect. 315.

Sect.

* *joyntenants* added in L. and M. and Roh.

† *joyntly* not in L. and M. or Roh.

‡ *joyntly—a joynt estate*, in L. and M. and Roh.

‖ *of the same horse or oxe* not in L. and M. or Roh.

§ *&c.* added in L. and M. and Roh.

¶ *&c.* added in L. and M. and Roh.

Sect. 322.

ALSO, in the case aforesayd, as if two have an estate in common for terme of yeares, &c. the one occupy all, and put the other out of possession and occupation, he which is put out of occupation shall have against the other a writ of ejectione firmæ *of the moietie, &c.*

Sect. 323.

IN the same manner it is where two hold the wardship of lands or tenements during the nonage of an enfant, if the one oust the other of his possession, he which is ousted shall have a writ of ejectment de gard *of the moitie, &c. because that these things are chattels reals, and may be apportioned and severed, &c. but no * action of trespasse* (videlicet) Quare clausum suum fregit, et herbam suam, &c. conculcavit, et consumpsit, &c. et hujusmodi actiones, &c. *the one cannot have against the other, for that each of them may enter and occupie in common, &c.* per my et per tout, *the lands and tenements § which they hold in common. But if two be possessed of chattells personalls in common by divers titles, as of a horse, an oxe, or a cowe, &c. if the one take the whole to himselfe out of the possession of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, &c. when he can see his time* (quant † il poet veier son temps), *&c. In the same manner it is of chattels realls, which cannot be severed, as in the case aforesaid, where two be possessed of the wardship of the bodie of an infant within age, if the one taketh the infant out of the possession of the other, the other hath no remedie by an action by the law, but to take the infant out of the possession of the other when he sees his time ‡.*

(Sid. 49.) "*FOR terme of yeares, &c.*" For one yeare, halfe a yeare, &c.

(Hob. 120. Plo. 247. Sid. 33. Mo. 123. 375.) "*The one occupy all, and put the other out of possession.*" These are words materially added, for albeit one tenant in common take the whole profits, the other hath no remedie by law against him, for the taking of the whole profits is no ejectment (1): But if he drive out of the land any of the cattell of the other tenant

* *such* added in L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.
† il *not in L. and M. or Roh.*
‡ *&c.* added in L. and M. but not in Roh.

(1) But now, by the stat. of the 4th of Ann. chap. 16. sect. 27. actions of account may be maintained by one jointenant and tenant in common, his executors and administrators, against the other, as bailiff, for receiving more than comes to his share and proportion, and against the executors and administrators of such jointenant or tenant in common; and the auditors appointed by the

tenant in common, or not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have *ejectione firmæ*, for the one moitie, and recover damages for the entrie, but not for the meane profits. (1 Roll. Abr. 741 Noy 14.) (Cro. Jac. 611.)

"*Ejectione firmæ of the moitie, &c.*" Here by this and the other (*&c.*) in these two Sections, are to be understood divers diversities between actions which concerne right and interest, (as of *ejectione firmæ*, *ejectment de gard*, *quare ejecit infra terminum* of a chattell real upon an expulsion or ejectment) and actions concerning the bare taking of the profits rising off the land or doing of trespasse upon the land, as here by the examples do appeare, for the right is severall, and the taking of the profits in common. The second diversity is between (2 Rep. 68. F. N. B. 197.) 21 E. 4. 11. 22. 43 E. 3. 24. 45 E. 3. 13.

[200. a.] ☞ chattels reals that are apportionable or severable, as leases for yeares, wardship of lands, interest of tenements by *elegit*, statute merchant, staple, &c. of lands and tenements, and chattels reals entire, as wardship of the body, a villeine for yeares, &c. for if one tenant in common take away the ward, or the villeine, &c. the other hath no remedie by action, but he may take them again. Another diversitie is between chattells realls and chattells personalls, for if one tenant in common take all the chattells personalls, the other hath no remedy by action, but he may take them again; and herein the like law is concerning chattells realls entire, and chattells personall for this purpose. But of chattels entire, as of a sheep, horse, or any other entire chattell, reall or personall, no survivor shall be between them that hold them in common: and tenants in common shall not joyne in an *ejectione firmæ*, nor in a writ of *ejectment de gard*, or a *quare ejecit infra terminum*, *&c.* for that these actions concerne the right of lands which are severall.

22 H. 6. 50. 58. 8 H. 6. 17. 19 H. 6. 57. 32 H. 6. 16. 2 E. 4. 23. 14 E. 4. 8. 18 E. 4. 30. 37 H. 6. 33. 21 E. 3. 29. 12 Ass. 28. 47 E. 3. 22. b. 10 H. 7. 16. F. N. B. 117. a. 17 E. 2. Account, 122. (Ant. 198. a.) 10 H. 4. Trespas, 178. 11 H. 4. 3. (Sir Tho. Ray. 15. 1 Lev. 29.

21 E. 4. 11, 12. (Ant. Sec. 311. & fol. 197. b.)

If two tenants in common be of a mannor, to the which waife and stray doth belong, a stray doth happen, they are tenants in common of the same, and if the one doth take the stray, the other hath no remedie by action, but to take him againe. But if by prescription the one is to have the first beast happening as a stray, and the other the second, there an action lieth if the one take that which pertaines to the other. 13 E. 3. Briefe, 674. (2 Roll. Abr. 566.)

If two tenants in common be of a dove-house, and the one destroy the old doves, whereby the flight is wholly lost, the other tenant in common shall have an action of trespasse, *quare vi et armis columbare le pl' fregit et ducentas columbas pretij.* 40 *s. interfecit, per quod volatum columbaris sui totaliter amisit:* for the whole flight is destroyed, and therefore he cannot in 47 E. 3. 22. b.

[200. b.] ☞ bar plead tenancie in common. And so it is if two tenants in common be of a parke, and one destroyeth all the deer, an action of trespasse lieth. 4 E. 3. Trespas, 233.

[c] If two tenants in common be of land, and of mete stones, *pro metis et bundis*, and the one take them up and carrie them away, the other shall have an action of trespasse *quare vi et armis* against [c] 1 H. 5. 1. 2 H. 5. 3.

the court, where such action shall be depending, are empowered to administer an oath, and examine the parties touching the matters in question, &c. See also 1 Leo. 219.—[Note 83.]

against him, in like manner as he shall have for the destruction of doves.

[d] 13 E. 3. Trespas, 212. 19 R. 2. Br. 927. 11 E. 3. Trespas, 212. Vid. 18 H. 6. 5.

[d] If two tenants in common be of a folding, and the one of them disturbe the other to erect hurdles, he shall have an action of trespasse *quare vi et armis* for this disturbance.

[e] 13 H. 7. 26.

[e] If two severall owners of houses have a river in common between them, if one of them corrupt the river, the other shall have an action upon his case.

[f] F.N.B. 127. Reg. 163. (Ant. 54. b.)

[f] If two tenants in common, or jointenants, be of an house or mill, and it fall in decay, and the one is willing to repaire the same, and the other will not, he that is willing shall have a writ *de reparatione faciendâ*; and the writ saith, *ad reparationem et sustentationem ejusdem domûs teneantur*; whereby it appeareth, that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men.

17 E. 2. tit. Account, 22. 8 E. 2. Account, 115. 30 E. 1. Account, 127. 45 E. 3. 10. 47 E. 3. 22. b. 38 E. 3. 9. 22 E. 3. 60. 3 E. 3. 27. 39 E. 3. 7. 82. F. N. B. 118. I. 10 H. 7. 16. 2 E. 4. 25. (Ant. 172. a. F. N. B. 118. 1 Roll. Abr. 118. 2 Inst, 379.) W. 3. ca. 23.

If one jointenant or tenant in common of land maketh his companion his baylife of his part, he shall have an action of account against him, as hath been said. But although one tenant in common or jointenant without being made baylife take the whole profits, no action of account lieth against him; for in an action of account he must charge him either as a guardian, baylife, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailife. And therefore all those bookes which affirm that an action of account lieth by one tenant in common, or jointenant, against another, must be intended when the one maketh the other his bailife, for otherwise never his baylife to render an account is a good plea.

If there be two tenants in common of a wood, turbarie, pischarie, or the like, and one of them doth wast against the will of his companion, his companion shall have an action of wast, and he that did the wast before judgement, hath election either to take his part in certaintie by the sherife and the oath of men, &c. or that he grant, that from thenceforth he shall not do wast but according to his portion, &c. and if he make choice of a certain place, then the place wasted shall be assigned to him. [g] But this extends not to coparceners, because they were compellable to make partition by the common law: and this, as it is said, doth extend as well to tenants in common and joyntenants for life, as to an estate of inheritance. But if one tenant in common, or joyntenant of a dove-house destroy the whole flight of doves, no action of wast doth lie in that case upon the said statute, * as some do hold.

[g] 27 H. 8. 13. 21 E. 3. 29. 29 E. 3. 39. 3 E. 2. Wast. 35. F. N. B. 59. D. F. N. B. 49. I.

* 47 E. 3. 22. 50 E. 3. 3.

If lands be given to two, and to the heires of one of them, and the tenant for life doth wast, he that hath the inheritance shall have no action of wast by the statute of *Gloucester*, but upon the statute of *W.* 2. he shall have an action of wast. And it is to be known, that one tenant in common may infeoffe his companion, but not release, because the freehold is severall. Joyntenants may release, but not infeoffe, because the freehold is joynt; but coparceners may both infeoffe and release, because their seisin to some intents is joynt, and to some severall (1).

10 E. 4. 3 b. 22 H. 6. 42. 21 E. 3. 47. 17 E. 3. 47. 18 E. 4. 27. 28 E. 3. 4. (2 Inst. 403. 11 Rep. 49. Ant. 53. b. F. N. B. 59. D. 2 Roll. Abr. 86. 403. Ant. 186. b. Post. 335. a.)

Sect.

(1) *M.* 26 & 27 *Eliz. per cur. If one coparcener in tail levies a fine to another* sur conusans de droit, &c. *it does not enure by way of release, but by way of grant, and it will be a discontinuance and alteration of the estate without execution,*

Sect. 324.

*ALSO, when a man * will shew a feoffement made to him, or a gift in taile, or a lease for life of any lands or tenements, there he shall say, by force of which feoffement, gift, or lease, he was seised, &c. but where one will plead a lease or grant made to him of a chattell real or personal, then he shall say, by force of which he was possessed, &c.*

More shall be said of tenants in common in the Chapters of Releases † and Tenant by Elegit.

"*HE was seised, &c.*" *Seisin* is a word of art, and in pleading is only applied to a freehold at least, as *possessed* for distinction sake is to a chattell reall or personall.

[201. a.] ☞ As if *B.* plead a feoffement in fee, he concludeth, *virtute cujus prædict.*' B. *fuit seisitus, &c.* But if he plead a lease for yeares, he pleadeth, *virtute cujus prædictis* B. *intravit, et fuit inde possessionatus*; and so of chattells personalls, *virtute cujus fuit inde possessionatus.* (Plowd. Com. 503. a. Post. 303. a. Plowd. 149. b. Post. 310. b. Noy, 26.)

And this holdeth not only in case of lands or tenements which lie in liverie, but also of rents, advowsons, commons, &c. and other things that lie in grant, whereof a man hath an estate for life or inheritance.

Also when a man pleads a lease for life, or any higher estate which passeth by liverie, he is not to plead any entrie, for he is in actuall seisin by the liverie it selfe. Otherwise it is of a lease for yeares, because there he is not actually possessed untill an entrie.

CHAP.

* *in pleading* added in L. and M. and Roh.

† *and Confirmations* added in L. and M. and Roh.

execution, because one parcener may enfeoff another, and this is a feoffment of record. But one may release to another, and it enures per mitter le droit.—Ld. Nottingh. MSS.—[Note 83†.]

Chap. 5. Of Estates upon Condition. Sect. (1) 325.

ESTATES which men have in lands or tenements * *upon condition are of two sorts* (sont † de deux maners), *viz. either they have estate upon condition in deed (scilicet,* ‡ ou ils ont estate sur condition en fait), *or upon condition in law,* ‖ *&c. Upon condition in deed is, as if a man by deed indented enfeoffes another in fee* § *simple, reserving to him and his heires yearely a certaine rent payable at one feast or divers feasts* per annum, *on condition that if the rent be behind, &c. that it shall be lawfull for the feoffor and his heires into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, &c. that then it shall be lawfull to the feoffor and his heires to enter, &c.* (Sur condition en fait est, sicome un home per fait endent enfeoffa un a uter en fee simple, reservant a luy et a ses heires annualment certaine rent payable a un feast ou a divers feasts per an, sur condition que si le rent soit aderere, &c. que bien list al feoffor et a ses

* *upon condition* not in L. and M. or Roh.
† de—en *in L. and M. and Roh.*
‡ ou *not in L. and M. or Roh.*
‖ *&c.* not in L. and M. or Roh.
§ *simple* not in L. and M. or Roh.

(1) *The doctrine of conditions* is derived to us from the feudal law. The rents and services of the feudatory are mentioned by feudal writers, as conditions annexed to his fief. If he neglected to pay his rent, or perform his service, the lord might resume the fief. But the payment of rent and the performance of feudal service were, for a long period of time, the only conditions that could be annexed to a fief; and, the latter, whether expressed or not, was always presumed by the law;—being incident to, and inseparable from, the estate of the feudatory.—In this sense they are called conditions in law, or implied conditions.—Afterwards, when other conditions were introduced, the estates to which they were annexed were ranked among improper fiefs.—See Sir Thomas Craig, *De Jure Feudali, lib.* 2. *dieg.* 4. *sect.* 1, 2, 3. Conditions of this last sort were called express, or conventionary conditions. By an application, in some respects very much forced, of the original principle of conditions, that, on the non-performance of them, the lord might resume his fief, conditional fees at common law, and some other modifications of landed property, were introduced as estates upon condition. These are often of such a nature, as to make it more natural that a stranger should have the estate on the non-performance of the condition, than the donor:—and, that the lord, instead of being confined to his right of resumption, should have it in his power to compel the performance of the condition, or recover from the donee a compensation, or satisfaction, for the breach of it. But, as all these estates were introduced as estates upon conditions, the law, where it still considers them as conditions, and except where it has been altered by act of parliament, confines the donor's remedy to the resumption of the estate, and gives that remedy only to the donor and his heirs.—Considered in this sense, the word Condition has, in our law, a much more contracted meaning than it has in the civil law; where it signifies, generally, all those pactions, or agreements, which regulate that which the contractors have a mind should be done, if a case, which they foresee, should come to pass. This is the definition of Domat, *lib.* 1. *tit.* 1. *sect.* 4.—[Note 84.]

a ses heires en mesmes les terres ou tenements de entrer, &c. Ou si terre soit alien a un home en fee rendant a luy certaine rent, &c. (A) et s'il happa que le rent soit aderere per un semaigne apres ascun jour de payment de ceo, ou per un mois apres ascun jour de payment de ceo, ou per ** un demy, &c. que adonques bien lirroit a le feoffor et a les heires d'entrer, &c.) ‡ *In these cases if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heires enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to ouste thereof. And it is called an estate upon condition, because that the state of the feoffee is defeasible, if the condition be not performed, &c.*

"*UPON condition.*" *Littleton* having before spoken of estates absolute, now beginneth to entreate of estates upon condition. And a condition annexed to the realtie, whereof *Littleton* here speaketh in the legall understanding, *est modus*, a qualitie annexed by him that hath estate, interest, or right, to the same, whereby an estate, &c. may either be defeated, or enlarged, or created upon an incertaine event. *Conditio dicitur cùm quid in casum incertum qui potest tendere ad esse aut non esse confertur.* Glanvill. lib. 10. cap. 8. Bracton, lib. 2. cap. 5, 6, 7, &c. lib. 4. fol. 213. Brit. cap. 36. & fol. 89. 99. 114. 130. 205, 206, 207. 249. Fleta, lib. 3. cap. 9. & lib. 5. ca. 5. Mirr. cap. 2. sect. 15. & 17.

"*Upon condition in deed,*" *quæ est facti*, that is, upon a condition expressed by the partie in legall termes of law.

"*Or upon condition in law, &c.*" *quæ est juris*, that is, *tacitè* created by law without any words used by the partie. Again, *Littleton* subdivideth conditions in deed (though not in expresse words) into conditions precedent (of which it is said, *Conditio adimpleri debet priusquam sequatur effectus*) and conditions subsequent. Again, of conditions in deed some be affirmative, and some in the negative; and some in the affirmative, which imply a negative: some make the estate, whereunto they are annexed, voydable by entrie or clayme, and some make the ☞ estate void *ipso facto*, without entrie or claime. (Plow. 23. a. 1 Roll. Abr. 420. 2 Rep. 79.)

[201. b.]

Also of conditions in deed, some be annexed to the rent reserved out of the land, and some to collaterall acts, &c. some be single, some in the conjunctive, some in the disjunctive, as shall evidently appear in this Chapter, where the examples of these divisions shall be explained in their proper place. Mir. cap. 2. sect. 15 & 17.

"*In law, &c.*" Of conditions in law more shall be said hereafter in this Chapter.

"*Upon condition in deed is, as if a man by deed indented, &c.*" Here *Littleton* putteth one example of six severall kinds of conditions. That is, first, of a single condition in deed. Secondly, of a condition subsequent to the estate. Thirdly, a condition annexed

** un—demy *not in L. and M. or Roh.*

‡ *And* added in L. and M. and Roh.

(A) *Part of the original French is here inserted, because the words* "rendant a luy certaine rent, &c." *are not noticed in the translation of the section, though the same words are commented upon by lord Coke, post.* 201. *b.*

annexed to the rent, &c. Fourthly, a condition that defeateth the estate. Fifthly, a condition that defeateth not the estate before an entrie. And lastly, a condition in the affirmative, which implieth a negative, (as behind or unpaid implieth a negative) viz. not paid. All which do appeare by the expresse words of *Littleton*.

"*Rend' a luy certaine rent, &c.* (B)" Here by this *(&c.)* is implyed for life, in taile, or in fee.

"*In these cases if the rent be not paid at such time, &c. then may the feoffor or his heires enter, &c.*" By this Section, and by the *(&c.)* therein contained, six things are to be understood.

First, Where our author saith, *if the rent be behind*, that though the rent be behind and not paid [*b*], yet if the feoffor doth not demand the same, &c. he shall never re-enter (1), because the land is the principall debtor; for the rent issueth out of the land, and in an assize for the rent the land shall be put in view; and if the land be evicted by a title paramount, the rent is avoyded, and after such eviction the person of the feoffee shall not be charged therewith, for the person of the feoffee was only charged with the rent in respect of the grant out of the land.

[*b*] 40 Ass. 11. 20 H. 6. 30, 31. 6 H. 7. 7. 19 H. 6. 76. 20 H. 6. 32. 22 H. 6. 46. Pl. Com. Kidwely's case, fo. 70. & Hill and Grange's case, fol. 73. (Noy, 23. 1 Roll. Abr. 459, 460. Perk. sect. 827. Noy, 23.)

Secondly, The demand must be made upon the land, because the land is the debtor, and that is the place of demand appointed by law (2).

If the king maketh a lease for yeares, rendring a rent payable at his receipt at *Westminster*, and after the king granteth the reversion to another and his heires, the grantee shall demand the rent upon the land, and not at the king's receipt at *Westminster*; for as the law without expresse words doth appoint the lessee in the king's case to pay it at the king's receipt, so in case of a subject, the law appoints the demand to be on the land (3).

Lib. 4. fo. 72, 73. Borough's case.

If there be a house upon the same, he must demand the rent at the house. And he cannot demand it at the back door of the house but at the fore door, because the demand must ever be made at the most notorious place. And it is not material whether any person be there or no.

49 Ass. 5. 15 Eliz. Di. 329.

Albeit the feoffee be in the hall or other part of the house, yet the feoffor need not [*c*] but come to the fore door, for that is the place appointed by law, albeit the door be open.

[*c*] Bendloes en Tresp. 4 & 5 Ph. & Mar. [*d*] 15 Eliz. Dyer, 329.

[*d*] ☞ If the feoffment were made of a wood only, the demand must be made at the gate of the wood, or at some high way leading through the wood or other most notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which he will, and albeit [202. a.]

(Ante, 145. a.)

(B) *See ante note A on Sect.* 325.

(1) By special consent of the parties, a re-entry may be for default of payment of rent without demand of it. 5 Rep. 40. b.—[Note 85.]

(2) For the place of performing the condition see Litt. Sect. 340. and the Commentary on that Section.

(3) The prior of St. John Jerusalem made a lease for years, reserving rent, with a condition of re-entry, and afterwards surrendered the priory and all its possessions to the king. The judges were of opinion, that the king, by reason of his prerogative, might take advantage of the condition without demand, though the prior himself could not. 5 Rep. 56. a. b.—[Note 86.]

albeit the feoffee be in some other part of the wood redie to pay the rent, yet that shall not availe him. *Et sic de similibus.*

Thirdly, And if the feoffor demand it on the ground at a place which is not most notorious, as at the back door of a house, &c. and in pleading the feoffor alledge a demand of the rent generally at the house, the feoffee may traverse the demand, and upon the evidence it shall be found for him, for that it was a void demand.

Fourthly, If the rent be reserved to be paid at any place from the land, yet it is in law a rent, and the feoffor must demand it at the place appointed by the parties, observing that which hath been said before concerning the most notorious place. Lib. 4. Borroughe's case, fol. 73. Pl. Com. 70.

Fifthly, And all this is to be understood when the feoffee is absent; for if the feoffee commeth to the feoffor at any place upon any part of the ground at the day of payment, and offer his rent, albeit they be not at the most notorious place, nor at the last instant, the feoffor is bound to receive it, or else he shall not take any advantage of any demand of the rent for that day (1). (Post. 211. a.)

Sixthly, Therefore the place of demand being now known, it is further to be known what time the law hath appointed for the same. This partly appeareth by that which hath been last said. For albeit the last time of demand of the rent is such a convenient time before the sun setting of the last day of payment as the money may be numbred and received, notwithstanding, if the tender be made to him that is to receive it upon any part of the land at any time of the last day of payment, and he refuseth, the condition is saved for that time, for by the expresse reservation the money is to be paid on the day indefinitely, and convenient time before the last instant, is the uttermost time appointed by law, to the intent (2) that then both parties should meet together, the one to demand and receive, and the other to pay it, so as the one should not prevent the other. But if the parties meet upon any part of the land whatsoever on the same day, the tender shall save the condition for ever for that time. (7 Rep. 28.) (5 Rep. 114. b.) (2 Cro. 423. 500.)

And if the reservation of the rent be (as here *Littleton* putteth the case) at certaine feasts, with condition that if it happen the rent to be behind by the space of a weeke after any day of payment, &c. in this case the feoffor needeth not demand it on the feast day, but the uttermost time for the demand is a convenient time (as hath been said) before the last day of the week, unlesse before that the feoffee meet the feoffor upon the land and tender the rent as is aforesaid (3). Lib. 5. fol. 114. Wade's case. Pl. Com. Hill. & Grange's case. 167. 172. 20 H. 6. 30, 31. 6 H. 7. 3.

If

(1) For the difference of the demand to be made in case of a re-entry to avoid an estate, or the forfeiture of a sum *nomine pœnæ*, and of the demand to be made in case of an entry to distrain, see before 144. a.

(2) Yet the rent is not due till the last minute of the natural day; for if the lessor dies after sun-set and before midnight, the rent shall go to the heir and not to the executors. 1 Saund. 287. Salk. 578. (*Note to the twelfth edition.*)—[Note 87.]

(3) For there is a material difference between a reservation of a rent payable on a particular day, or within a certain time after, and a reservation of a rent payable at a certain day, with a condition that if it be behind by the space of any given time, the lessor shall enter. In both cases, a tender on the first, or last day of payment, or on any of the intermediate days, to the lessor himself, either upon, or out of the land, is good. But, in the former case, it is sufficient

Mich. 40 & 41 Eliz. inter Stanly & Read. Lib. 7. fo. 28. Maunde's case.

If a rent be granted payable at a certaine day, and if it be behind and demanded that the grantee shall distreine for it, in this case the grantee need not demand it at the day; but if he demand it at any time after he shall distreyne for it, for the grantee hath election in this case to demand it when he will to inable him to distreine.

8 H. 7. 7. b.

"*And them in his former estate to have, &c.*" Regularly it is true that he that entreth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition, but yet this fayleth in many cases.

4 H. 6. 2. lib. 8. fo. 43. 44. Whittingham's case. 5 H. 7. 6. a. (Post. 297. b.)

1. In respect of impossibility. As if a man seised of lands in the right of his wife maketh a feoffment in fee by deed indented, upon condition that the feoffee should demise the land to the feoffor for his life, &c. the husband dieth, the condition is broken, in this case the heire of the husband shall enter for the condition broken, but it is impossible for him to have the estate that the feoffor had at the time of the condition made: for therein he had but an estate in the right of his wife, which by the (A) coverture was dissolved. And therefore when the heire hath entred for the condition broken and defeated the feoffment, his estate doth vanish, and presently the state is vested in the wife.

2. In

(A) *The text should be read, it seems, as if lord Coke had said,* which by the determination of the coverture.

sufficient, if the lessee attend on the first day of payment, at the proper place; and, if the lessor do not attend there to receive the rent, the condition is saved. In the latter case, to save the lease, it is not sufficient that the lessee attends on the first day of payment, for he must equally attend on the last day. 10 Rep. 129. a. Plow. 70. a. b. and Cropp *v.* Hambleton, Cro. Eliz. 48. —It is to be observed, that it was once doubted, whether proof of actual entry and ouster was necessary in ejectment, brought on breach of a condition of re-entry.—It was afterwards settled, that it was not, but that, notwithstanding the confession of the re-entry, the demand of the rent must be proved. Anon. 1 Vent. 248.—Little *v.* Heaton, 2d Lord Raym. 750. and 1st Salk. 259. and see 3 Burr. 1896, 1897. But now, by the 4 Geo. 2. c. 28. sect. 2. landlords or lessors, having a right by law to re-enter, for non-payment of rent, may, without any formal demand, or re-entry, serve a declaration in ejectment for the recovery of the demised premises; and shall recover judgment and execution, in the same manner as if the rent in arrear had been lawfully demanded, and re-entry made. And if the lessee or tenant permits execution to be executed on such judgment, without paying the rent and arrears, and full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed, he shall be barred and foreclosed from all relief in law or equity, except by writ of error for reversal of such judgment.—By the same statute, sect. 4th, if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear, with the costs, or pays such arrears and costs into court, the proceedings in ejectment shall cease, and the tenant shall be relieved in equity, and hold the lands demised according to the old lease, without any new lease. In Archer *v.* Snapp, Andr. 341. lord chief justice Lee observes, that both the courts of law and the courts of equity had, previous to this statute, exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for non-payment of rent, by compelling him to take the money really due to him. The same observation is made in Bull. Ni. Pri. 97. See 2 Salk. 597. 8 Mod. 345. 10 Mod. 383. and 2 Vern. 103. 1 Wilson, 75. 2 Stra. 900. So, in a *cessavit*, the defendant, by tendering the arrears, and giving security, might free himself. See Pigot on Com. Rec. 62.—[Note 88.]

2. In respect of necessity. If *Cestuy que use* after the statute of *R.* 3, and before the statute of 27 *H.* 8, had made a feoffment in fee upon condition, and after had entred for the condition broken; in this case he had but an use when the feoffment was made, but now he shall be seised of the whole state of the land. So that as in the former case, the ancestor had somewhat at the making of the condition, and the heire shall have nothing when he hath entred for the condition broken, so in this case the feoffor had no estate or interest in the land at the time of the condition made, but a bare use; yet after his entrie for the condition broken he shall be seised of the whole state in the land, and that also for necessitie, for by the feoffment in fee of *Cestuy que use*, the whole estate and right was devested out of the feoffees. And therefore of necessitie the feoffor must gain the whole estate by his entrie for the condition broken.

Tenant in speciall tail hath issue, and his wife dieth, tenant in taile maketh a feoffment in fee upon condition, the issue dieth, the condition is broken, the feoffor re-enters, he shall have but an estate for life, as tenant in taile *apres possibility* of issue extinct by the re-entry, and yet he had an estate taile at the time of the feoffment, and that also for necessity. [202. b.] (8 Rep. 43, 44.)

3. In some cases the feoffor by his re-entry shall be in his former estate, but not in respect of some collaterall qualities. As if tenant by homage ancestrell maketh a feoffement in fee upon condition, and entreth upon the condition broken, it shall never be holden by homage ancestrell again. And so it is if a copihold escheate, and the lord make a feoffement in fee upon condition, and entreth for the condition broken. And the reason in both these cases is, for that the custome or prescription for the time is interrupted. (Ante 103. a.)

(1) Lord and tenant by fealty and rent, the lord is in seisin of his rent, the lord granteth his seignory to another and to his heires upon condition, the tenant attorneth and payeth his rent to the grantee, the condition is broken, the lord distreineth for his rent, and rescous is made, he shall be in his former estate, and yet the former seisin shall not enable him to have an assise without a new seisin. 15 Ass. 12. (4 Rep. 9. b.)

If tenant in taile make a feoffment in fee upon condition, and dieth, the issue in taile within age doth enter for the condition broken, he shall be first in as tenant in fee simple as heire to his father, and consequently and instantly he shall be remitted. But if the heire be of full age, he shall not be remitted, because he might have had his *formedon* against the feoffee, and the entrie for the 8 H. 7. 7. (Post. 350. b.)

(1) This is seemingly contradicted by the authorities cited in the margin. In that taken from lord Coke's Reports, it is said, that "If the lord grants his "seignory on condition, and the tenant pays the rent to the grantee, and "afterwards the condition is broken, and the lord distrains for the services, "upon rescous made he shall have assise, for the seisin before *is* sufficient."—The case reported in the margin from the Book of Assises is to the same effect. But it is to be observed, that, when the lord distrains, his distress amounts to a new entry. This may serve to reconcile the apparent contradiction, in this instance, between the Commentary and the authorities cited in the margin. —[Note 89.]

the condition is his own act; but more shall be said hereof in his proper place in the Chapter of *Remitter*.

2 H. 6. 4. (1 Roll. Abr. 412.) If a man make a feoffment in fee of *Blacke Acre* and *White Acre* upon condition, &c. and for breach thereof that he shall enter into *Blacke Acre*, this is good.

43 Ass. 47. 13 E. 4. 4. 2 H. 5. 7. b. 39 Ass. 15. 11 H. 5. 25. 16 Ass. 47. If tenant for life make a feoffment in fee upon condition, and entreth for the condition broken, he shall be tenant for life again, but subject to a forfeiture, for the state is reduced, but the forfeiture is not purged (2). (1 Roll. Abr. 856. Post. 252. a.)

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(2) It may be further observed, 1st. That as the entry of the feoffor on the feoffee for a condition broken defeats the estate to which the condition was annexed, so it defeats all rights and incidents annexed to that estate, as dower, &c. and all the mesne incumbrances of the feoffee. See 1 Roll. Abr. 474. 2dly, That every condition must defeat the entire estate, and that a condition cannot be so framed, as to make one and the same estate in any lands cease as to one person, and remain as to another, or cease for one time, and revive afterwards. 6 Rep. 40. b. 41. a. 3dly, That a condition annexed to land, cannot be apportioned by any of the parties themselves, so as to become void as to one part of the land, and to remain good as to the other. Thus, in the case cited by lord Coke, 4 Rep. 120. a. b. a lease was made for twenty-one years, of three manors, rendering rent for manor *A.* 6*l.* for manor *B.* 5*l.* and for manor *C.* 10*l.* to be paid on a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the rents. The lessor granted the reversion of part of manor *A.* to one and his heirs; and afterwards granted the reversion of another part to another and his heirs: it was adjudged, that the second grantee should not enter for the condition broken, because the condition was entire, and, by the severance of part of the reversion, was destroyed in all. But a condition may be apportioned by act in law. See the instance put by lord Coke, post. 215. a. 4thly, That part of a condition may be good, and another part of it may be void in law: as, if a person makes a gift in tail to the donor's eldest son, remainder to his youngest son in tail, with a condition that, if the eldest son alien in fee, his estate shall cease, and the lands should remain to the second son in tail; that part of the condition which prohibits the alienation made by tenant in tail, is good in law, but that part of it, which says that, upon such alienation, the lands shall remain over, is void, and the donor may re-enter. See Litt. Sections 720, 721, 722, 723, and the Commentary page 379. b. And see post. 223. b. note 1. 379. b. note 1. 5thly, That, if *A.* be tenant for life, remainder in contingency, remainder to *B.* in tail, and *A.* before the contingency happens, surrender his estate to *B.* his surrender bars the contingent remainder. But, if he surrenders on condition, and before the contingency happens, the condition is broken, and *A.* enters on the estate, the contingent remainder is revived. See Thompson *v.* Leach, 1 Lord Raym. 313.—[Note 90.]

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*IN the same manner it is if lands be given in taile, or let for terme of life or * of yeares, upon condition* (sur † condition), *&c.*

"*Upon condition, &c.*" This implyeth the severall kinds of conditions in deed before specified.

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BUT where a feoffment is made of certaine lands reserving a certaine rent, ‡ *&c. upon such condition, that if the rent be behind, that it shall be lawfull for the feoffor and his heires* (que § bien lirroit al feoffor et ‖ ses heires) *to enter,*** *and to hold the land untill he be satisfied or payed the rent behind, &c. in this case if the rent be behind, and the feoffor or his heires enter, the feoffee is not altogether excluded from this* (le feoffee n'est pas exclude de ceo tout ⸸ net), *but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied* (tanque ⸸⸸ il soit satisfie) *of the rent behind*; *and when he is satisfied, then may the feoffee re-enter* (donque poit le feoffee ‡† re-entrer) *into the same land, and hold it as he held it before* (et ceo tener ‖‖ come il tenoit a devant). *For in this case the feoffor shall have the land* (le feoffor avera §§ la terre) *but in manner as for a distresse, until he be satisfied* (tanque *!* il soit satisfie) *of the rent, &c. though* (coment †† que) *he take the profits in the meane time* ‡‡ *to his own use, &c.*

"*AND to hold the land untill he be satisfied or payed the rent behinde, &c.*" By this it is implyed, that if such a feoffment be made, reserving [*b*] (for example) 8 markes rent at the feast of *Easter*, with such a condition as is afore said, the feoffor at the feast day demands the rent, the feoffee paieth unto him 6 markes parcell of the rent, the feoffor entreth into the lands and taketh the profits towards satisfaction. Afterwards the feoffee doth tender

Vide Sect. 332. 19 E. 3. tit. Barre 280. 19 R. 2. Done rent, 10. Pl. Com. 524.

[*b*] 20 E. 3. tit. Covenant, 3.

* *for terme* added in L. and M. and Roh.

† tiel *added in L. and M. and Roh.*

‡ *&c.* not in L. and M.

§ il *added in L. and M.*

‖ a *added in L. and M.*

** *into the land held of them* in L. and M.

⸸ de *added in L. and M. and Roh.*

⸸⸸ que *added in L. and M. and Roh.*

‡† re-entrer—entre *in L. and M. and Roh.*

‖‖ come—coment *in L. and M. and Roh.*

§§ avera la terre—ceo aver *in L. and M. and Roh.*

! que *added in L. and M. and Roh.*

†† que *not in L. and M. or Roh.*

‡‡ *to his own use* not in L. and M. or Roh.

tender the two markes residue of the rent to the feoffor upon the land, who refuseth it. It ☞ hath been adjudged that the feoffee upon the refusal may enter into the land (1); for when the feoffor is satisfied either by perception of the profits or by payment or tender and refusall, or partly by the one and partly by the other, the feoffee may re-enter into the land. And this is within the words of *Littleton*, viz. *(untill he be satisfied.)* And albeit the feoffor had accepted part of his rent, yet he may enter for the condition broken, and retain the land untill he be satisfied of the whole. All which is worthy of observation. [203. a.]

(Autrement in case de obligation ou debt sur contract. Doc. Pla. 109.)

" *For in this case the feoffor shall have the land but in manner as for a distresse, until he be satisfied of the rent, &c.*" By this it appeareth that the feoffor by his re-entry gaineth no estate of freehold (2), but an interest by the agreement of the parties to take the profits in nature of a distresse. And therefore if a man maketh a lease for life with a reservation of a rent, and such a condition, if he enter [upon] the condition broken, and take the profits of the land *quousque, &c.* he shall not have an action of debt for the rent *arere*, for that the freehold of the lessee doth continue, and therefore the booke [*c*] that seemeth to the contrary is false printed, and the true case was of a lease for yeares, as it appeareth afterwards in the same page of the leafe.

(Sid. 223. 262. 344. Plow. 524. b.)

[c] 2 E. 3. fo. 7.

But herein also a diversity worthy the observation is implyed, viz. If a man make a lease for yeares, reserving a rent with a condition, that if the rent be behind, that the lessor shall re-enter and take the profits untill thereof he be satisfied, there the profits shall be accounted as parcell of the satisfaction, and during the time that he so taketh the profits he shall not have an action of debt for the rent for the satisfaction whereof he taketh the profits. But if the condition be that he shall take the profits untill the feoffor (A) be satisfied or paid of the rent, without saying (thereof) or to the like effect, there the profits shall be accounted no part of the satisfaction but to hasten the [lessor] (B) to pay it, and as *Littleton* here saith, that untill he be satisfied he shall take the profits in the mean time to his own use (3).

30 E. 3. 7. Vid. Semblable. 27 H. 8. 4. 43 E. 3. 21. 31 Ass. Pl. 26. Vid. le Statute de Merton, ca. 6, and observe these words, quod inde percipere possint duplicem valorem, &c. Et. c. 7, without this word (inde.) (See ant. 82. b.)

(A) *The word* feoffor, *seems to be here inserted for* lessor. *See Mr. Ritso's Intr. p.* 119.
(B) *Instead of*, lessor, *it should be* lessee, *as it seems. See Mr. Ritso's Intr. p.* 119.

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(1) But there must be a previous actual demand, in the same manner as where the condition is general. Hob. 82. 133. Hobart was of opinion, that the feoffor, to entitle himself to enter by way of penalty, should demand the rent not only on the day when it became due, but on the day after. Hob. 208. —[Note 91.]

(2) This is so, though the condition be, that the feoffor, his heirs and assigns, may enter; and his interest goes to his executor. But he may maintain an ejectment. 1 Saund. 112. 1 Sid. 344, 345. T. Raym. 135. 158.—[Note 92.]

(3) Care must be taken, with respect to conditions, or powers of entry, to distinguish between a general condition that the lessor shall re-enter; a special condition that he may enter and hold until payment or satisfaction; and a power of entry, limited by way of use. I. *A general condition that the lessor*

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ALSO, divers words (amongst others [enter ‖‖ auters]) *there be, which by vertue of themselves make estates upon condition; one is the word* (sub condic.) (un est le parol §§ *sub conditione): as if* A. *infeoffe* B. *of certaine land, to have and to hold to the said* B. *and his heires, upon condition* (sub * conditione), *that the said* B. *and his heires do pay or cause to be paid to the aforesaid* A. *and his heires yearely such a rent, &c. In this case without any more saying the feoffee hath an estate upon condition.*

HERE

‖‖ les *added in L. and M. and Roh.*
§§ *sub conditione—de condicion* in L. and M. and Roh.
* istâ *added in L. and M. and Roh.*

lessor shall re-enter is the subject of the foregoing Section. II. *A special condition that he may enter*, is the subject of the present Section. The distinction when the profits taken by the lessor after entry are, and when they are not, to be in satisfaction of the rent, is not admitted in equity, for the courts of equity will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession of it, and decree him, after he is satisfied the rent in arrear, and the costs, charges and expenses attending his entry and detention of the lands, to give up the possession to the lessee, and deliver and pay him the surplus of the profits of the estate and the money arising thereby. III. *A power of entry limited by way of use.* This takes its effect from the Statute of Uses; as, if *A.* by feoffment, lease and release, fine, or common recovery, conveys an estate to *C.* and his heirs, to the use, intent, and purpose, that *B.* may receive out of the lands so conveyed a certain annual sum; and to this further use, intent, and purpose, that if such annual sum, or any part of it, be unpaid by a certain time, it shall be lawful for *B.* and his assigns to enter upon, and hold possession of the land, and receive the rents and profits of it, until the arrears are satisfied: here, as soon as the rent is in arrear, an use, which is served out of the original seisin of the feoffee, releasee, conusee or recoveror, springs up and vests in the person to whom the power is given. This use is immediately transferred into possession by the statute. He has consequently a right to take and keep that possession till the purpose for which it is executed is satisfied, and then the use determines. By virtue of this estate he may make a lease for years to try his title in ejectment, either, to obtain the possession of the lands, if it be withheld from him, or, to restore it, if it be disturbed or divested; and if he assigns the annual sum, this right of entry, and perception of the rents and profits of the lands charged with the payment of it, passes with it to the assignee. But a distinction must be made between this case and that of a grant of a rent to be issuing out of certain lands, with a proviso, declaration or covenant, that if the rent be in arrear, the grantee may enter, &c. Here there is no seisin in any person, out of which an use can arise to the grantee on non-payment of the rent; and therefore possession is not in him till he makes an actual entry. But an interest vests in him when the rent becomes in arrear, and he may reduce it into possession by ejectment. See Havergill v. Hare, Cro. Jac. 510. 2 Roll. Rep. 12. Poph. 126. 147. 3 Bulstr. 250. Jemmot v. Cowley, Sid. 223. 262. 344. Raym. 135. 158. Saund. 112.—[Note 93.]

(Dyer, 138. b.) Sub Conditione. Marie, Dyer, 138. 27 H. 8. 15.

HERE in this and the next two Sections *Littleton* doth put four examples of words that make conditions in deed: and first *sub conditione*. This is the most expresse and proper condition in deed, and therefore our author beginneth with it.

13 H. 4. Enter Cong. 57. 29 Ass. 7. 33 Ass. 11. 40 Ass. 13. Bracton, ubi supra. Fleta, lib. 4. ca. 9. Brit. cap. 36. & ubi supra.

Vid. Sect. 325.

"*Such rent, &c.*" ☞ This (*&c.*) implieth any other rent or sum in grosse, or any collaterall condition whatsoever, either to be performed by the feoffee (whereof our author here putteth his case) or by the feoffor, and extendeth to all kinds of conditions in deed, before specified. [203. b.]

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ALSO, if the words were such (si les † parols fueront tielx), *Provided alwaies* (Proviso semper), *that the aforesaid* B. *do pay or cause to be paid to the aforesaid* A. *such a rent, &c. or these, So that* (Ita quod) *the said* B. *do pay or cause to be paid to the said* A. *such a rent, &c. in these cases without more saying, the feoffee hath but an estate upon condition* (le feoffee ‖ n'ad estate forsque sur condition); *so as if he doth not performe the condition, the feoffor and his heires may enter, &c.*

Proviso. Vid. Sect. 220. Dier. 28 H. 8. fol. 13. 27 H. 8. fol. 14, 15. 13 H. 4. Entre Cong. 57. Seignior Cromwell's case, li. 2. fo. 71, 72. at large. 35 H. 8. tit. Condition.

PROVIDED alwaies, (Proviso semper), *that the aforesaid* B. *do pay, &c.*"

Our author putteth his case where a *proviso* commeth alone. And so it is if a man by indenture letteth lands for yeares, provided alwaies, and it is covenanted and agreed between the said parties, that the lessee should not alien, and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words (1).

Br. lib. 8. 89, Frances's case. (2 Rep. 70. b.)

This

† parols—condicions *in L. and M.* ‖ n'ad—ad *in L. and M. and Roh.*

(1) Acc. 1 Roll. Abr. 410. L. 30. though it stands indifferent whether it be the speaking of the grantor or grantee; for in that case it shall be referred to the donor, lessor, or feoffor. Dyer, 6. And it is immaterial in what part of the deed the word proviso stands, and though there be covenants before or after. 2 Rep. 70, 71. 1 Roll. Abr. 407. Dyer, 311. But when it does not introduce a new clause, and only serves to qualify or *restrain* the *generality* of a former clause, *it is not a condition*. Moore, 307. 707.

We should carefully distinguish between, I. *A condition*, II. *A remainder*, III. And *a conditional limitation*. IV. It may also be proper to notice, in this place, *the effect of a condition, defeating the estate of a tenant to the præcipe in a recovery*.

I. We have seen that *a condition* defeats the whole estate; that none but the donor or the heir can take advantage of, or enter for, the breach of it; and that, when he enters, he is in as of his old estate. Such is the case put by Littleton of a feoffment in fee, reserving a yearly rent, with a condition that, if the rent be behind, it shall be lawful for the feoffor and his heirs to enter.

II. *A remainder* is defined by lord Coke, ant. 143. to be "a remnant of an "estate

This word *proviso* shall be also taken as a limitation or qualification, as hereafter in his proper place shall be said. And sometime it shall amount to a covenant. All which do appear by the authorities in the margent *. [*] 27 H. 8. 15. &c.

For

" estate in lands or tenements, expectant on a particular estate, created " together with the same, at the same time;" so that it waits for, and only takes effect in possession on, the natural expiration or determination of the first estate; as, if a man limits an estate to *A.* for life, and after his decease to *B.* in fee, this is a remainder: it does not defeat, but it expects the natural end and expiration of the first estate limited to *A.* for his life; and, when that event happens, not the heir, but a stranger has the advantage of it.

III. *A conditional limitation* partakes of the nature both of a condition and a remainder. It is to be observed, that at the common law, whenever either the whole fee, or a particular estate, as an estate for life, or in tail, was first limited, no condition or other quality could be annexed to this prior estate, which would have the double effect of defeating the estate, and passing the land to a stranger: for, as a remainder, it was void, being an abridgment or defeasance of the estate first limited; and, as a condition, it was void, as no one but the donor or the heirs could take advantage of a condition broken, and the entry of the donor or his heirs unavoidably defeated the livery, upon which the remainder depended. On these principles, it was impossible, by the old law, to limit by deed, if not by will, an estate to a stranger, upon any event which went to abridge or determine an estate previously limited. But the expediency and utility of such limitations, assisted by the revolution effected in our law by the statute of uses, at length forced them into use, in spite of the maxim of law, that a stranger cannot take advantage of a condition. These limitations are now become frequent, and their mixed nature has given them the appellation of conditional limitations: they so far partake of the nature of conditions, as they abridge or defeat the estates previously limited; and they are so far limitations, as, upon the contingency taking place, the estate passes to a stranger. Such is the limitation to *A.* for life, in tail, or in fee, provided, that when *C.* returns from Rome, it shall from thenceforth remain to the use of *B.* in fee. See Mr. Fearne's Essay on Contingent Remainders, 6th ed. p. 9. Of late, however, it has been frequently argued, that the difference between a remainder, and what is generally understood by a conditional limitation, is merely verbal. See 10 Mod. Rep. 423. Mr. Douglas's note to page 727, of his Reports, and Mr. Fearne's reply in the last edition of his Essay, 6th ed. p. 15.

IV. In addition to what has been mentioned in the concluding note on 202. b. respecting the principle, that, when a feoffor enters for a condition broken, he is in as of his former estate,—it may be observed, that, when a tenant for life joins with a remainder-man in suffering a common recovery, it is sometimes practised, as a precaution against letting in the encumbrances of the remainder-man, *to annex a condition to the estate of the bargainee or releasee, who is made tenant to the præcipe, on the non-performance of which his estate is to become void.* For, if *A.* be tenant for life, with remainder in tail to *B.* and *B.* executes leases, confesses judgments, or otherwise encumbers his estates; and afterwards *A.* and *B.* join in suffering a common recovery, all the encumbrances of *B.* are immediately let in upon the fee gained by the recovery; and that fee, and every estate derived out of it, are subject to them. To avoid which, *A.* the tenant for life, by lease and release, or by bargain and sale enrolled, conveys the estate to the intended tenant to the præcipe, to hold to him and his assigns during the joint lives of him and the grantor or bargainor; with a declaration, that such grant and release, or bargain and sale is made, to enable the grantee or bargainee to be tenant of the freehold in the proposed

Ita quod. Fleta, lib. 4. ca. 9. Bracton, ubi supra. Britton, ubi supra.

For the *(&c.)* in this Section explanation is made in the Section next before.

(Dyer, 13. b.)

" *Or these, So that* (Ita quod)." This is the third condition in deed whereof our author maketh mention.

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recovery; and a declaration of the uses, to which it is intended that the recovery shall enure. Then a proviso is inserted, that, if the bargainee or releasee do not, within six months, pay the tenant for life 100,000*l.* or some other very large sum of money, the bargain and sale, or grant and release, shall be void; and that it shall be lawful for the bargainor or grantor to enter, as in his former estate. The money is not paid at the day appointed; and thereupon the bargain and sale, or grant and release, is void, and the bargainor or grantor becomes seised of his ancient life estate. But, though the bargain and sale becomes void, yet, as, at the time of suing the original writ and the præcipe, the bargainee or releasee was tenant of the freehold, the subsequent cesser or determination of his estate does not impeach the recovery. For, if the person against whom the præcipe is brought, be, at the time when the præcipe is sued, or at any time before judgment, actual tenant of the freehold, it is immaterial what becomes of it afterwards. This doctrine has been carried so far, that where a tenant to the freehold was made by a fine, and the fine has been reversed, yet the recovery was held good. (See Lloyd *v.* Evelyn, 1 Salk. 568; and see 1 Shower's Rep. 347. Hob. 262. Noy, 126. 1 Mod. 218.) The recovery therefore, in this case, is good; the freehold upon which it was suffered is determined; and the bargainor or grantor comes in of his original estate, and of course avoids all the leases, judgments, and other encumbrances of the tenant in tail. The reason why the conveyance is made to the bargainee or releasee during the joint lives of him and the grantor or bargainor, is, to preserve, *as far as the case admits*, his powers, by leaving the reversion in him. —For, supposing *A.* to be tenant for life, with the usual powers of leasing, jointuring, and charging; remainder to trustees to preserve contingent remainders; remainder to *A.*'s first and other sons in tail male; remainder to his daughters as tenants in common in tail, with cross remainders in tail between them, if more than one, with remainders over; *A.* and his daughters may suffer a common recovery; and it will be good against *A.* and his daughters, and their issues in tail, and the remainders over. But the estates tail of the sons, being prior to the estates of the daughters, and being supported by the estate of the trustees for preserving contingent remainders, are not, whether vested or contingent, at the time of the recovery, affected by it.—But if *A.* granted his whole life estate to the tenant to the præcipe, it *might* be apprehended, that the powers relating to his estate, whether appendant or in gross, would be extinguished thereby, (See Edwards *v.* Slater, Hardres, 410. and King *v.* Melling, 1 Vent. 225.) and a limitation or grant of new powers would be void against the sons and the heirs male of their bodies. To prevent this question being made, *A.* the tenant for life, conveys an estate to the intended tenant to the præcipe, only during the joint lives of the tenant and grantor or bargainor. This continues the old reversion in the grantor or bargainor, and preserves the powers relating to his original estate, to which he is restored on the breach of the condition. It is customary in these cases to declare, that the recovery shall enure in the first place, for corroborating, strengthening, and confirming the estate for life of the grantor or bargainor, and all other estates precedent to the estate in tail meant to be destroyed, and all powers and privileges annexed to such estate for life, and other precedent estates.—The mode of suffering recoveries on a conditional estate of freehold was in use so early as the end of the last century.—[Note 94.]

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ALSO, there be other words in a deede which cause the tenements to be conditionall. As if upon such feoffment a rent be reserved to the feoffor, &c. and afterward this word is put into the deed (et puis soit mitte en le fait * cest parol), *That if it happen* (Quod si contingat) *the aforesaid rent to be behind in part or in all, † that then it shall be lawfull for the feoffor and his heires to enter, &c. this is a deed upon condition.*

"*THAT if it happen* (Quod si contingat), *&c.*" This is the fourth condition in deed set down by our author. (Ante 146. b.) 6 E. 2. Entrie Cong. 65. 8 E. 2. Ass. 320.

adjudged. Quod si contingat. Pasch. 37 Eliz. Rot. 254. inter Sayer et Hares in Com. Banco.

[204. a.] "*To enter, &c.*" Hereby it is evident, that ☞ some words of themselves do make a condition, and some other (whereof our author here and in the next Section * putteth an example) do not of themselves make a condition without a conclusion and clause of re-entrie: and manie times *(si)* makes a condition, and sometimes a limitation, as hereafter shall be said in this Chapter. * Vid. Sect. 331. 3 H. 6. 7. Si. Fleta, li. 4. ca. 9. Bracton, lib. 4. fo. 213. b. (5 Rep. 9.)

*Inesse potest donationi modus, conditio, sive causa. * Scito quòd (ut) modus est (si) conditio (quia) causa.* * 4 Mar. Dyer, 138. b.

Conditio is explained before. *Modus* is at this day properly taken for a modification, limitation, or qualification, for the which also the law hath appointed apt words; and because *Littleton* speaketh of this also in this end of the Chapter, I will reserve this matter to his proper place, where the reader shall perceive excellent matter of learning touching this point. Bracton, ubi supra.

Causa, the cause or consideration of the grant. And herein there is a diversitie betweene a gift of lands, and a gift of an annuitie or such like. For example, if a man grant an annuitie *pro unâ acrâ terræ*, in this case this word *pro* sheweth the cause of the grant, and therefore amounteth to a condition; for if the acre of land be evicted by an elder title, the annuitie shall cease, for *cessante causâ cessat effectus*. Pro. 24 E. 3. 34. (Hob. 41, 42. 10 Rep. 42. Plowd. 141. a.

And so if an annuitie be granted *pro decimis, &c.* if the grantee (A) be unjustly disturbed of the tithes the annuitie ceaseth. And so it is if an annuitie be granted *pro consilio*, and the grantee refuse to give counsell, the annuitie ceaseth. So if an 7 Rep. 9. b. 10. 28. b. Ante 144. a. 9 Rep. 50. a. Post. 237. a.)

9 E. 4. 20. 32 E. 3. Annu. 30. 14 E. 4. 4. 15 E. 4. 2. b. 8 H. 6. 23. 5 E. 2. tit. Ann. 44. 41 E. 3. 19. 32 E. 1. Avowrie, 242. 21 E. 4. 49. 22 E. 4. 28. 35 H. 6. 2. 10 E. 3. 44. 5 E. 2. 9 E. 4. 20. 15 E. 4. 3.

annuitie

* cest parol *not in L. and M. or in Roh.* † *&c.* added in L. and M. and in Roh.

(A) *Instead of* grantee, *it should be* grantor, *as it seems. See Mr. Ritso's Intro. p.* 119.

annuitie be granted *quòd præstaret consilium*, this makes the grant conditionall.

But if *A. pro consilio impenso, &c.* make a feoffement, or a lease for life, of an acre, or *pro unâ acrâ terræ, &c.* albeit he denieth counsell, or that the acre be evicted, yet *A.* shall not re-enter, for in this case there ought to be legall words of condition or qualification, for the cause or consideration shall not avoyd the state of the feoffee; and the reason of this diversitie is, for that the state of the land is executed, and the annuitie executorie.

Fleta, lib. 5. cap. 34. 34 Ass. 1. 40 Ass. 13.

[e] 5 E. 2. Cui in vita, 34. tit. Condition, Br. 5 H. 4. 1.

And yet sometime in case of lands or tenements *(causa)* shall make a condition. As if a woman give lands to a man and his heires, *causâ matrimonii prælocuti*, in this case if she either marrie the man, or the man refuse to marrie her, she shall have the land again to her and to her heires. [e] But of the other side, if a man give land to a woman and to her heires, *causâ matrimonii prælocuti*, though he (A) marrie her, or the woman refuse, he shall not have the lands again, for it stands not with the modestie of women in this kind, to aske advice of learned counsell, as the man may and ought; *and the rather, for that in the case of the woman she may averre the cause, (for the reason aforesaid) although it be not contained in the deed, yea though the feoffement be made without deed.

* 12 E. 1. 1. Feoffements & Faits, 114. F. N. B. 205. L. Vide Sect. 365. Ad faciend' ea intentione, &c. Dyer, 138. 7 H. 4. 22. 31 H. 8. tit. Condition, 19. Br. Pl. Com. 142. 38 H. 6. 33. 36, 37. Doct. & Stud. lib. 2. cap. 34. 27 H. 8. 18. a.

If a man maketh a feoffement in fee, *ad faciendum*, or *faciendo*, or *eâ intentione*, or *ad effectum*, or *ad propositum*, that the feoffee shall do or not do such an act, none of these words make the state in the land conditionall, for in judgement of law they are no words of condition; and so it was resolved, *Hil.* 18 *Eliz. in Com. Banco*, in the case of a common person; but in the case of the king the said or the like words do create a condition, and so it is in the case of a will of a common person, which case I myselfe heard and observed.

32 E. 3. Brev. 291. (1 Roll. Abr. 407, 408, 409, 410. Moore, 57. 2 Leo. 33. 3 Rep. 64. a. 10 Rep. 42. a.)

But for the avoyding of a lease for yeares, such precise words of condition are not so strictly required as in case of freehold and inheritance [f]. For if a man by deed make a lease of a manor for yeares, in which there is a clause (and the said lessee shall continually dwell upon the capitall messuage of the said manor, upon paine of forfeiture of the said terme) these words amount to a condition.

[f] 7 E. 6. Dier, 79. 28 H. 8. Dier, 27. a. Subpœna forisfacturæ.

Quod non licebit. 3 E. 6. Dyer, 65, 66. 4 Mar. 138. [g] Hill. 40 Eliz. Rot. 1610. inter Browne and Ayer. Vid. Pl. Com. 142. Br. and Bestone's case.

And so it is if such a clause be in such a lease, *Quòd non licebit*, to the lessee, *dare, vendere, vel concedere statum, et sub pœnâ forisfacturæ*, this amounts to make the lease for yeares defeasible, and so it was adjudged in the court of common pleas [g] in queen *Elizabeth*'s time; and the reason of the court was, that a lease for yeares was but a contract, which may begin by word, and by word may be dissolved.

(A) *Here, it seems, the text should be read as if the words,* though he do not marrie her, *had been used by lord Coke.*

[204. b.]

☞ Sect. 331.

BUT there is a diversitie between this word si contingat, &c. *and the words next aforesaid, &c. For these words,* si contingat, &c. *are nought worth to such a condition, unlesse it hath these words following, That it shall be lawfull for the feoffor and his heires to enter, &c. But in the cases aforesaid, it is not necessarie by the law to put such a clause,* scilicet, *that the feoffor and his heires may enter, &c. because they may do this by force of the words aforesaid, for that they containe in themselves a condition* (pur ceo que ils impreignont * a eux mesmes en ley un condition), scilicet, *that the feoffor and his heires may enter, &c. Yet it is commonly used in all such cases aforesaid to put the clauses in the deeds* (de mitter † les clauses en les faits), scilicet, *if the rent be behind, &c. that it shall be lawfull to the feoffor and his heires to enter, &c. And this is well done, for this intent, to declare and expresse to the common people, who are not learned in the law, of the manner and condition of the feoffement* (pur declarer et expresser a les lays gents, que ne sont apprises ‡ en la ley, ‖ de le manner et le condition de le feoffment), *&c. As if a man seised of land letteth the same land* (sicome home seisie de terre § lessa mesme la terre) *to another by deed indented for term of yeares, rendering to him a certaine rent, it is used to be put into the deed, that if the rent be behind at the day of payment, or by the space of a weeke or a month, &c. that then it shall be lawfull to the lessor to distreine, &c.* ** *yet the lessor may distreyne of common right for the rent behind, &c. though such words were not put into the deed, &c.*

[205. a.]

☞ "*It is not necessarie by the law to put such clause, &c.*" *Quæ dubitationis causâ tollendæ inseruntur, communem legem non lædunt. Et expressio eorum quæ tacitè insunt, nihil operatur.*

"*Or a month, &c.*" Here albeit the clause of distresse be added, that if the rent be behind by the space of a week or a month, that the lessor may distraine, yet he may distraine within the week or month, because a distresse is incident of common right to every rent service. And the words be in the affirmative, and therefore cannot restraine that which is incident of common right.

The other *(&c.)* in this Section upon that which hath been said are evident.

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* a—en *in L. and M. and Roh.*

† les—tiels *in L. and M. and Roh.*

‡ en la—de *in L. and M.* de la *in Roh.*

‖ de la manner—le matere *in L. and M. and Roh.*

§ come de franktenement *added in L. and M. and Roh.*

** *And* added in L. and M. and Roh.

Sect. 332.

ITEM, if a feoffment be made upon such condition (si * feoffment soit fait † sur tiel condition), *that if the feoffor pay to the feoffee at a certain day, &c.* 40 *pounds of money, that then the feoffor may re-enter, &c. in this case the feoffee is called tenant in morgage, which is as much to say in French as mortgage, and in Latine* mortuum vadium (1). *And it seemeth*

* ascun *added in Roh. but not in L. and M.*

† a ascun home *added in Roh. but not in L. and M.*

(1) Few parts of the law lead to the discussion of more extensive or useful learning than the law of mortgages. The nature of these notes neither requires nor admits of more than some few general observations:—1st, Upon the origin of mortgages:—2dly, On what constitutes a mortgage:—3dly, On the different estates of the mortgagor and mortgagee:—4thly, On the nature of an equity of redemption:—and 5thly, On general devises by mortgagees in fee of their real estates.

1st. As to *the origin of mortgages*;—from what is said of them in this Chapter, it appears that they were introduced less upon the model of the Roman *pignus*, or *hypotheca*, than upon the common law doctrine of conditions.—This circumstance has had a very important influence on the English law respecting conveyances by mortgage. In the civil law, when a mortgage is executed, the debt intended to be secured by it, is considered to be the principal, and the securities are considered as adjuncts, depending, for their existence, on the existence of the debt. The consequence is, that, when the debt is discharged, the securities, and all the estates, interests, liens, and charges created by them, are extinguished; or, to use the language of the civil law, are confounded; and, from that time, have no legal existence. In this light, speaking generally, when the rights of third persons do not interfere, the debt and security are viewed by courts of equity. But, in courts of law, the land alone is considered, and the mortgagor is treated as a grantor, and the mortgagee, as a grantee of an estate on condition. Immediately, on the execution of the mortgage, the land vests in the mortgagee.—If the money is paid on the very day appointed for the payment of it, the condition is said to be performed, and the mortgagor, as in any other case, where the grantee of land on condition performs the condition, may enter on the land and hold it, as of his former estate. If the money be not paid at the time, then, at law, the land is discharged of the condition; it becomes absolutely vested in the mortgagee; the mortgagor has no legal right to re-possess himself of it by payment of the money; and the estate, for all legal purposes, remains in the mortgagee, and can only be re-vested in the mortgagor by a re-conveyance from the mortgagee.—But, in the view of a court of equity, the land, immediately on the payment of the mortgage debt, becomes the absolute property of the mortgagor; and a court of equity will decree the mortgagee to re-convey it to him, and account to him for the intermediate profits.—In a case, on which the present annotator was consulted, a mortgagor in fee died without an heir, and intestate as to his real estate; a commission of escheat was issued and an inquisition held. The three commissioners, who were gentlemen of the highest consideration in the profession, were of opinion that the crown was not entitled to the equity of redemption. The jury found, and the sheriff returned accordingly; and Mr. Perceval, the attorney-general, who was fully apprized of the circumstances of the case, declined traversing the inquisition.

2dly,

seemeth that the cause why it is called mortgage is, for that it is doubtful whether

2dly, *As to what constitutes a mortgage*;—no particular words or form of conveyance are necessary for this purpose. It may be laid down as a general rule, and subject to very few exceptions, that, wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appears from the deed itself, or by any other instrument, it is always considered in equity as a mortgage, and redeemable; even though there is an express agreement of the parties, that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons. See Newcomb *v.* Bonham, 1 Vern. 7. 214. 2 Ca. in Chan. 58. 159. Howard *v.* Harris, 1 Vern. 33. 190. 2 Ca. in Chan. 147. Talbot *v.* Braddyl, 1 Vern. 183. 394. Barrel *v.* Sabine, 1 Vern. 268. Manlove *v.* Ball & Bruton, 2 Vern. 84. Jennings *v.* Ward, ibid. 520. Price *v.* Perrie, 2 Freeman, 258. Francklyn *v.* Fern, Barnard. Cha. 30. Clench *v.* Witherly, Cas. temp. Finch, 376. Cooke *v.* Cooke, 2 Atk. 67. Mellor *v.* Lees, 2 Atk. 494. Cotterell *v.* Purchase, Cas. temp. Talbot, 61. Endsworth *v.* Griffiths, 1 Bro. Par. Ca. 149. Floyer *v.* Lavington, 1 P. W. 268. In many of these cases the courts have found it necessary, not only to apply their general principles, but to determine the fact, whether the conveyance was intended as an absolute sale, or as a security for the money. If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if, instead of receiving the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of the interest; or, if the expense of preparing the deed of conveyance was borne by the grantor; each of these circumstances has been considered by the courts as tending to prove that the conveyance was intended to be merely pignorititious.—It seems, however, to be settled, 1st, that a *bonâ fide* purchaser of an estate or interest, will not be considered a mortgagee, on account of a right to re-purchase being given to the vendor, though at an advanced price. Verner *v.* Winstanley, 2 Sch. & Lefroy, 393. And 2dly, That, where the mortgagee, or trustee for him, is authorized to sell, if the money be not paid at a particular time, he may make a good title to a purchaser, though the mortgagor do not join in the conveyance. Clay *v.* Sharpe, Cha. M. Term, 1802, reported by Mr. Sugden in his Law of Vendors, 4th ed. App. N° XIII.

3dly, As to the *nature of the estates of the mortgagor and mortgagee*;—it was not, till lately, accurately settled. It was formerly contended, that the mortgagor, after forfeiture of the condition, had but a mere right to reduce the estate back to his own possession, by payment of the money. It is now established, that the mortgagor has an actual estate in equity, which may be devised, granted, and entailed; that the entails of it may be barred by fine and recovery; but, that he only holds the possession of the land, and receives the rents of it, by the will or permission of the mortgagee, who may by ejectment, without giving any notice, recover against him or his tenant. In this respect the estate of a mortgagor is inferior to that of a tenant at will. In equity, the mortgagee is considered as holding the lands only as a pledge or security for payment of his money. Hence a mortgage in fee is considered only as personal estate in equity, though the legal estate vests in the heir, in point of law. Hence also, a mortgagee, though in possession, will, in case of a living vacant, be compelled in equity to present the nominee of the mortgagor to it,—even though nothing but the advowson is mortgaged to him. On the same principle there is a *possessio fratris*; and tenancy by the curtesy, of an equity of redemption. Casborne *v.* Scarfe, 1 Atk. 603. Keech *v.* Hall, Doug. 21. Moss *v.* Gallimore, ibid. 266. Amherst *v.* Dawling, 2 Vern. 401. Gally *v.* Selby, 1 Stran. 403. Gardiner *v.* Griffith, 2 P. Will. 404. Mackenzie *v.* Robinson, 3 Atk. 559.—In this light the legislature has viewed the different

estates

whether the feoffor will pay (si le feoffor ‡ voyt payer) *at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead* ‖ *to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.*

[c] Glanvil. lib. 10. cap. 68. & lib. 13. cap. 26, 27.

"*Mortgage*" is derived [c] of two French words, viz. *mort*, that is *mortuum*, and *gage*, that is *vadium*, or *pignus*. And it is called in Latine *mortuum vadium*, or *morgagium*. Now it is called here *mortgage* or *mortuum vadium*, both for the reason here expressed by *Littleton*, as also to distinguish it from that which is called *vivum vadium*. *Vivum autem dicitur vadium, quia nunquam moritur*

‡ voyt—poet *in L. and M. and Roh.*

‖ *to him upon condition, &c. and if he doth pay the money, then the pledge is dead*, not in L. and M. or Roh.

estates of mortgagor and mortgagee in the statutes of the 4th & 5th of Will. and M. c. 16, and 7 Ann. c. 19.

4thly. As to *the nature of an equity of redemption*;—originally there was no right of redemption in the mortgagor. Lord Hale, in the case of Roscarrick *v.* Barton, 1 Chan. Ca. 219. says, that in the 14th year of Richard II. the parliament would not admit of redemption. See the printed Rolls, vol. 3. p. 259. It was, however, admitted not long after. But, after its admission, if the money was not paid at the time appointed, the estate became liable, in the hands of the mortgagee, to his legal charges, to the dower of his wife, and to escheat; and it was an opinion, that there was no redemption against those who came in by the post. This introduced mortgages for long terms of years. These are attended with this particular advantage, that, on the death of the mortgagee, the term and the right in equity to receive the mortgage debt vest in the same person: whereas, in cases of mortgages in fee, the estate, on the death of the mortgagee, goes to his heir, or devisee, and the money is payable to his executor or administrator. This produces a separation of rights, that is often attended with great inconvenience, both to the mortgagor and mortgagee. On the other hand, in case of mortgages for years, there is this defect, that, if the estate is foreclosed, the mortgagee will be only entitled for his term.—The difference between a trust and an equity of redemption, is observed by lord Hale, in the case of Pawlett and the Attorney-general, Hard. 465.—In respect to the right of the widow of a mortgagee in fee to her dower, she is certainly entitled to it at law; but it is so clear, that, if she should attempt to recover it by a writ of dower, a court of equity would stay the proceeding, that, in accepting titles, it is never attended to. The same observation applies to the husband's estate by the curtesy, after his wife's decease.

5thly. It now appears to be settled, that *estates in mortgage and trust estates, will pass by a devise in general terms, unless an intention to the contrary can be inferred*, either from expressions in the will, or from the objects of the devise. Marlow *v.* Smith, 2 Peere Williams, 198. Att. Gen. *v.* Philips, heard in Cha. on the 16th Nov. 1767. Duke of Leeds *v.* Munday, 3 Ves. 348. 5 Ves. 341. Ex parte Sergison, 4 Ves. 147. Att. Gen. *v.* Bowyer, 5 Ves. 300. Att. Gen. *v.* Buller, 5 Ves. 399. Braybrooke *v.* Inskip, 8 Ves. 437. Att. Gen. *v.* Vigors, 8 Ves. 283. Ex parte Morgan, 10 Ves. 101. Broome *v.* Monk, 10 Ves. 605. Roe on the demise of Read *v.* Reed, 8 Durn. and East, 118.—To prevent any question of this kind from arising, it is advisable, that in wills there should be an express devise of the estates held by the testator in trust or mortgage. —[Note 96.]

moritur ex aliquâ parte quod ex suis proventubus acquiratur. As if a man borrow a hundred pounds of another, and maketh an estate of lands unto him, untill he hath received the said sum of the issues and the profits of the land, so as in this case neither money nor land dieth, or is lost, (whereof *Littleton* hath spoken [*d*] before in this Chapter) and therefore it is called *vivum vadium.*

[*d*] Vid. Sect. 327.

[205. b.]

☞ Sect. 333.

ALSO, as a man may make a feoffment in fee in morgage, so a man may make a gift in tayle in morgage, and a lease for terme of life, or for terme of yeares in morgage. † And all such tenants are called tenants in morgage, according to the estates which they have in the land, &c.*

This Section upon that which hath been said needeth no further explication.

Sect. 334.

ALSO, if a feoffment be made in morgage upon condition, that th feoffor shall pay such a sum at such a day, &c. as is between them by their deed indented, agreed and limited (come est ‡ enter eux per lour fait endent accorde et limit), *although the feoffor dyeth before the day of payment, &c. yet if the heire of the feoffor* (uncore si le heire ‖ le feoffor) *pay the same sum of money* (mesme le summe § de money) *at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land; and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c. not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the condition, &c. and the intent was but that the money should be payd at the day assessed, &c. and the feoffee hath no more losse, if it be paid by the heir, than if it were paid by the father, &c. therefore if the heir pay the money, or tender the money at the day limited, &c. and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c. will tender the aforesaid money to the feoffee* (voile tender les **avantdits deniers al feoffee) *at the day appointed, the feoffee is not bound to receive it* (le feoffee n'est †† pas tenus de ceo receiver).

"*THAT*

* *so a man may make a gift in tayle in morgage* not in L. and M. or Roh.

† *And* not in L. and M. or Roh.

‡ enter—perenter, *L. and M. and Roh.*

‖ de *added in L. and M. and Roh.*

§ de money *not in L. and M. or Roh.*

** avantdits *not in L. and M. but in Roh.*

†† pas *not in L. and M. but in Roh.*

27 H. 8. 19. b. Lib. 8. fol. 91. Frances's case. (1 Roll. 426.)

"*THAT the feoffor shall pay at such a day, &c.*" Albeit conditions be not favoured, yet they are not alwayes taken literally, but in this case the law enableth the heir that was not named to perform the condition for four causes (1) †.

(Post. 219. b.)

First, Because there is a day limited, so as the heir commeth within the time limited by the condition, for otherwise he could not do it, as shall be said hereafter in this Chapter.

Secondly, For that the condition descends unto the heir, and therefore the law that giveth him an interest in the condition, giveth him an abilitie to perform it.

Thirdly, For that the feoffee doth receive no damage or prejudice thereby (all these reasons are expresly to be collected out of the words of *Littleton*). And these things being observed,

Fourthly, The intent and true meaning of the condition shall be performed. And where it is here said, that the heir may tender *at the day limited, &c.* herein is implyed, that ☞ the executors or administrators of the morgagor, or in default of them the ordinary may also tender, as shall be said [*f*] hereafter in this Chapter. But what if the condition had been, if the morgagor or his heirs did pay, &c. and he dyed before the day without heir, so as the condition became impossible, here it is to be observed, that where the condition becometh impossible to be performed by the act of God, as by death, &c. the state of the feoffee shall not be avoyded, as shall be said hereafter in this Chapter. And therefore the law here inableth the heir (of whom no mention was made in the condition) to performe the condition, lest the inheritance should be lost, wherein divers diversities are worthy of observation (1).

[206. a.]

[*f*] Vid. Sect. 337.

First,

(1) † *V. T.* 15 *Jac.* *After covenant to stand seised to the use of* B. *and his heirs, with proviso of revocation on payment to* B. *and his assigns*; B. *dies*; he *may tender to the heir, and revoke.* *Allen's case, Ley,* 55. b. Hal. MSS.—[Note 97.]

(1) Lord Coke here considers the effect of impossible conditions. 1st. Where they are possible at the time of their creation, but afterwards become impossible; and he distinguishes that impossibility which is produced by the act of God, and that which is produced by the act of the party. 2dly. When they are impossible at the time of their creation. 3dly. When they are against law, either as *mala prohibita*, or *mala in se*. 4thly. When they are repugnant to the grant by which they are created, or to the estate to which they are annexed. It should be observed, that a condition is then only considered in the eye of the law as impossible at the time of the creation, if it cannot by any means take effect. Such is the case put by lord Coke, that the obligee shall go from the church of St. Peter at Westminster to the church of St. Peter at Rome, within three hours. But, if it only be in an high degree improbable, and such as is beyond the power of the obligee to effect, it is not then considered as impossible. See the cases of this nature in 1 Roll. Abr. 419, 420.—It is said, that if the condition of a bond be to pay a certain sum, or to do any other act, out of his majesty's dominions, the condition is void, and the bond is single, because the performance of it cannot be tried. See 21 Edw. 4. 10.—It was upon a similar principle, that if a man professed himself a monk in a religious house beyond seas, it was no disability, because the fact could not be tried. For the only method which the law had to know if a man was professed, was to issue a writ in the king's name to the bishop of the diocese, commanding him to certify, if such a monk was professed, in such a house, in such a place, within

First, between a condition annexed to a state in lands or tenements upon a feoffment, gift in taile, &c. and a condition of an obligation, recognizance or such like. [g] For if a condition annexed to lands be possible at the making of the condition, and become impossible by the act of God, yet the state of the feoffee, &c. shall not be avoyded. As if a man maketh a feoffment in fee upon condition, that the feoffor shall within one year go to the citie of *Paris* about the affaires of the feoffee, and presently after the feoffor dyeth, so as it is impossible by the act of God that the condition should be performed, yet the estate of the feoffee is become absolute; for though the condition be subsequent to the state, yet there is a precedency before the re-entry, viz. the performance of the condition. And if the land should by construction of law be taken from the feoffee, this should work a damage to the feoffee, for that the condition is not performed which was made for his benefit. And it appeareth by *Littleton*, that it must not be to the damage of the feoffee; and so it is if the feoffor shall appeare in such a court the next term, and before the day the feoffor dyeth, the estate of the feoffee is absolute. [h] But if a man be bound by recognizance or bond with condition that he shall appear the next term in such a court, and before the day the conusee (A) or obligor dyeth, the recognizance or obligation is saved; and the reason of the diversitie is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken untill there be a default in the obligor; and therefore in all cases where a condition of a bond, recognizance, &c. is possible at the time of the making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c. there the obligation, &c. is saved. But if the condition of a bond, &c. be impossible at the time of the making of the condition, the obligation, &c. is single. And so it is in case of a feoffment in fee with a condition subsequent that is impossible, the state of the feoffee is absolute: but if the condition precedent be impossible, no ☞ state or interest shall grow thereupon. And to illustrate these by examples you shall understand. If a man be bound in an obligation, &c. with condition that if the obligor do go from the church of

[206. b.]

14 H. 8. 28. 10 H. 7. 22. 4 H. 7. 4. 8 E. 4. 1. 28 H. 8. 25. lib. 5. fo. 22 Laughter's case, & 75. 39 H. 3. 5. 17 H. 6. Obligat. 18. 5 El. Dier, 222.

St. *Peter*

[g] Pl. Com. 456. Wrothe's case. 14 H. 7. 3. 15 H. 7. 1. 14 E. 4. 3. 38 H. 6. 2. 3.

[h] 15 H. 7. 18. 31 H. 6. Barre, 60. 18 E. 4. 17. 9 Eliz. 262. Dyer, lib. 5. 22. Laughter's case. 38 H. 6. 2.

Fleta, lib. 4. cap. 9. & Bracton & Britton, ubi supra.

(1 Leon. 229. 1 Roll. Abr. 420. Cro. El. 291. 864.)

(A) *Instead of* conusee *it should be* conusor, *as it seems. See Mr. Ritso's Intr. p.* 119.

within his diocese. But this method could not be used with respect to foreign professions, as the bishop was not bound to obey the king's writ, and might certify either true or false, without subjecting himself to punishment. For this reason, no notice was taken in our law of foreign profession.—Thus L. Rolle, 2 Abr. 43. says, "If an Englishman goes into France, and there "becomes a monk, he is, notwithstanding, capable of a grant in England; "for that such profession is not triable; and also, for that all profession is "taken away by the statute; and, by our religion, now received, such vows "and profession are held void. I have heared," continues he, "that this was "in 44 Eliz. in one Ley's case, resolved accordingly by all the justices in "Chancery-lane."—[Note 98.]

St. *Peter* in *Westminster* to the church of St. *Peter* in *Rome* within three hours, that then the obligation shall be voyd. The condition is voyde and impossible, and the obligation standeth good.

And so it is if a feoffment be made upon condition that the feoffee shall go as is aforesaid, the state of the feoffee is absolute, and the condition impossible and voyde.

* If a man make a lease for life upon condition that if the lessee go to *Rome*, as is aforesaid, that then he shall have a fee, the condition precedent is impossible and voyde, and therfore no fee simple can grow to the lessee.

* Pl. Com. Fuller's case, 272. (1 Roll. Abr. 418. Post. 217. b. 218.)

If a man make a feoffment in fee upon condition that the feoffee shall re-enfeoffe him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force untill the day be past, the state of the feoffee is absolute, for "the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof [*i*]." And so it is if *A.* be bound to *B.* that *I. S.* shall marry *Jane G.* before such a day, and before the day *B.* marry with *Jane*, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases.

35 H. 6. tit. Barre, 262. 37 H. 6. Barre, 60. 2 E. 3. 9. 9 El. Dyer, 262. 28 H. 8. 30. (8th Rep. 83. a. 92. a. Hob. 24.)

But it is commonly holden [*k*] that if the condition of a bond, &c. be against law, that the bond itself is voyd.

[*i*] 4 H. 7. 4. 30 H. 8. Dyer, 42. 11 H. 4. 57. in protection. 10 H. 7. 18. (Doc. Pla. 230.)

But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se*, and a condition against law (that concerneth not any thing that is *malum in se*) but therefore is against law, because it is either repugnant to the state, or against some maxime or rule in law. And therefore the common opinion is to be understood of conditions against law for the doing of some act that is *malum in se*, and yet therein also the law distinguisheth. As if a man be bound upon condition that he shall kill *I. S.* the bond is voyd.

[*k*] Vid. Bract. Britton, Fleta, ubi supra. Bracton, lib. 3. fol. 100. 2 H. 4. 9. 8 E. 4. 12. b. 2 E. 4. 2. & 3. 4 H. 7. 4. b. 10 H. 7. 22. 14 H. 8. 28. 42 E. 3. 6. 23. (1 Roll. Abr. 418. Plo. 64. b.) 2 H. 4. 9. (2 Ven. 109)

But if a man make a feoffment upon condition that the feoffee shall kill *I. S.* the estate is absolute, and the condition voyd.

(Pl. Com. Browning's case, 133.)

If a man make a feoffment in fee upon condition that he shall not alien, this condition is repugnant and against law, and the state of the feoffee is absolute (whereof more shall be said in his proper place). But if the feoffee be bound in a bond, that the feoffee or his heires shall not alien, this is good, for he may notwithstanding alien if he will forfeit his bond that he himself hath made.

(Post. Sect. 360. 10 Rep. 38. Hob. 170. 1 Roll. Abr. 419.)

So it is if a man make a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the state is absolute.

7 H. 6. 43. b. 21 H. 6. 33. 21 H. 7. 11. 21 H. 7. 30. 20 E. 4. 8.

But a bond with a condition that the feoffee shall not take the profits is good. If a man be bound with a condition to enfeoffe his wife, the condition is void and against law, because it is against the maxime in law, and yet the bond is good; but if he be bound to pay his wife money, that is good. *Et sic de similibus*, whereof there be plentifull authorities in our bookes (1).

(Moore, 810. Post. 225.) Pl. Com. in Browning's case, 133. a. 27 H. 8.

"*Tender*

(1) It is observed in 1 P. W. 189. that "all instances of conditions against "law, in a legal sense, are reducible under one of these three heads; either, to "do

" *Tender the money at the day limited, &c.*" Note, hereby is implyed, that albeit a convenient time before sun set be the last time given to the feoffor to tender, yet if he tender it to the person of the morgagee at any time of the day of payment, and he refuseth it, the condition is saved for that time. Vide Sect. 325. (5 Rep. 114.)

" *He may enter, &c.*" And so may his heir after his death.

" *But if a stranger of his own head, who hath not any interest, &c. will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.*" *Nota*, by this period and the *(&c.)* it is implyed, that if the morgagor dye, his heir within age of 14 yeares (the land being holden in socage), the next of kin to whom the land cannot descend being his gardian in socage may tender in the name of the heir, because he hath an interest as gardian in socage. Also if the heir be within age of 21 yeares, and the land is holden by knights service, the lord of whom the land is holden may make the tender of his interest which he shall have when the condition is performed, for these in respect of their interest are not accounted estrangers.

But if the heir be an ideot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded upon charity, and so in like cases.

Vide Sect. 401. Hill. 28 Eliz. in Banco Regis, inter Watkins & Astwick, pro terris in Com. Devon. 45 E. 3. tit. Release, 28. 32 E. 1. tit. Annuity, 51. 33 H. 6. 13. (1 Leo. 34. Moore, 222. Post 225. b. 225. a.)

" *The feoffee is not bound to receive it.*" And note that 36 H. 6. tit. Barre, 166.

33 E. 1. tit. Annuitie, 51. 33 E. 3. Judgement, 254. (Ant. 180. b. Post. 245. a. 258. a.)

Littleton

" do *malum in se*, or *malum prohibitum*; 2dly, to omit the doing of something " that is a duty; 3dly, to encourage such crimes and omissions. And such " conditions as these, the law will always, and without any regard to circum- " stances, defeat." It is not within the plan of these notes to enumerate, or discuss, the various instances in which the conditions of bonds have been held unlawful at law, or in equity. Those which chiefly deserve consideration are such as relate to, 1st, Bonds given for procuring marriages, or what is usually called marriage brokage. See Hall *v.* Potter, 3 Levinz, 411. Shower's Par. Cas. 76. 1 Brown's Par. Cas. 60. Scribblehill *v.* Brett, 1 Brown's Parl. Cases, 57. Keat *v.* Allen, 2 Vern. 588. Cole *v.* Gibson, 1 Vez. 503. 2dly, Bonds restraining the obligor from a free exercise of a trade. Here, if the restraint be qualified, so as only to take in a particular place, and the breach of the condition tends apparently to the detriment of the obligee, and a consideration is given by the obligee to the obligor for executing the bond, the condition will not be impeached either at law or in equity. See 1 P. W. 190, 191. 10 Mod. 133. 3dly, Bonds of resignation. The validity of these bonds, and the propriety of their being supported, considered as a matter of policy, was most elaborately and ably discussed in the great cause of the bishop of London and Fytche, heard on appeal in the house of lords in May 1783. A state of this case, and of the arguments and speeches of the lords, prelates, and judges who spoke, when it was heard before the lords, is to be found in Mr. Cunningham's Law of Simony.—It seems to be settled, that, if a bond is given with a condition to do several things, and only some of them are against law, the bond shall be good as to the doing the things agreeable to law, and only void as to those which are against law. Norton *v.* Simmes, Hob. 12. Mosdell *v.* Middleton, 1 Vent. 237. Pearson *v.* Humes, Carter, 229. Chesman *v.* Nainby, 2 Lord Raymond, 1456.—[Note 99.]

Littleton saith, that he is not bound to receive it at a stranger's hand. But if any stranger in the name ☞ of the morgagor or his heir (without his consent or privity) tender the money, and the morgagee accepteth it, this is a good satisfaction, and the morgagor or his heir agreeing thereunto may re-enter into the land; *omnis ratihabitio retrò trahitur et mandato æquiparatur.* But the morgagor or his heir may disagree thereunto if he will. [207. a.]

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AND be it remembered that in such case, where such tender of the money is made, &c. and the feoffee refuse to receive it, by which the feoffor or his heires enter, &c. then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him (1).

"*TENDER of the money is made, &c.*" Here is implyed at the due time and place according to the condition.

"*Enter, &c.*" viz. into the lands or tenements.

"*Then the feoffee hath no remedy by the common law to have this money, &c.*" And the reason is, because the money is collaterall to the land, and the feoffee hath no remedy therefore.

8 E. 2. tit. Ass. 389. 31 Ass. 32.

If an obligation of an hundred pound be made with condition for the payment of fifty pound at a day, and at the day the obligor tender the money, and the obligee refuseth the same, yet in action of debt upon the obligation, if the defendant plead the tender and refusall, he must also plead that he is yet ready to pay the money, and tender the same in court. But if the plaintife will not then receive it, but take issue upon the tender, and the same be found against him, he hath lost the money for ever.

(2 Roll. Abr. 523, 524.) Sid. 13. 364, 365. 22 H. 6. 39. 21 E. 4. 25. 22 E. 3. 5. Lib. 9. fo. 79. H. Peytoe's case.

If a man be bound in 200 quarters of wheat for deliverie of a 100 quarters, if the obligor tender at the day a 100 quarters, &c. he shall not plead *uncore prist*, because albeit it be parcell of the condition, yet they be *bona peritura*, and it is a charge for the obligor to keep them. And the reason wherefore in the case of the obligation the sum mentioned in the condition is not lost by the tender and refusall, is not only for that it is a duty and parcel of the obligation, and therefore is not lost by the tender and refusall, but also for that the obligee hath remedy by law for

(2 Roll. Abr. 523. Dyer, 24. b. 25. a. cont.)

8 E. 2. tit. Ass. 389.

(1) Here the performance of the condition is excused by the default of the feoffee or obligee, viz. by tender and refusal. It is also excused, 1. By his absence in those cases where his presence is necessary for the performance of the condition. 2. By his obstructing or preventing the performance. And 3. By his neglecting to do the first act, if it is incumbent on him to perform it. See the cases in 1 Roll. Abr. 457, 458. It is also excused, in some cases, by his not giving notice to the feoffee or obligee. See 1 Roll. Abr. 463. 467, 468. —[Note 100.]

for the same. And in this case, *liberata pecunia non liberat offerentem.*

(2 Saund. 48.) 7 H. 4. 18. 5 Mariæ, Dier, 150. 21 E. 4. 25. 22 E. 3. 5. 33 H. 6. 2. b. 17 Ass. pl. 2. 20 E. 4. 1. b. 9 H. 6. 16. 36 H. 6. 26. 15 E. 4. 1. 16 H. 7. 13. 18 E. 3. 53. 7 E. 4. 4, 5. 19 H. 6. 12. 27 H. 8. 1. a. 22 H. 6. 39. tit. Abatement, 11. 49 E. 3. 3. 19 H. 6. 12.

[But if a man make a single bond, or knowledge a statute or recognizance, and afterwards make a defeasance for the payment of a lesser sum at a day, if the obligor or conusor tender the lesser sum at the day, and the obligee or conusee refuseth it, he shall never have any remedy by law to recover it, because it is no parcell of the sum contained in the obligation, statute, or recognizance, being contained in the defeasance made at the time or after the obligation, statute, or recognizance. And in this case in pleading of the tender and refusall the partie shall not be driven to plead, that he is yet ready to pay the same or to tender it in court: neither hath the obligee or conusee any remedy by law to recover the sum contained in the defeasance. [o] And so it is if a man make an obligation of 100 pound with condition for the deliverie of corne, or timber, &c. or for the performance of an arbitrement, or the doing of any act, &c. This is collaterall to the obligation, that is to say, is not parcell of it, and therefore a tender and refusall is a perpetual bar (2).

[o] Henry Peytoe's case, ubi supra.

But if a man be bound to make a feoffement in fee to the obligee, and he make a lease and a release to him and his heires, albeit this be a collaterall condition, yet it is well performed, because this amounts in law to a feoffment (3).

31 Ass. 25. 11 H. 4. 33. 1 H. 6. 8.

1 E. 4. 1. 7 E. 4. 3. Pl. Com. Fogasse's case, fo. 6. (Moore, 36, 37. Post. 236. b,)

" *Money,*

(2) In the 10th, 11th, and 12th editions, there is, in the margin, a reference to 3 Cro. 755; but there is no such page in that volume of Croke. Most probably it is misprinted, for 1 Cro. 755. Cotton *v.* Clifton, where it was held, " that, where an obligation is made, and afterwards a defeasance is made " thereof, if he pays a less sum, there, if he pleads the defeasance and the " tender of the lesser sum, he need not to say, *tout temps prist*; for, by the " tender, he was discharged of all; but otherwise it is of an obligation, with " a condition to pay a lesser sum."—[Note 101.]

(3) No authority is cited for this position. In Plowd. 156. it is laid down, that a lease and release may be pleaded as a feoffment; and in 1 Finch, 48. and 2 Finch, 68. it is said, that a lease and release amounts to a feoffment. But this must be understood with some qualifications, as the operation of a feoffment is, in some instances, much more forcible, and of course may be much more beneficial to the person entitled to the benefit of the condition, than the operation of a lease and release. The nature of a feoffment will be considered in one of the notes to the Chapter of Releases.—With respect to the difference adverted to above, between the operation of a lease and release, and the operation of a feoffment; it is immaterial whether, by the lease, is understood a bargain and sale for years under the statute, or a lease at common law, with an actual entry by the lessee. In either case, though the lessor had the possession, yet, unless he was seised of the freehold, when he executed the lease, his release would not vest an estate of freehold in the releasee. But his feoffment, if he had but a mere possession, would vest the freehold in the feoffee. In the same manner, if tenant for life enfeoffs in fee, it divests the whole inheritance, and is a forfeiture of his estate. But nothing of this is produced by a release grounded on a previous lease, either at common law or by the statute.—[Note 102.]

Lib. 5. fol. 114, 115. Wade's case, lib. 9. fol. 78. (5 Rep. 114. Wade's case, 2 Inst. 579. 742. 3 Inst. 93.)

"*Money, moneta, legalis moneta Angliæ,*" lawful money of *England*, either in gold or silver, is of two sorts, viz. the *English* money coyned by the king's ☞ authoritie, or forraine coyne by proclamation made currant within the realme. *Coyne, cuna dicitur à cudendo*, of coyning of money. In French *coine* signifieth a corner, because in ancient time money was square with corners, as it is in some countries at this day. Some say that *coine dicitur à κοῖνος, id est communis, quòd sit omnibus rebus communis. Moneta dicitur à monendo*, not only because he that hath it, is to be warned providently to use it, but also because *nota illa de authore et valore admonet. Pecunia dicitur à pecu*, beasts, *omnes enim veterum divitiæ in animalibus consistebant*; and it appeareth that in *Homer*'s time there was no money but exchange of cattel, &c. (1).

[207. b.]

Aristotle, lib. 5. cap. 8. (Cro. Car. 89. Trover and Conversion lies for money out of a bag.)

Nummus, απο τῦ νόμω, quia lege fit non natura. Vide (*) the statute of 9 *H.* 5, of the noble, halfe noble, and farthing of gold, which is the fourth part of a noble, and that is twenty pence.

(*) 2 H. 5. stat. 2. cap. 7. (Cro. El. 841.)

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ALSO, if a feoffment be made on this condition, that if the feoffee pay to the feoffor at such a day between them limited twenty pounds, then the feoffee shall have the land (si feoffment soit fait sur tiel condition, que si le feoffee paya al feoffor a tiel jour inter eux limit xxl.* adonques le feoffee avera la terre) *to him and to his heires*; *and if he faile to pay the money at the day* † *appointed, that then* (‡ que adonque) *it shall be lawfull for the feoffor or his heires to enter, &c. and afterwards, before the day appointed the feoffee sell the land to another, and of this maketh a feoffment to him, in this case if the second feoffee will tender the sum of money at the day appointed to the feoffor, and the feoffor refuseth the same, &c. then the second feoffee hath an estate in the land clearly without condition. And the reason is, for that the second feoffee hath an interest in the condition for the safeguard of his tenancy* (pur salvation de ‖ son tenancie). *And in this case it seems that if the first feoffee after such sale*

* que *added in L. and M. and Roh.*

† *appointed—&c.* L. and M.

‡ que *added in Roh. but not in L. and M.*

‖ son—le *L. and M. and Roh.*

(1) See the account given in Bla. Com. vol. i. ch. 7. of his majesty's prerogative respecting the coin of the kingdom; and see 5 Mod. 7. 2 Salk. 446. For the etymology of the word Sterling, see Du Cange and Spelman's Glossaries, under the word *Esterlingus*; and Mr. Leake's Historical Account of English Money, page 20. Guineas took their name from the gold brought from Guinea by the African company, who, as an encouragement to bring over gold to be coined, were permitted, by their charter, to have their stamp of an elephant upon the coin made of the African gold. By a proclamation of the 22d of December, 1717, the guinea, which till then had been current for 21 shillings and sixpence, was reduced to 21 shillings, and half-guineas, double guineas, and five pound pieces in proportion.—[Note 103.]

sale of the land, will tender the money at the day appointed, &c. to the feoffor, this shall be good enough for the safegard of the estate of the second feoffee, because the first feoffee was privie to the condition, and so the tender of either of them two is good enough, &c.

"AND *if he faile to pay the money, &c.*"
If a man make a feoffment of lands, to have and to hold to him and his heires, upon condition, that if the feoffee pay to the feoffor, at such a day twenty pounds, that then the feoffee shall have the lands to him and his heires, if the condition had not proceeded further, it had been void, for that the feoffee had a fee simple by the first words, and therefore the words subsequent (2) are materially added (and if he faile to pay the money, &c.)

12 E. 3. Condic. 8. 13 E. 3. Ibid. 10. 12 Ass. 5. Plowd. 481. (5 Rep. 117.) Li. 5. fo. 96, 97. Goodale's case.

"*The second feoffee will tender the sum of money, &c.*"
Albeit the second feoffee be not named in the condition, yet shall he tender the sum because he is privie in estate, and in judgment of law hath an estate and interest in the condition, (as *Littleton* here saith) for the salvation of his tenancy. *Vid.* Sect. 334. And note, he that hath interest in the condition on the one side, or in the land on the other, may tender.

(8 Rep. 42. b.) (2 Cro. 9. 245.) Li. 5. fo. 114, 15. Wade's case.

[208. a.] And it is to be ☞ observed also, that the feoffee may tender any money that is currant within the realme, albeit it be forrein coin, so as it be currant by act of parliament, or by the king's proclamation (3), as hath been said.

"*Tender the sum.*" The feoffee may tender the money in purses or bags, without shewing or telling the same, for he doth that which he ought, viz. to bring the money in purses or bags, which is the usuall manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it.

"*If the first feoffee.*" Here it appeareth, that the first feoffee may, notwithstanding his feoffment, pay the money to the feoffor, because he is partie and privie to the condition, and by his tender may save the estate of his feoffee, which in all good dealing he ought to do (1).

Sect.

(2) See note 1. fol. 216.

(3) And if, at the time of the feoffment, a purer or more weighty money were current, and, before the day of payment, coin of a baser alloy is established by proclamation, a tender of the sum in that coin is good. Dav. Rep. 18. *Note to the 11th edition.*—[Note 104.]

(1) In the same manner, *equity permits all persons to redeem, who have any estate or interest in the equity of redemption of the mortgagor*; as tenant for life, remainder-man or reversioner, jointress, tenant by the curtesy, by *elegit*, statute merchant or staple, &c. All these may redeem; and volunteers are equally admitted to redeem, as purchasers for a valuable consideration. Howard *v.* Harris, 1 Vern. 190. 2 Eq. Cas. Abr. 594. The tenant for life and jointress contribute towards the redemption of the mortgage debt. In 1 P. Wms. 650, the reporter states, that he mentioned to the court, that the life estate, (especially in the case where the tenant for life had the remainder in fee,) might be valued at two fifths, which had been done in some cases; yet the court said, how

how equitable soever that might be, it was not the practice, for which reason it would be dangerous, and create uncertainty to go out of the rule; and the register said, he had never known a life valued at more than one-third. And see Brend *v.* Brend, 1 Vern. 213. Ballet *v.* Sprainger, Pre. Cha. 62. James *v.* Hailes, ib. 44.—But the remainder-man or owner of the inheritance must come in to redeem in the life of the tenant for life, or jointress; for he cannot, after their decease, compel a contribution from their assets. Cornish *v.* Mew, 1 Cha. Ca. 271. Howell *v.* Price, Pre. Cha. 423. Hungerford *v.* Hungerford, Gilb. Eq. Rep. 67.—In what cases *the doweress will be permitted to redeem*, is a question which involves in it many points of great nicety. The law requires a legal seisin in the husband; and it is a settled point, that the wife cannot be endowed of a trust estate. Upon this principle, it was generally understood, that the wife was not entitled to her dower out of an estate, which, at the time of her marriage, was subject to a mortgage in fee. But this, perhaps, was never formally determined, till the case of Dixson *v.* Saville, 1 Bro. Cha. Ca. 326. But the case is different with respect to mortgages for terms of years. It may be observed here, 1st. that, at common law, if a lease be made for a term of years, rendering rent, the wife is entitled to her dower of a third part of the reversion by metes and bounds, and to a third part of the rent; and execution will not cease during the term. 2dly. If the husband makes a gift in tail, rendering rent, as the rent is payable out of, or in respect of, an estate of inheritance, the wife will be endowed of a third part of the rent. 3dly. If the husband makes a lease for life, rendering rent, the wife is not entitled to her dower of the rent, because it is not payable, in this case, out of, or in respect of, an estate of inheritance. 4thly. If the husband makes a lease for years, reserving no rent, then judgment will be given for the wife, with a *cesset executio* during the term. This, if the term be of long duration, deprives her, virtually, of her dower. 5thly. If a person purchases an estate of inheritance which is in mortgage for a term of years, the wife of the vendor will not be entitled to her dower in equity, if the term was created before the marriage of the vendor, and actually assigned to a trustee for the purchaser, to attend the inheritance. 6thly. If a person dies seised in fee, subject to a term of years, if the term be a term in gross, for securing the payment of a sum of money, the widow, by discharging the money secured by it, or paying one third of the interest, will be entitled to dower. 7thly. If the term be an outstanding satisfied term, she will also be entitled to her dower against the heir. Ante 32. a. Bro Abr. Dower, 44. 60. 89. 1 Roll. Abr. 678. Bodmin and Vandebendy, Shower's Cases in Parliament, 69. Brown *v.* Gibbs, Precedents in Chancery, 97. Wray *v.* Williams, ibid. 151. Dudley *v.* Dudley, ibid. 241. Banks *v.* Sutton, 2 P. Wms. 700. Hill *v.* Adams, 2 Atkyns, 208. Amb. 6. under the name of Swannock *v.* Lyford.—The last of these cases applies particularly to the position contained under the 5th division,—that in the case of a purchaser, the wife will not be relieved in equity against a term of years so outstanding.—As this circumstance frequently occurs in practice, and the general doctrine of terms of years, as they affect dower, is very important, we present the reader with a manuscript note of lord Hardwicke's argument, on making his decree in the case last mentioned, where he enters very largely, and with his usual ability, both on the general doctrine, and its application to the point in question.

"Lord Chancellor.—Plaintiff's husband, being seised of a freehold estate, subject to a term of one thousand years standing out in a mortgage, by virtue of a mortgage made by his father, conveys the inheritance to defendant for a valuable consideration; and, at the time of this conveyance, defendant takes an assignment of the term in mortgage, in the names of trustees, to wait and attend upon such inheritance: and now the plaintiff brings her bill against defendant the purchaser, for dower, praying to be admitted to redeem this mortgage term, and to have it out of the way; and, upon payment of her proportion of the mort-

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gage money, to be let into her dower immediately, that she might not wait till the determination of the term.—Question is, Whether the court ought to decree this, under the present circumstances of the case? I cannot say but, that the decree already made at the rolls for plaintiff the widow, is absolutely consistent with the mere reason of the thing, if it was not to be considered originally, and settled; but, as this must depend, not only upon the precedents of the court, but the practice of conveying titles to estates, upon which the precedents themselves were settled, I do not wonder that a decree of this kind should be made by a judge, who was not absolutely conversant in such precedents of the court, and the distinctions taken therein. But, upon consideration of them, and the great authority relied upon, of lady Radnor and Vandebendy, Show. P. C. I am of opinion, that the decree ought to be reversed. And, if it should not, would it not be going directly contrary to that great authority, and the reasons upon which it is founded, and make such uncertainty in this court in regard to purchases, that the subject would not know what to rely upon?—The wife here claims her dower, subject to a term originally standing out in a mortgage. The consequence of that is, that, in law, though she might have brought her writ of dower, and recovered judgment, yet she could not have had the benefit of it, till after the determination of the term; for the judgment would be, with a *cesset executio* till that time. This was the wife's legal remedy; and, that being so, she comes into this court upon the foundation of her general right of dower, to be delivered from that restriction which the law imposes upon her, from having the benefit of it, till such determination of the term, and to be admitted to redeem this term, which is now not in the hands of the mortgagee, but of the purchaser, as being assigned to attend upon the inheritance, and for the other purposes before mentioned: and, though the assignment is not in the words "to protect the inheritance from dower, or mesne incumbrances," yet it is always so understood; otherwise there would be no use in taking the term in the name of a trustee.—It is admitted by the defendant, in case things had stood as they were at the time of the marriage, viz. that the term had been in the mortgagee, and the inheritance in the husband, as heir, or purchased from him by the purchaser without an assignment of the term, as here, the wife, as entitled to dower, might then have come here to redeem the mortgage, to have the benefit of coming at her dower immediately, by paying off the mortgage money, or keeping down the interest for the benefit of the heir or purchaser. And even this was, (when originally settled) going a good way in favour of a doweress, though it was consistent with the reason of the thing; for, as she was entitled to dower, and as a mortgage is only a redeemable interest, it is fit the equity of redemption should follow the nature of the interest in the estate; and she to be endowed, and the heir at law to be entitled to the inheritance subject to such dower, was giving the wife a real benefit arising from her dower, and not a mere nominal one, as it would be at law, where there is an outstanding term; for, when the law says, she shall have judgment for dower, but with a *cesset executio* till the determination of the term, that is in fact to say, she shall have no dower, and therefore this court, as against the heir, but not the purchaser of the term and inheritance, gives her the benefit of her dower, by removing the term. And, if all the cases of tenancy in dower and curtesy likewise were now originally to be considered, it might as well be left upon the strength of the law, for it is undoubtedly a mere legal title that the one has, as well as the other; and there is no contract of the party's intervening. Therefore, if a woman marries, and the husband is in possession of an estate, or, if a man marries, and the woman is in possession of an estate, each party knows that, at the time of the marriage, their estates are liable and subject, on the one side, to a tenancy by the curtesy, and, on the other, to dower, and to all mesne incumbrances and terms; and there is no harm to say, that both shall take their chance. The commiseration, in respect to dower, has arisen from the determinations in favour of tenancy by the curtesy; and indeed, the distinction made between dower and tenancy by

curtesy is founded upon very slight reasons; but, however, it has been so established. The great point, in this case, depends upon the determination in the case of lady Radnor and Vandebendy, in Show. P. C. and Preced. Chan. and that was thus: (I mention it from lord Somers's own notes)—It was sent to the master, in order to state the case, who stated it:—That, Charles earl of Warwick, upon the marriage of his son, settled his estate, as to part, in jointure to his lady, and part, upon the son in tail, and part, upon himself in tail; and, upon failure of issue male, then to trustees for 99 years, to be disposed of by the said earl, either by deed or will, and, for want of such appointment, the term was declared to be for the next in remainder, and to be attendant upon the inheritance; and, as to a third part of a moiety of the estate, it was limited to lord Bodmyn in tail. The son died without issue; and then the earl, according to his power of appointment, charges the estate with some annuities, some of which were determined at the time of the purchase in question, and some were continuing; and then the trust term, which was merely such, was to be attendant upon the inheritance. Vandebendy purchases of lord Bodmyn, plaintiff's husband, that part of the estate limited to him; and took, not only a conveyance, but a recognizance in two statutes, in very considerable sums, to indemnify the estate from incumbrances, and against the wife's dower, and for suffering a recovery, and took an assignment of the term. Vandebendy afterwards conveys to sir John Rotheram, which occasioned it to be called in Preced. Chanc. 65. by the name of lady Radnor *v.* Rotheram.—Lady Radnor brought a bill to have the benefit of dower against Vandebendy, (who purchased of lord Bodmyn her husband,) and to set this term out of the way; and, by the decree before made, lord Jefferys inclined to give relief, and did set the term out of the way, and direct she should bring dower at law; but lord Somers reversed that decree; and, upon appeal to the house of lords the reversal was affirmed. There was great doubt in this court, and so in the house of lords; and there was a great inclination in the house to reverse that decree of lord Somers; but, when the counsel came to the bar, the lords asked, Whether it was usual for conveyancers to convey terms for years to attend the inheritance. to prevent dower? and the counsel, with great candor, saying it was, the lords affirmed lord Somers's decree. The point that weighed in the judgment was, that this was the case of a purchase for a valuable consideration; that, in making conveyances, purchasers relied upon that method of taking a conveyance of the inheritance to themselves, and an assignment of the term standing out to a trustee, to attend it; that the outstanding term was prior to the title of dower in the wife, and, therefore, purchasers have relied upon that, as a bar to such dower; so that this court and house of lords were of opinion, that, if they were not to permit that to be so, it would be to overturn the general rule, which had been established and practised by many titles to estates, and tend to make such titles precarious for the future. And, as to what was said in the case of Brown and Gibbs, Preced. Chanc. 97. viz. that, though there was a purchaser, in the case of lord Radnor and Vandebendy, yet, that the court did not go upon that reason.—I do not know who reported that to be the saying of the court; but this I know, that that was the only reason for the determination there; and that is plain, for Vandebendy, the purchaser, having purchased for a valuable consideration, lord Somers did rely upon that greatly; for he said, it has been always looked upon, that a term, purchased in by such a person to protect the inheritance against dower, &c. has been sufficient for that purpose; and therefore, it would not only be a new thing to determine it should not, but of very great consequence, and greater than what appears at first view, besides what has been already mentioned, and especially, since practitioners have all along advised this method, whereby many persons have been purchasers in that way; and there cannot be a stronger argument against altering this method by any determination, than to say, it was never done: but the argument by the counsel was of another nature; for they said, that judgment had been given for dower in all ages, and, in the case of a term,

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as in the present case, she might come into this court, to have the benefit of her dower, notwithstanding such term. Ever since this case, it has always been said that the court is bound by it; and, on the other hand, I have heard it often said by the court, that they will go no farther. And therefore, to have the benefit of a determination, every person's case must be exactly and strictly the same with that. I am of the same opinion too, and will not go any farther than that case does. So that, then the question comes to be this, Whether there is any distinction between this case and that? It is said, that, there the purchaser was allowed to protect himself, by taking in the term attendant upon the inheritance, because that was a satisfied term, which, in the consideration of this court, was become part of the fee; that he purchased the whole estate of the husband, and, therefore, an old term, such as that was, has been allowed to be so assigned, to protect the inheritance; but that, in this case, the husband had nothing in the term, because he was owner of the inheritance subject to it, and of the equity of redemption of it; and, for that, at the time of the purchase, the term was in mortgage, and standing out, and the money advanced still due upon it, that it was a security separate from the husband's inheritance, and the purchaser took it from the mortgagee only and not from the husband. But, I think, that makes no difference here from that of Vandebendy. If there is any difference, it is against the plaintiff, and makes the case much stronger in favour of the present purchaser. It is difficult to say, upon the state of the case, that the term there was a satisfied term at the time of the purchase. I rather think it was not; for lord Somers states it, that the earl of Warwick, who had the power of appointing the trust term, did appoint it, by charging it with some annuities, which were to commence a year after, and that some of them were continuing, and some of them determined, and, I think, after the purchase made; and, if that was so, this was not as atisfied term, but still subsisting to pay those annuities, which were incumbrances continuing upon the terms; so that Vandebendy, who took the assignment of the term, took it subject to the trust so continuing on it, in like manner as the purchaser here took the term, subject to the mortgage, and the money due thereon. Therefore, the distinction endeavoured to be made between the case there being a satisfied term, and this being a mortgage term, not satisfied, fails. But, supposing the term had been satisfied, how would that make any difference? It is true, that would then have been a trust for the husband, and his heirs, and he would have it as part of his ownership and dominion over the estate; and, consequently, it would be subject to dower, as against the husband. For, if the husband dies, and there is a satisfied term continuing, the wife would be entitled to come into this court, against the heir, to set that term out of the way, in order to have the benefit of her dower; and that is expressly so said in the case of Banks and Sutton, 2 Wms. 700. by the master of the rolls, and he cites a case to that purpose: and undoubtedly she would, without paying any thing. And if, in the present case, the husband had made no conveyance to the purchaser, and the mortgage had continued in the mortgagee, or his assignee, and the equity of redemption had descended on the heir, she would have been entitled likewise to dower against him, by redeeming the term, and paying her proportion of the mortgage money, or by keeping down the interest. But, if a term for years is in mortgage, and a person purchases the inheritance of the husband, and takes an assignment of the term from the mortgagee, by paying off the money, not only to have the trust of the term as a security, but to protect the inheritance so purchased, would it not be hard to take away the benefit of it from him? Shall it be said, that he shall have a less inheritance by taking in a mortgage term in that manner, by actually paying off the mortgage money, than if he had taken an old satisfied term, for which he never paid any thing? Therefore, if the term, in lady Radnor's case, had been a satisfied one, that would have been so far from distinguishing that case from this in favour of the plaintiff, that it would have been rather stronger in favour of the purchaser; for here, he paid a consideration for the outstanding term,

and there, nothing would have been paid for such said satisfied term. But, it is said, that this purchase of the mortgage was from the mortgagee, and not from the husband. If that was so, I do not know that this would make any difference, because the husband here joined in the assignment of the mortgage. But, what results from this case is, that, it was part of the agreement of all the parties, (the husband joining) that the term should be purchased in, by the purchaser of the estate, to attend his inheritance; and that is the very trust declared by the deed. It has been admitted here, that, if the husband had paid off the mortgage himself, after the coverture, and taken an assignment of the term in mortgage, in trust for him and his heirs, to attend the inheritance, (in which case it would have then become a satisfied term;) and, after this, a purchaser had purchased from him, and paid him the whole money, and taken a conveyance of the inheritance from him, and an assignment of the term from the trustees, that would have been very well, and within the case directly of lady Radnor. What is the difference, then, in the reason of the thing, whether the husband pays off the mortgage himself, and takes an assignment of the term, in trust for himself and his heirs, and then sells to a purchaser the inheritance, who takes the term from the trustees; or, whether the purchaser comes, and purchases the inheritance from the husband, and pays off the mortgage, and takes an assignment of the term to himself? Is the case the less strong for that? It is rather stronger.—It is admitted that, if this had been an old satisfied term, standing out attendant upon the inheritance, and a purchaser had purchased from the husband, and had taken in this term, that would have protected the inheritance. That, if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees, in trust for himself and his heirs in fee, that will prevent dower. So, if a man purchases an estate after coverture, and takes a conveyance to trustees, in trust for himself and his heirs, that will put an end to dower: so, if he takes an estate in jointenancy, or a conveyance to himself for a long term of years. But, it is objected, that the act done here by the purchaser, at the time of his purchase, he having notice of the marriage, will put the wife in a worse condition than she would have been in originally, if the purchaser had not intervened; since then, there would have been a redeemable mortgage, (the equity of redemption being in the husband,) and the husband dying, she would be entitled to redeem such mortgage, and then, to have had dower; and therefore, by the purchaser's knowing of the title of dower, by reason of the marriage, he would have put her into a worse condition, which in equity he ought not to have done; and this ought not to alter her right. But this does not differ from the common case. For, in this case, suppose the husband had, before the purchase, redeemed the mortgage, and taken an assignment of the mortgage term, in trust for himself and his heirs, to attend the inheritance, and, after that, the purchaser had purchased from him, and taken an assignment of such attendant term, in trust for him and his heirs, would not that have altered the wife's right to dower, though without that intervention of the purchaser? She would be entitled to her dower, as against the heir; so likewise, in the case of an old term attending upon the inheritance in trust; but this purchase prevents the descent of the estate to the heir, and therefore it is not to be said, that the purchasers have put the wife in a worse condition, by the intervention of their purchase: but, because conveyancers did rely upon the assignment of the term to trustees to protect the inheritance, as sufficient for that purpose, it was determined as has been mentioned; and I do not see how the present case can differ from that of an old term to attend the inheritance. But the present point is, that here the term was in the mortgagee, and the inheritance in the husband. The term will stand in the way of dower at law, and the purchaser comes in upon that foot, pays his money, and relies upon that term to protect his purchase; and therefore, I think, this is strictly within the reason of the case of lady Radnor and Vandebendy, and all the other cases grounded upon it. Another distinction made is, that here is an express

express covenant taken from the husband against the dower of his wife; for the covenant is, that the purchaser should enjoy the estate free from incumbrances, &c. and from all dowers, &c. and particularly the dower of the plaintiff; and then there is a covenant for further assurance: and, that this shows, that the purchaser relied upon this covenant as his security to indemnify him against dower; and, that it is plain, without question, this is notice of the dower. A man may reasonably take a covenant against such right of dower, and yet rely upon the security of the trust term besides, and may take such covenant against any damages, in respect to any suits by the wife for dower. The purchaser did not purchase here subject to his wife's dower, for he paid a price for the estate exclusive of it. If the estate in his hands had been subject to the dower, then the covenant against it of the husband's would not have signified. But, however, be that as it will, it is similar to that of Vandebendy; for there, the purchaser took two statutes, (with defeasance,) to indemnify the estate from incumbrances, and the wife's dower, and to suffer a recovery; and it was insisted upon there, by the counsel, as is here; but lord Somers said, though a man does take such security, which he does to prevent any damages that may arise, yet that does not preclude him from any favour he is entitled to. Another consideration in this case is, length of time; for the purchase was made in 1711. The husband died in 1719, and the plaintiff, the widow, never brought dower, or the present bill, till 1737; and it appears, that defendant, the purchaser, has since made great improvement upon the estate, and therefore it would be very hard, especially after the several cases determined in favour of purchasers, even if there was a hair's breadth of a distinction between this case and that of lady Radnor and Vandebendy, to suffer the plaintiff now to come here for dower. It is said, about 10 years ago plaintiff did claim her dower of the present defendant, which amounted to notice to him of such dower, (which he did not want). But, however, the making a claim, and then not proceeding directly upon it, shows, that plaintiff was conusant of her right, but would not proceed; and the purchaser must think, by her delaying so to do, that she would not, and that might be an inducement for him to make such improvements as he has done. Therefore, upon the whole, I think the decree ought to be reversed, and the bill to be dismissed; but I will not give costs."

In the above case, Chute, Clarke, and Weldon, for plaintiff, cited Attorney-general and Scot, lord Talbot's time. See Lady Radnor and Vandebendy, Show. P. C. 69. Preced. Chanc. 65. 97. 133. 2 Wms. 632.

Attorney-general, Brown, Gapper, and Murray, contra, cited the above cases, and Mitchell and Reynolds, at the Rolls, 1730. "Bill was brought for dower, and case was, the husband in 1710, had made a mortgage for 500 *l.*, for the term of 1,000 years, which was assigned to *J. S.* after the marriage of plaintiff, to secure a further sum. The husband mortgages another estate in fee, and both these mortgages were assigned to defendant; and, in 1725, defendant came to an account with the husband, and likewise came to an agreement with him for the purchase of the estate, for the mortgage sum only. Accordingly, the husband conveyed the equity of redemption. One question arose, relating to the estate mortgaged in fee; and another, in respect to the mortgage for years. And as to the mortgage for years, the master of the rolls said, the doweress should have dower out of a term for years, where the inheritance was in the husband, as against the heir of the husband, or against a volunteer; but it is settled that she shall not as against a purchaser for a valuable consideration: and cited the case of lady Radnor and Vandebendy. And he said likewise what was mentioned before, in the principal case, relating to the method of conveyances; but that he could not look upon defendant here as a purchaser, because he could not look upon the method here taken between him and the husband as a purchase, the agreement for the purchase being for the mortgage

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ALSO, if a feoffment be made upon condition, that if the feoffor pay a certaine sum of money to the feoffee, then it shall be lawfull to the feoffor and his heires to enter: in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is past. For when the condition is, that if the feoffor pay the money to the feoffee, &c. this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c. and when the feoffor dyeth, then the time of the tender is past. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money as is aforesaid, for that the time of the tender was not past by the death of the feoffor. Also it seemeth, that in such case* (‡ que en tiel case) *where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heires of the feoffor may enter* (et si le feoffee ceo refuse,† les heires de feoffor poient entrer), *&c. And the reason is, for that the executors represent the person of their testator, &c.* (1).

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* *&c.* added in L. and M. and Roh.
‡ que *not in L. and M. or Roh.*
† donques *added in L. and M. and Roh.*

mortgage money only; therefore relieved the widow. But said, that he would not relieve her as against a purchaser."

In the late case of Maundrell *v.* Maundrell, 7 Ves. jun. 567. and 10 Ves. jun. 246. the doctrine, which is the subject of this note, received a full investigation.—[Note 105.]

(1) The following succinct observations,—1st. On the right of the executor to receive the mortgage debt: 2dly. On the application of his personal estate in discharge of his mortgage debts: 3dly. On limiting the right of redemption to persons not entitled to the ownership of the land, when the mortgage is executed: and 4thly. On the length of possession by a mortgagee, which bars the mortgagor's right of redemption,—may, perhaps, without impropriety, be inserted in this place.

1st. It has been long settled in equity, that *mortgage money is to be paid, not to the heir, but to the executor:* and this holds, though the mortgage be in fee; though the condition be for payment to the mortgagee, his heirs or executors; though there be no want of assets; though there be no bond given, or covenant entered into by the mortgagor, for payment of the money; and, whether the mortgage be forfeited or not, at the death of the mortgagee; for equity considers a mortgage as part of the mortgagee's personalty. See the argument of lord keeper Finch in Thornbrough *v.* Baker, 1 Cha. Ca. 285. and see 2 Cha. Ca. 50, 51. 187. 224. 2 Vent. 348. 351.—This follows from the principle, which has been already noticed, that, in equity, the lands are only considered as a pledge or security for the money lent, and the money is the principal, if not the sole object. In adopting this rule, courts of equity appear to have been guided by the same reasoning, which in former times made courts of law consider the estates of tenant by statute merchant and tenant by statute staple merely as chattel

chattel interests. These, from their uncertain nature, ought to have been considered as freehold; but being, as Mr. justice Blackstone observes, a security and remedy provided for personal debts, to which debts the executor is entitled, the law has therefore thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts, if recovered, would belong. 2 Bl. Com. ch. 10. sect. 5. Still however the mortgage is considered as forfeited in law, and the mortgagor can only recover the mortgaged lands back, by the aid of equity.

2dly. It also follows, from the circumstance of the mortgaged lands being considered, in equity, as a security or pledge for the mortgage debt, that, after the legal forfeiture, it continues as much a debt as before: Hence, *in general, the personal estate of the mortgagor is, upon his decease, to be applied in discharge of the mortgage:* and this holds equally in favour of the heir; of a general devisee, or *hæres factus*; and of a devisee of particular lands; and whether there is, or is not, a bond or covenant for payment of the money. Cope *v.* Cope, 1 Salk. 450. Howell *v.* Price, Prec. in Cha. 423. Pockley *v.* Pockley, 1 Vern. 36. Lord Winchelsea *v.* Norcliff, 1 Vern. 403. Bartholomew *v.* May, 1 Atk. 487. Galton *v.* Hancock, 2 Atk. 424. 427. 430. This doctrine has been frequently extended to the case of a devise of lands in trust, to pay off debts; where (particularly if the personalty is bequeathed to the executor) the courts, notwithstanding an express devise of a real estate for the payment of debts, have directed the personalty to be first applied in payment of them. See Gower *v.* Mead, Prec. in Cha. 2. Dolman *v.* Smith, ibid. 456. 2 Vern. 740. Hall *v.* Brooker, Gilb. Rep. 72. See also Bamfield *v.* Wyndham, Prec. in Cha. 101. Wainwright *v.* Bendloe, Gilb. Rep. 125. Stapleton *v.* Colville, Ca. temp. Talbot, 202.—*In some cases, however, the courts have considered the land as the primary fund, and the personalty merely as auxiliary.* The personal estate is then only a surety for the land, and will have the same equity as the land is entitled to, when it is pledged as a surety for a personal debt. This doctrine is most pointedly and happily stated, explained, and exemplified by Mr. Cox in his note under page 664 of the second volume of his edition of Peere Williams. —The cases chiefly occur, where a person purchases an estate, subject to a sum of money, which he does not discharge, or leaves part of the purchase money secured on the estate. Speaking generally, in these cases, as between the real and personal representatives of the purchaser, the land is the primary fund for the payment of such money: but the purchaser may arrange this at his pleasure. To prevent doubt on the subject, it is advisable to insert a clause in the purchase deed, expressing the purchaser's intention in this respect.

3dly. It sometimes happens, that by the language of the proviso for redemption the right to redeem is limited to a person, who had either no interest, or a partial interest only, in the land, at the time of the mortgage; and that, from the circumstance, it becomes doubtful, *whether the person, to whom the equity of redemption is thus limited, does not acquire, under the limitation, the beneficial ownership of the equity of redemption*; or, at least, a greater interest in it than he had in the land before the mortgage. Speaking generally, a strong indication of intention is necessary, to transfer the beneficial ownership of the equity of redemption, from the person entitled to the beneficial ownership of the estate at the time of the mortgage, or to vary his rights; when this is intended, a full recital of the intention should be inserted.—In the same manner, when money is raised by mortgage for the benefit of a person, having a partial interest in the land, as where the husband and wife join in a mortgage of her estate, and the money is paid to him, or where the tenant for life and the reversioner join in a mortgage, and the money is paid to the tenant for life, it should be stated, whether it be the intention of the parties, that, as between the estate and the person receiving the money, the estate or the person receiving the money is to be debtor for it, and indemnify the other.—But this is unnecessary,

THIS diversitie is plain and evident, and agreeth with [a] our books, and yet somewhat shall be observed hereupon: for here it appeareth, that seeing no time is limited, the law doth appoint the time, and that is during the life of the feoffor. Wherein divers diversities are worthy the observation:

[a] 14 H. 7. 31. 15 H. 7. 1. (Ant. 47. Post. 219. a. 2 Cro. 244.) (2 Co. 70.)

First, between this case that *Littleton* here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a bond for the payment of a sum of money where no time is limited: for in such a condition of a bond the money is to be payd presently, that is, in convenient time. [b] And yet in case of a condition of a bond there is a diversitie between a condition of an obligation, which concernes the doing of a transitorie act without limitation of any time, as payment of money, delivery of charters, or the like, for there the condition is to be performed presently, that is, in convenient time; and when by the condition of the obligation the act that is to be done to the obligee is of his own nature locall, for there the obligor (no time being limited) hath time during his life to perform it, as to make a feoffment, &c. if the obligee doth not hasten the same by request. In case where the condition of the obligation is locall, there is also a diversitie, when the concurrence of the obligor and the obligee is requisite, (as in the said case of the feoffment) and when the obligor may performe it in the absence of the obligee, as to knowledge satisfaction in the court of king's bench, [*] although the knowledge of satisfaction is locall, yet because he may do it in the absence of the obligee, he must do it in convenient time, and hath not time during his life.

1

44 E. 3. 9. 33 H. 6. 45. & 48. b. 4 E. 4. 29. 9 E. 4. 22. 15 E. 4. 30. 21 E. 4. 38. b. 9 H. 7. 17. b. 10 H. 7. 15. 14 H. 8. 21. a. & 29. b.

2

[b] Lib. 6. fol. 30, 31. Boothie's case. 33 H. 6. 47, 48. (1 Roll. Abr. 436.) (6 Rep. 31. Boothie's case. Post. 210. b.) (2 Roll. Abr. 436, 437.)

[208. b.]

3

[*] Boothie's case, ubi supra. (Doc. Pla. 269. 457.)

Another diversity is, where the condition concerneth a transitory or locall act, and is to be performed to the feoffee (A) or obligee, and where it is to be performed to a stranger: as if *A.* be bound to *B.* to pay ten pounds to *C.* *A.* tenders to *C.* and he refuseth, the bond is forfeited, as in this Section shall be said more at large.

4

(Vide ant. Sect. 324.)

Another diversitie is between a condition of an obligation, and a condition upon a feoffment, where the act that is locall is to be done to a stranger, and where to the obligee or feoffor himself. As if one make a feoffment in fee, upon condition that the feoffee shall infeoffe a stranger, and no time limited, the feoffee shall not have time during his life to make the feoffment, for then he should take the profits in the mean time

5

Boothie's case, li. 6. fo. 31. li. 2. fo. 79. b. Seignior Cromwell's case. 44 E. 2. 9. 21 E. 4. 41. 2 E. 4. 3, 4. 19 H. 6. 67. 73. 76. 4 E. 4. 4. b. 26 H. 8. 9. b. (2 Rep. 59. 219. b.)

(A) *Should it not be* feoffor?

unnecessary, if the mortgage is made, by an exercise of a special power; as in that case, the property, as between the persons entitled to it, and the mortgagor, is always the debtor.

4thly. It does not appear, that the courts of equity have fixed *any determinate period of time to be such a length of possession as to bar the mortgagor's right of redemption:* but as, in the courts of law, twenty years is a bar to an entry or ejectment, the courts of equity, (consistently with their general system, that the rules and practice of their courts should bear an analogy to the rules and practice of the courts of law) have inclined to allow *the same period of twenty years to be a bar to a redemption.*—See Cook *v.* Arnham, 3 P. W. 283. and the note of the editor at the end of that case.—[Note 106.]

time to his own use, which the estranger ought to have, and therefore he ought to make the feoffment as soon as conveniently he may; and so it is of the condition of an obligation. But if the condition be, that the feoffee shall re-infeoffe the feoffor, there the feoffee hath time during his life, for the privitie of the condition between them, unlesse he be hastened by request, as shall be said hereafter.

6 Another diversitie is, when the obligor or feoffor (A) is to enfeoffe a stranger, as hath been said, and when a stranger is to enfeoffe the feoffee or obligee: as if *A.* enfeoffe *B.* of *Black Acre*, upon condition that if *C.* enfeoffe *B.* of *White Acre*, *A.* shall re-enter, *C.* hath time during his life, if *B.* doth not hasten it by request, and so of an obligation. (Vide post. Sect. 352, 353, 354.)

7 But in some cases albeit the condition be collaterall, and is to be performed to the obligee, and no time limited, yet in respect of the nature of the thing the obligor shall not have time during his life to perform it. As if the condition of an obligation be, to grant an annuitie or yearly rent to the obligee during his life, payable yearely at the feast of *Easter*, this annuity or yearly rent must be granted before *Easter*, or else the obligee shall not have it at that feast during his life, *et sic de similibus*; and so was it resolved by the judges [*] of the common pleas in the argument of *Andrews*'s case, which I my selfe heard. 14 E. 3. Det. 138. li. 2. fo. 80. Seignior Cromwell's case. [*] Vid. Dyer, 14 El. 311. (6 Rep. Boothie's case.)

8 Lastly, When the obligor, feoffor, or feoffee is to do a sole act or labour, as to go to ☞ *Rome*, *Jerusalem*, &c. in such and the like cases, the obligor, feoffor, or feoffee, hath time during his life, and cannot be hastened by request. And so it is if a stranger to the obligation or feoffment were to do such an act, he hath time to do it at any time during his life.

[209. a.]

"*If the executors of the feoffor tender, &c.*" So as now it appeareth that either the heir of the feoffor, or his executors, may (when a day is limited) pay the money; and so also may the administrator of the feoffor do, if the feoffor dye intestate [*f*]; and this may the ordinarie do if there be neither executor nor administrator as hath been said. (Ant. 206. a.) Lib. 5. fol. 96, 97. Goodale's case. [*f*] Vid. Sect. 334. (See Hensloe's ca. 9 Rep. 36. b.)

"*And if the feoffee refuse it, the heirs of the feoffor may enter, &c.*" *Nota*, a tender by the executors or administrators, and a refusall, doth give the heir of the feoffor a title of entrie. And here by this *(&c.)* is a diversitie implyed, when a tender and refusall shall give a third person title of entrie.

If a man be bound to *A.* in an obligation with condition to enfeoffe *B.* (who is a meer stranger) before a day, the obligor doth offer to enfeoffe *B.* and he refuseth, the obligation is forfeit, for the obligor hath taken upon him to infeoff him, and his refusall cannot satisfie the condition, because no feoffment is made; but if the feoffment had been by the condition to be made to the obligee, or to any other for his benefit or behoof, a tender and refusall shall save the bond, because he himself upon the matter 33 H. 6. 16, 17. 36 H. 6. 8. 2 E. 4. 2, 3. 15 E. 4. 5, 6. 22 E. 4. 13. 32 E. 3. Barre, 264. 7 E. 3. 29. 9 H. 7. 17. 10 H. 7. 14. b. 1 Roll. Abr. 452.

35 H. 8. Dier, 56. lib. 5. fol. 23. Lambe's case. (5 Rep. 23. Post. 211. a. Ant. 206. a.)

is

(A) *Instead of* feoffor, *the word* feoffee *is used in the 7th edition, as the sense appears to require.*

is the cause wherefore the condition could not be performed, and therefore shall not give himself cause of action. But if *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* in this case if *C.* tender, and *D.* refuse, the obligation is saved, for the obligor himself undertaketh to do no act, but that a stranger shall enfeoffe a stranger. And it is holden in bookes [*h*] that in this case it shall be intended, that the feoffment should be made for the benefit of the obligee. Some to reconcile the books seem to make a difference between an expresse refusall of the stranger, and a readinesse of the obligor at the day and place to make performance, and the absence of the stranger: but that can make no difference. I take it rather to be the error of the reporter, and the records themselves are necessary to be seen; for the law herein is, as it hath been before declared.

[*h*] 8 E. 4. 14. 2 E. 4. ubi supra.

If *I.* enfeoffe one in fee upon condition to enfeoffe *I. S.* and his heires, the feoffee tenders the feoffment to *I. S.* and he refuseth it, the feoffor may re-enter, for by the expresse intent of the condition, the feoffee should not have and retain any benefit or estate in the land, but is as it were an instrument to convey over the land.

19 H. 6. 34. (2 Rep. 59. 1 Roll. Abr. 452. 1 Rep. 133. b.)

But in that case, if the condition were to make a gift in tayle to *I. S.* and he refuseth it, and a tender and refusall is made, there the feoffor shall not re-enter, for that it was intended that the feoffee should have an estate in the land. And so it is if a feoffment be made upon condition that the feoffee shall grant a rent charge to a stranger, if the feoffee tender the grant and he refuseth, the feoffor shall not re-enter, because the feoffee was to retain the land; which points are worthy of due observation.

2 E. 4. Entrie conge, 25.

Here in the case of *Littleton*, when the executors make the tender, and the feoffee refuseth, albeit the heir be a third person, yet is he no stranger, but he and the executors also are privies in law.

(Post. 209. b.)

"*The person of the testator, &c.*" This is to be understood concerning goods and chattels either in possession or in action, and the executor doth more actually represent the person of the testator, than the heir doth the person of the ancestor. For if a man bindeth himself, his executors are bound though they be not named, but so it is not of the heir: furthermore, here the administrators and the ordinary also are implyed, as before hath been said (1).

(2 Saun. 136.)

Sect.

(1) But by the 33 H. 8. c. 39. if any person be indebted to the king by recognizance, obligation, or other specialty, and die, his heir shall be charged therein, though the word "heir" be not comprised in such recognizance, &c. In the case of sir Gerard Fleetwood, 8 Rep. 171. lord Coke observes, that the freehold and inheritance of the king's debtor are bound from the time of the debt accrued. If the observation be just, it must by the common law have been immaterial with respect to the king, whether the heir was named in the specialty or not.

Perhaps the following succinct view of THE PREROGATIVE REMEDIES OF THE CROWN, *for the Recovery of Debts*,—I. At the Common Law:—II. Under the statute of Henry 8:—III. Under the statutes of Queen Elizabeth; and under the act passed, for this purpose, in the reign of his late Majesty:—IV. And

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AND note, that in all cases of condition for payment of a certaine summe in grosse touching lands or tenements, if lawfull tender be once refused, he which ought to tender the money is of this quit, and fully discharged for ever afterwards.

THIS

—IV. And of the general effect of these remedies, may not be unacceptable to the reader.

I. *By the Common Law*, execution may be issued, not only against the goods and chattels, but against the lands of the king's debtor: and, for rent reserved on a lease, the king may distrain, not only on the lands comprised in the lease, but on any other lands of his debtor.

II. *By the* 33 *Hen.* 8. *c.* 39. all bonds executed to the king, are to have the same force, and to be attended with the same remedies, as statutes staple.

III. *By the* 13 *of Queen Elizabeth*, *c.* 4. the lands of treasurers, receivers, and other accountants to the crown, therein particularly or generally mentioned, are made liable to execution for debts to the crown, in the same manner, as if the party had acknowledged a recognizance under the statute of Henry 8. A doubt arose upon this statute, whether a sale might be made under it, after the death of the accountant or debtor. To obviate this doubt, the explanatory statute of *the 27th of Elizabeth*, *c.* 3. was passed, by which a power of sale, after the death of the debtor, was expressly given. Afterwards, by an act made in the *39th year of Queen Elizabeth*, the explanatory act was repealed, and a new exposition was made of the statute of the 13th Elizabeth, with various new provisions. But the act of the 39th Elizabeth being only temporary, and having expired early in the reign of James 1. the explanatory act of the 27th Elizabeth was revived.

IV. However it fell into disuse, and, in the late reign, when it came to be examined, on occasion of the exertions, made, during lord North's administration, for the recovery of the crown debts, it was found defective. This gave rise to the act of *the 25th of his late Majesty*, *c.* 35. by which, the court of exchequer is authorized, on the application of his majesty's attorney general, in a summary way, by motion, to order the estates of crown debtors, which should be extended by any writ of extent, or *diem clausit extremum*, to be sold for payment of the debts.

V. 1. *The result appears* to be, that all *the freehold lands*, which an accountant to the crown, under the acts, which have been mentioned, has, at the time when he enters into his office, are chargeable with his debts to the crown on account of that office. The case is not altered by his selling them before he becomes indebted, though it be a sale to a *bonâ fide* purchaser, for a valuable consideration, and without notice. Sir Christopher Hatton's case, 10 Co. Rep. 55. b. The same doctrine holds in respect to the debts of a person, who has executed a bond to the crown. This is the case of all receivers of the land-tax, as they execute a bond to the crown to account for the money coming to their hands as receivers. It follows, that all their lands are chargeable to the crown from the execution of the bond, and consequently, though they sell them

to

Vide Sect. sequent.

THIS is to be understood, that he that ought to tender the money is of this discharged for ever to make any other tender; but if it were a dutie before, though the feoffor enter by force of the condition, yet the debt or dutie remayneth.

(9 Rep. 79. a.) As if *A.* borroweth a ☞ hundred pound of *B.* and after mortgageth land to *B.* upon condition for payment thereof: if *A.* tender the money to *B.* and he refuseth [209. b.] it, *A.* may enter into the land, and the land is freed for ever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if *A.* without any loane, debt, or dutie preceding infeoffe *B.* of land upon condition for the payment of a hundred pounds to *B.* in nature of a gratuitie or gift; in that case if he tender the hundred pound to him according to the condition, and he refuseth it, *B.* hath no remedie therefore; and so is our author in this and his other cases of like nature to be understood.

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ALSO, if the feoffee in morgage before the day of payment which should be made to him, makes his executors and die, and his heir entreth into the land as he ought, &c. it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to

to a purchaser, at a time when they are not indebted, and have no money belonging to the crown in their hands; still, the lands are liable to the crown for their future debts.

As between the crown and the debtor, the lands in the hands of his trustees are chargeable with the crown debts; and, in the late case of the King *v.* Smith, it was held that an outstanding legal estate will not protect, even a *bonâ fide* purchaser, for a valuable consideration, without notice, against crown debts. See Mr. Sugden's Law of Vendors, 4th edition, Appendix, N° 15.

In the case of the King *v.* Smith, Wightwick's Reports in the Exchequer, p. 39, the question was, whether a simple contract debt to the crown was such a charge or lien on the freehold estate of the debtor, as should bind the land in the hands of a purchaser from him, without notice and without fraud, if the debts were not recorded at all, or not recorded till after the conveyance. The barons were unanimously of opinion that it was not; but seem to have considered that the land of such a debtor would be chargeable in the hands of the purchaser, if, at the time of the purchase, the debtor filled a situation, notoriously accountable to the crown.

V. 2. With respect to *copyhold lands*.—The king cannot extend the copyhold land of his debtor; Kitchen, 123; Rex *v.* Budd, sir Thomas Parker, 190. 8 Ves. jun. 394, 395.

V. 3. *Leaseholds for years* may be taken in execution at the suit of the crown debt; but though on record, the debt of the crown is not a charge or lien on leaseholds for years, until the writ of execution is taken out upon them and delivered to the sheriff.

Generally speaking, what has been said in this annotation applies equally to the sureties for the debtor to the crown, as to the debtor himself:—and, for many legal consequences, a person accountable to the king's debtor is accountable to the king himself.—[Note 107.]

*to the feoffee in manner as a dutie, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other dutie; and therefore the payment shall not be made to the heir, * as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c. there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir* († le payment doit estre fait al heir) *at the day appointed, &c.*

"*PAY such a sum at such a day, &c.*" Here is implyed, that this payment ought to be reall, and not in shew or appearance. For if it be agreed between the feoffor and the executors of the feoffee that the feoffor shall pay to the executors but part of the money, and that yet in appearance the whole sum shall be paid, and that the residue shall be repaid, and accordingly at the day and place the whole sum is paid, and after the residue is repaid, this is no performance of the condition, for the state shall not be divested out of the heir, which is a third person, without a true and effectual payment, and not by a shadow or colour of payment, and the agreement precedent doth guide the payment subsequent. 18 E. 4. fol. 18. lib. 5. fol. 98. Goodale's case. 19 H. 6. 54. 20 E. 3. Account, Pl. 70. (5 Rep. 117.) (5 Rep. 96.)

And by this Section also it appeareth, that the executors do more represent the person of the testator, than the heir doth the ancestor; for though the executor be not named, yet the ☞ law appoints him to receive the money, but so doth not the law appoint the heir to receive the money unless he be named. (Ant. 209. a. 9 Rep. 39.)

[210. a.]

"*Ought to be made to the heir at the day appointed, &c.*" And here it also appeareth, that if the condition upon the morgage be to pay to the morgagee or his heires the money, &c. and before the day of payment the morgagee dieth, the feoffor cannot pay the money to the executors of the morgagee: for *Littleton* saith that in this case the payment ought to be made to the heir. *Et in hoc casu designatio unius personæ est exclusio alterius, et expressum facit cessare tacitum*; and the law shall never seek out a person, when the parties themselves have appointed one. But if the condition be to pay the money to the feoffee his heirs or executors, then the feoffor hath election to pay it either [*m*] to the heir or executors. Vid. li. 5. fo. 96. Goodale's case. Dier, 2 Eliz. 181. 44 E. 3. 1. b. (Ant. 47. a.) [*m*] 12 E. 3. Condition, 8 & 10. (8 Rep. 73.)

If a man make a feoffment in fee upon condition that the feoffee shall pay to the feoffor his heirs or assigns 20 pound at such a day, and before the day the feoffor make his executors and dieth, the feoffee may pay the same either to the heir or to the executors, for they are his assigns in law to this intent. But if a man make a feoffment in fee upon condition that if the feoffor pay to the feoffee his heirs or assigns 20 pound before such a feast, and before the feast the feoffee maketh his executors and dyeth, the feoffor ought to pay the money to the heir, and not to the executors, for the executors in this case are no assigns in law; and the reason of this diversitie is this, for that in

* *as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir,* not in L. and M. or Roh.

† donques *added in L. and M. and Roh.*

(1 Rol. Abr. 421.)

(Hob. 9.)

27 H. 8. 2. 3 & 4 Ph. & Mar. 140. a.

(*) Mic. 23 & 24 Eliz. in curia Wardorum inter Randal & Browne. Vid. 2 Eliz. Dier, 181. Pl. Com. Chapman's case, 186. 288. Vid. Goodale's case, lib. 5. fo. 96, 97. 17 Ass. pl. 2. Goodale's case, ubi supra. (Mo. 243. Ante 208. a.)

in the first case the law must of necessitie find out assigns, because there cannot be any assigns in deed, for the feoffor hath but a bare condition and no estate in the land which he can assigne over. But in the other case the feoffee hath an estate in the land which he may assigne over; and where there may be assigns in deed, the law shall never seek out or appoint any assigns in law. And albeit the feoffee made no assignment of the estate, yet the executors cannot be assigns, because assigns were only intended by the condition to be assigns of the estate; and so was it resolved (*) *Mich.* 23 & 24 *Eliz.* by the two chief justices in the court of wards between *Randall* and *Browne*, which I observed.

But if the condition be to pay the money to the feoffee his heirs or assigns, and the feoffee make a feoffment over, it is in the election of the feoffor to pay the money to the first feoffee or to the second feoffee; and so if the first feoffee dyeth, the feoffor may either pay the money to the heir of the first feoffee, or to the second feoffee, for the law will not enforce the feoffor to take knowledge of the second feoffment, nor of the validity thereof, whether the same be effectuall or not, but at his pleasure, and the first feoffee and his heirs are expresly named in the condition (1).

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(1) Hob. 9. Pease and Styleman.—*A man was bound to pay* 20*l. to such a person as he (the obligee) should by his will appoint. The obligee made J. S. his executor, but made no other appointment. It was resolved, upon demurrer, that the executor should not have the* 20 *l. for he is only an assignee in law, who takes to the use of the testator: but here the condition is in favour of an actual assignee, who takes to his own use. The conusee of a fine leases to the conusor for* 99 *years, with condition, if the lessee pays to the lessor, his heirs and assigns, that the uses limited to the conusee and his heirs, by an indenture, should cease: the lessor dies. Lord Nottingham was of opinion, that the uses should not cease by payment to the administrator of the lessor, because he may be an assignee in deed, as here.* 11 *May*, 1659, *Sir Andrew Young*.—Lord Nott. MS. notes.—Howe *v.* Whitebanck. Upon a fine, the use of land was limited to *A.* for 80 years, with a power to *A.* and his assigns to make leases for three lives, to commence after the determination of that term. *A.* assigned over to *B.*, *B.* died, having made his will, and appointed *C.* his executor. *C.* assigned over to *D.*: *D.* in pursuance of the power, made a lease for life. The question was, whether *D.* was such an assignee of *A.* as to have a power to make this lease; or whether it should extend only to the immediate assigns of *A?* The doubt in this case was the greater, as there had been a devolution upon an executor. The case of Pease and Styleman was cited, where it was said, that an executor or administrator should not in some cases be said to be a special assignee. But all the court seemed to incline to the contrary, and that *D.* should be called an assignee, well enough for the purpose of making the leases in question, and that so should any person that came to the estate under the first lessee, though there should be twenty mesne assignments. And afterwards, in the Michaelmas term following, judgment was given accordingly.—1 Freem. 476.—[Note 108.]

Sect. 340.

ALSO, upon such case († sur tiel case) *of feoffment in mortgage, a question hath been demanded in what place the feoffor is bound to tender* (est tenus ‡ de tender) *the money to the feoffee at the day appointed, &c. And some have said, upon the land so holden in mortgage* (que sur la terre issint § tenus en morgage), *because the condition is depending upon the land. And they have said that if the feoffor be upon the land there ready to pay the money* (Et ont dit ‖ que si le feoffor soit ¶ sur le terre la prest a paier le money) *to the feoffee at the day set, and the feoffee be not then there, then* (+ adonque) *the feoffor is quit and excused of the payment of the money, for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him; for he is bound to seek the feoffee if he be then in any other place* (s'il soit adonque en ** ascun auter lieu) *within the realm of England. As if a man be bound in an obligation of* 20 *pound upon condition endorsed upon the same obligation, that if he pay to him to whom the obligation is made at such a day* 10 *pound, then* (†† adonque) *the obligation of* 20 *pound shall lose his force, and be holden for nothing; in this case it behooveth him that made the obligation to seek him to whom the obligation is made if he be in England, and at the day set to tender unto him the said* 10 *pound, otherwise he shall forfeit the sum of* 20 *pound comprised within the obligation,* ‖‖‖ *&c. And so it seemeth in the other case, &c. And albeit that some have said that the condition is depending upon the land, yet this proves not that the making of the condition to be performed, ought to be made upon the land, &c. no more than if the condition were that the feoffor at such a day shall do some speciall corporall service to the feoffee, not naming the place where such corporall service shall be done. In this case the feoffor ought to do such corporall service at the day limited to the feoffee, in what place soever of England that the feoffee be, if he will have advantage of the condition, &c. So it seemeth in the other case. And it seems to them that it shall be more properly said, that the estate of the land is depending upon the condition, * than to say* (que †* a dire) *that the condition is depending upon the land, &c.* Sed quære, &c.

"*ALSO, upon such case of feoffment in mortgage, a question hath been demanded, &c.*" Here and in other places, that I may say once for all, where *Littleton* maketh a doubt, and setteth down severall opinions and the reasons, he ever setteth down (*) the better opinion and his own last, and so he doth here. (*) Vid. Sect. 170. 302. 375.

† sur—en *L. and M. and Roh.*
‡ de—a, *L. and M. and Roh.*
§ tenus *not in L. and M.*
‖ que *not in L. and M. but in Roh.*
¶ sur le terre la *not in L. and M. or Roh.*
+ que *added in L. and M. and Roh.*
** ascun—un, *L. and M. and Roh.*
†† que *added in L. and M. and Roh.*
‖‖‖ *&c.* not in L. and M. but in Roh.
* *&c.* added in L. and M. and Roh.
†* est a tant, *added in L. and M. and Roh.*

here. [n] For at this day this doubt is settled, having been oftentimes resolved, that seeing the ☞ money is a sum in grosse, and collaterall to the title of the land, that the feoffor must tender the money to the person of the feoffee according to the later opinion, and it is not sufficient for him to tender it upon the land; otherwise it is of a rent that issueth out of the land. But if the condition of a bond or feoffment be to deliver twenty quarters of wheat, or twenty load of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffee, but the obligor or feoffor before the day must go to the feoffee, and know where he will appoint to receive it, and there it must be delivered. And so note a diversitie between money and things ponderous, or of great weight. If the condition of a bond or feoffment be to make a feoffment, there it is sufficient [b] for him to tender it upon the land, because the state must pass by liverie. [210. b.]

[n] 8 E. 4. 4. & 14. 11 H. 4. 62. 17 Ass. p. 2. 17 E. 3. 2. 21 H. 7. Keylway, 74. 16 El. Dier, 3. 7. lib. 4. fo. 73, in Borough's case. 21 E. 4. 6. (5 Rep. 95. 2 Cro. 423. 3 Cro. 688.) 18 E. 4. 2. 19 R. 2. Det. 178. (Ant. 206. b. 207. a.) (1 Roll. 453.) (Ant. 208.)

[b] 2 E. 4. 3.

"*Within the realm of England* (1) §." For if he be out of the realm of *England* he is not bound to seek him, or to go out of the realme unto him. And for that the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition.

"*Some speciall corporall service to the feoffee.*" This is a diversity between a rent issuing out of land, and a corporall service issuing out of land, for it sufficeth (as hath been ☞ said) that the rent be tendered upon the land (1)(A), out of which it issueth. But homage or any other special corporal service must be done to the person of the lord, and the tenant ought by the law of conveniency to seek him to whom the service is to be done in any place within *England*. [211. a.]

21 E. 3. 10. 20 H. 6. 31. 27 E. 3. 34. 21 Ass. 13. 7 E. 4. 4. 21 E. 4. 17.

20 E. Avowrie, 113. 45 E. 3. 9. 46 E. 3. Barre, 216. Mich. 22 & 23 Eliz. in Banke le Roy, which I myselfe heard and observed. 19 Eliz. Dier, 354. Lib. 8. fol 92. in France's case. (Cro. Jac. 9.)

If a man be bound to pay twenty pound at any time during his life at a place certain, the obligor cannot tender the money at the

(A) *The preceding reference to lord Nottingham's note below seems misplaced, as the note is here irrelevant. It appears to relate to the commentary on Sect.* 341.

(1) § If *A.* recites by his deed, that whereas he is indebted to *B.* in 100*l.* and he covenants with *B.* that the 100*l.* shall be paid and delivered to *B.* or his assigns at Rotterdam, in Holland, by *C.* without any suit at law, upon the first requisition which shall be made of it; in this case, the demand may be in any other place besides Rotterdam: for though payment is to be made at Rotterdam, yet the demand may be made in any place; and if the demand be made in England, or at Dort, which is 10 miles from Rotterdam, it is good, for he ought to have reasonable time to pay it after the demand, having respect to the distance of the place. But if the demand should be limited to Rotterdam, perhaps he would never come there, and so the covenant would be of no effect.—Mich. 1650, between Halsted and Vanleyden, adjudged upon a special verdict. 1 Roll. Abr. 443.—In Brownlow, 46. it is laid down, that, if money be appointed by will to be paid, and no place limited for the payment, there must be a request to pay the money, and the executor is not bound to seek him to whom it is to be paid.—[Note 109.]

(1) *Otherwise when the lease is void; for there no acceptance of rent afterwards can make it have continuance.* Post. 215. a. Lord Not. MS.—[Note 110.]

the place when he will, for then the obligee should be bound to perpetuall attendance, and therefore the obligor in respect of the incertainty of the time must give the obligee notice that on such a day at the place limited, he will pay the money, and then the obligee must attend there to receive it: for if the obligor then and there tender the money, he shall save the penaltie of the bond for ever. (1 Roll. Abr. 453. Ant. 206. 210.)

The same law it is if a man make a feoffment in fee upon condition, if the feoffor at any time during his life pay to the feoffee twenty pound at such a place certaine, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it, for without such notice as is aforesaid, the tender will not be sufficient. But in both these cases if at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money. 18 Eliz. Dyer, 354. (2 Rep. 59. 3 Rep. 64.) (8 Rep. 92. Post. Sect. 353. 2 Cro. 9, 10.)

If *A.* be bound to *B.* with condition that *C.* shall enfeoffe *D.* on such a day, *C.* must give notice to *D.* thereof, and request him to be on the land at the day to receive the feoffment, and in that case he is bound to seek *D.* and to give him notice. (Hob. 51. 1 Roll. Abr. 463. 2 Cro. 9.)

"*To tender* (de tender)," or *tendre*, is a word common both to the *English* and *French*, in *Latine offerre*; and in that sense, and with that *Latyn* word it is alwayes used in the common law. *Vide* Sect. 514, the tender of the halfe marke. And before, Sect. 333, 334. 337. (2 E. 4. 3 & 4.)

[211. b.]

☞ Sect. 341.

BUT if a feoffment in fee be made, reserving to the feoffor a yearely rent, and for default of payment a re-entrie, &c. in this case the tenant needeth not (en cest case il ne besoigne * le tenant) *to tender the rent, when it is behind, but upon the land, because this is a rent issuing out of the land, which is a rent seck* (que † est rent secke). *For if the feoffor be seised once of this rent, and after he commeth upon the land, &c. and the rent is denied him, he may have an assise of* Novel Disseisin. *For albeit he may enter by reason of the condition broken, &c. yet he may choose either to relinquish his entrie, or to have an assise, &c. And so there is a diversitie, as to the tender of a rent which is issuing out of the land, and of the tender of another sum in grosse, which is not issuing out of any land.*

HERE the diversitie appeareth between a sum in gross, and a rent issuing out of the land, as hath been touched before.

"*Yet he may choose, either to relinquish his entrie, or to have an assise.*"

Here it appeareth, that if the condition be broken for non-payment of the rent, yet if the feoffor bringeth an assise for the (Ant. 145. a.) 14 E. 3. Entre congeable, 45. 14 Ass. 11. 45 Ass. 5. 6 H. 7. 3. 17 E. 3. 73. Pl. Com. 133. 22 H. 6. 57. (3 Rep. 64, 65.) (1 Roll. Abr. 475. Post. 373. a. Noy, 7.)

rent

* a *added in L. and M. and Roh.* † ceo *added in L. and M. and Roh.*

rent due at that time, he shall never enter for the condition broken, because he affirmeth the rent to have a continuance, and thereby wayveth the condition. And so it is if the rent had had a clause of distresse annexed unto it, if the feoffor had destrained for the rent, for non-payment whereof the condition was broken, he should never enter for the condition broken, but he may receive that rent and acquite the same, and yet enter for the condition broken. But if he accept a rent due at a day after, he shall not enter for the condition broken, because he thereby affirmeth the lease to have a continuance (1).

(1 Roll. Abr. 445, 446.)
(2 Cro. 13, 14.)

Sect. 342.

AND therefore it will be a good and sure thing for him that will make such feoffment in mortgage, to appoint an especial place (2) *where the money shall be payd, and the more speciall that it be put, the* ☞ *better it is for the feoffor. As if* A. *infeoffe* B. *to have to him and to his heires, upon such condition, that if* A. *pay to* B. [212. a.] *on the Feast of Saint Michael the Arch-Angell next comming, in the cathedrall church of St. Paul's in London, within four hours next before the hour of noon of the same Feast, at the Rood loft of the Rood of the North door* (a le Rood loft de * le Rood de le North doore) *within the same church, or at the tomb of Saint Erkenwald, or at the door of such a chappell, or at such a pillar, within the same church, that then it shall be lawfull to the aforesaid* A. *and his heirs to enter, &c. in this case he needeth not to seek the feoffee in an other place, nor to be in any other place, but in the place comprised in the indenture, nor to be there longer than the time specified in the same indenture, to tender or pay the money to the feoffee, &c.*

HERE is good counsell and advice given, to set down in conveyances every thing in certaintie and particularitie, for certaintie is the mother of quietnesse and repose, and incertaintie the cause of variance and contentions; and for obtaining of the one, and avoyding of the other, the best meane is, in all assurances, to take counsell of learned and well-experienced men, and not to trust only without advice to a precedent. For as the rule is concerning the state of a man's bodie, *Nullum medicamentum est*

* le Rood de le *not in L. and M. or Roh.*

(1) Though he received part of the rent, he may re-enter for the residue that is unpaid. 10 H. 7. 24. a.—[Note 111.]

(2) Upon the marriage of lord Anglesea with a daughter of lady Dorchester, a term of years was limited in his lordship's Irish estates, for raising 12,000 *l.* for the portions of the daughters. There was but one daughter of the marriage. It was made a question, whether the portion was to be paid in England, without any deduction or allowance for the exchange from Ireland to England? It was determined in Chancery, that the portion ought to be paid in England, where the contract was made and the parties resided, and not in Ireland; because it was a sum in gross, and not a rent issuing out of land. Vin. Abr. vol. 5. 209.—[Note 112.]

est idem omnibus, so in the state and assurance of a man's land, *Nullum exemplum est idem omnibus.*

"*At the tomb of Saint Erkenwald, &c.*" This *Erkenwald* was a younger son of *Anna*, king of the *East Saxons*, and was first abbot of *Chersey* in *Surrey* which he had founded, and after bishop of *London*, a holy and devout man, and lieth buried in the south isle, above the quire in Saint *Paul*'s church, where the tomb yet remaineth, that *Littleton* speaketh of in this place: he flourished about the yeare of our Lord 680.

The residue of this Section and the *(&c.)* are evident.

Sect. 343.

ALSO, in such case, where the place† of payment is limited, the feoffee is not bound (le feoffee n'est‡ oblige) *to receive the payment in any other place but in the place so limited. But yet if he do receive the payment in another place, this is good enough and as strong for the feoffor as if the receipt had been in the same place so limited, &c.*

HEREBY it appeareth that the place is but a circumstance; and therefore if the obligee receiveth it at any other place, it is sufficient, though he be not bound to receive it at [212. b.] any other place. ☞ And so it is if the money be to be paid on such a feast, yet if the money be tendred and received at any time before the day, it is sufficient (1). (6 Rep. 46. b. 47. Plo. 69. b. 5 Rep. 117.)

Sect. 344.

ALSO, in the case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such other thing in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money,

† *of payment* not in L. and M. or Roh.

‡ pas *added in L. and M. and Roh.*

(1) It hath been formerly doubted, Whether the defendant, in such a case, ought not to plead specially? See 1 Cro. 142. S. C. 1 Ander. 198. S. C. Mo. 267. S. C. Ow. 45. Savil. 96. 1 Leon. 311. But now this point is settled; for *per* 4 *Annæ, cap.* 16. sect. 12. if the obligor, his heirs, executors, and administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the condition of the bond, though such payment was not strictly made according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place, according to the condition, and had been so pleaded. *Note to the 11th edition.*—[Note 113.]

money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction.*

(Dyer, 1.)
3 H. 7. 4. b.
9 H. 7. 16.
11 H. 7. 20, 21.
19 E. 4. 1. b.
47 E. 3. 24.
22 E. 4. 24.
37 H. 6. 26.
Li. 9. fo. 78.
Peytoe's case.
(1 Roll. Rep. 296.)
12 H. 4. 23.

HEREUPON are many diversities worthy of observation. First, there is a diversitie, when the condition is for payment of money; and when for the deliverie of a horse, a robe, a ring, or the like: for where it is for payment of money, there if the feoffee or obligee accept an horse, &c. in satisfaction, this is good: but if the condition were for the deliverie of a horse, or robe, there, albeit the obligee or feoffee accept money or any other thing for the horse, &c. it is no performance of the condition. The like law is, if the condition be to acknowledge a recognizance of twentie pounds, &c. if the obligee or feoffee accept twenty pounds in satisfaction of the condition, it is not sufficient in law, * but notwithstanding such acceptance, the condition is broken. And so it is of all other collaterall conditions, though the obligee or feoffee himself accept it.

* Peytoe's case ubi supra. (Ant. 207.)

4 H. 7. 4. Dy.
35 H. 8. 56.
27 H. 8. 1.
(Ant. 208. b.)

Secondly, in case when the condition is for payment of money, there is a diversitie when the money is to be payd to the partie, and when to an estranger; for when it is to be payd to an estranger, there if the stranger accept an horse or any collaterall thing in satisfaction of the money, it is no performance of the condition, because the condition in that case is strictly to be performed. But if the condition be, that a stranger shall pay to the obligee or feoffee a sum of money, there the obligee or feoffee may receive a horse, &c. in satisfaction.

Lib. 5. fo. 117. Pinnel's case.

Thirdly, where the condition is for payment of twentie pounds, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater.

26 H. 6. tit. Barre, 37. (Sid. 44. Post. 373. a. Mo. 47.)

But if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser sum either before the day, or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction.

30 E. 3. 23. (Hob. 68, 69.)

Fourthly, not only things in possession may be given in satisfaction (whereof *Littleton* putteth his case,) but also if the obligee or feoffee accept a statute or a bond in satisfaction of the money, it is a good satisfaction.

11 R. 2. tit. Barre, 3. 43. (1 Roll. Abr. 470. 604.) (Noy, 110, 5 Rep. 117.) 37 H. 6. 26. 46 E. 3. 33. 34 H. 6. 17. 12 H. 8. 1. b.

If the obligor or feoffor be bound by condition to pay an hundred markes at a certaine ☞ day, and at the day the parties do account together, and for that the feoffee or obligee did owe twentie pound to the obligor or feoffor, that sum is allowed, and the residue of the hundred markes paid, this is a good satisfaction, and yet the twenty pound was a chose in action, and no payment was made thereof, but by way of retainer or discharge (1).

[213. a.]

" *In*

* *&c.* added in L. and M. and Roh.

(1) In Roll. Rep. 296. it is said, that the reason why a collateral thing cannot be satisfied with money, or other collateral thing, is, because the collateral thing

"*In full satisfaction.*" *Nota*, in satisfaction and in full satisfaction is all one.

Sect. 345.

ALSO if a man infeoffe an other upon condition, that he and his heirs shall render to a stranger and to his heirs a yearly rent of* 20 *shillings, &c. and if he or his heirs fail of payment thereof, that then it shall be lawfull to the feoffor and his heirs to enter, this is a good condition: and yet in this case, albeit such annuall payment be called in the indenture a yearly rent, this is not properly a rent. For if it should be a rent, it must be rent service, rent charge, or a rent secke, and it is not any of these* (et † il n'est ascun de eux). *For if the stranger were seised of this, and after it were denied him, he shall never have an assise of this, because that it is not issuing out of any tenements* (pur ceo que il n'est ‡ pas issuant ‖ hors d'ascun tenements); *and so the stranger hath not any remedy, if such yearly rent be behind in this case, but that the feoffor or his heirs may enter, &c. And yet if the feoffor or his heirs enter for default of payment, then such rent is taken away for ever. And so such a rent is but as a paine* (et issint tiel rent § n'est forsque un peine) *set upon the tenant and his heirs, that if they will not pay this according to the form of the indenture, they shall lose their land by the entrie of the feoffor or his heirs for default of payment. And in this case it seemeth that the feoffee and his heirs ought to seek the stranger and his heirs if they be within* England, ⸸ *because there is no place limited where the payment shall be made, and for that such rent is not issuing out of any land* (et pur ceo que tiel rent n'est pas issuant ‡‡ hors d'ascun terre), *&c.*

"*SHALL render to a stranger a yearly rent, &c.*" This reservation is meerly void [*a*] for the reasons hereafter in this *section* alledged by *Littleton*, and also for that no estate moveth from the stranger, and that he is not partie to the deed. (Dr. and Stud. cap. 20.) [*a*] Lib. 8. fol. 70, 71. (Plo. 243. sera bon in case le Roy. Aut. 47. a. Cro. Car. 288. Ant. 143. b.)

And albeit it be a voyd reservation, and can be no rent, and the words of the condition be, that if the feoffee or his heirs fail of payment of it, (that is of the annuall rent) that then, &c. yet it appeareth that the condition is good, and annuall rent shall be taken for an annuall sum of money in grosse, and not in the proper signification thereof, *viz.* to be a rent issuing out of land, which is to be observed, that words in a condition shall be taken

* *in fee* added in L. and M. and Roh.
† que *added in L. and M. and Roh.*
‡ pas *not in L. and M.*
‖ hors *not in L. and M.*
§ n'est—est, *L. and M. and Roh.*
⸸ *because there is no place limited where the payment shall be made, and,* not in L. and M. or Roh.
‡‡ hors *not in L. and M. or Roh.*

thing is not due, and so no contract can be made of it till the day of payment; and that the reason why money may be satisfied by a collateral thing is, because it is of certain value.—[Note 114.]

taken out of their proper sense, *ut res magis valeat quàm pereat,* and so in like cases it is holden [*b*] in our books.

[*b*] 6 E. 2. Entr. cong. 55. recipere. 8 Ass. 34. Revertere.

(1 Rep. 76. Godbolt, 448.)

(Ant. 148. a. Sect. 221.)

But if *A.* be seised of certain lands and *A.* and *B.* joyn in a feoffment in fee, reserving a rent to them both and their heirs, and the feoffee grant that it shall be lawfull for them and their heirs to distrein for ☞ the rent, this is a good grant of a rent to them both, because he is partie to the deed, and the clause of distress is a grant of the rent to *A.* and *B.* as it appeareth before in the chapter of rents. But if *B.* had been a stranger to the deed, then *B.* had taken nothing. And upon this diversitie are all the books [*c*], which *primâ facie* seem to vary, reconciled.

[213. b.]

[*c*] 18 E. 2. Ass. 381. 26 H. 8. 2. 13 E. 2. Feoffments & Faits, 108. 31 Ass. pl. 31.

"*For if it should be a rent, it must be rent service, rent charge, or a rent secke, and it is not any of these.*" This is a good *logicall* argument *à divisione, & argumentum à divisione est fortissimum in lege.* [*d*] *Littleton* useth this argument elsewhere, where see more of this matter.

[*d*] Vide Sect. 381.

"*For default of payment.*" Note here, seeing it is but a sum in grosse, there need no demand of the rent; for *Littleton* here saith, that the feoffee ought to seek the person of the stranger to pay him the sum of money, because it is a sum in grosse and not issuing out of the land.

Sect. 346.

AND here note two things: one is, that no rent (which is properly said a rent) may be reserved upon any feoffment, gift, or lease, but only to the feoffor, or to the donor, or to the lessor, or to their heirs, and in no manner it may be reserved (& en nul ‖ maner § il poit estre reserve) *to any strange person. But if two jointenants make a lease by deed indented, reserving to one of them a certain yearly rent, this is good enough to him to whom the rent is reserved, for that he is privie to the lease, and not a stranger to the lease, &c.*

(Hob. 130. 2 Roll.Abr. 447. Post. 386. 8 Rep. 71. Ant. 39. b.)

"*TO the feoffor, donor, &c. or to their heires.*" Hereby it may seem that if a man make a feoffment, gift, or lease, that (omitting himself) he may reserve a rent to his heirs (1). But *Littleton*

‖ auter *added in L. and M. and Roh.* § il *not in L. and M. or Roh.*

(1) *Plo.* 107. *If a man leases, rendering rent to the heir, it is void; for the heir takes as purchaser, and is* quasi *a stranger. Hob.* 130. *Oats v. Frith. Father seised in fee and son join in a lease to commence after the death of the father, rendering rent to the son, and dies, the reservation was adjudged void; for though the son proves heir by the event, that does not mend the case: but if the reservation had been to the heir of the lessor, omitting the lessor, it would have been*

Littleton is not so to be understood; his meaning is, that either the feoffor, &c. may reserve the rent to himself only, or to himself and his heirs. And yet it is holden [e] in our books, that a man may make a feoffment in fee reserving a rent of forty shillings to the feoffor for term of his life, and ☞ after his decease, a pound of comyne to his heirs, that this is good.

[214. a.]

[e] 6 E. 3. 27, 28. (Ant. 161. a.) (10 Rep. 106. Hob. 130.) (Ant. 47. a.)

If a man make a feoffement in fee, reserving a rent to him or his heirs, it is good [f] to him for term of his life, and void to his heir.

[f] Lib. 5. fol. 111. Mallorie's case.

"*But*

been good; for though the rent never was in the father to demand, yet the son would take it; not as a purchaser, but as a rent inherent in the root of the reversion, which he has by descent from his father; and in the same sense the rent itself was in the father, viz. to release (by the word rent, but not action) though not to ask. So note the difference (says Hobart) when in such a lease the rent is reserved to the heir first, omitting the ancestor, which is good, and where an annuity or warranty is granted against the heir, omitting the ancestor, which is not good. It appears in the case of Littleton, that though the reservation to a stranger be bad to carry any rent to the stranger, yet it will be good to the lessor, and that not only during his life, but generally during all the term; for when it is said, rendering to I. S. *the words* I. S. *shall be void, in the same manner as if he had said, rendering rent generally: because, 1st, If a man leases, rendering rent to him and a stranger, it is good to him clearly, and void to the stranger.* 31 Ass. 30. *2dly, When a man leases, rendering rent to him and his heirs general, yet the law will direct it to an issue who is not his heir general, merely for congruity's sake.* Dyer, 115. *b. sir* Thomas Wyatt's *case, and before* 12. *b. Difference between a lease reserving rent to* I. S. *and a lease upon condition, that* I. S. *shall re-enter if the rent be in arrear, for there neither shall enter; not* I. S. *because he cannot by law; not the lessor, because there are no words to give re-entry to any beside* I. S. *But in the case of Doctor and Student, feoffment upon condition, that he shall pay* 20 *l. to* I. S. *and that otherwise* I. S. *shall re-enter; there, though* I. S. *cannot re-enter, the feoffor can, for there the condition was created by the first words: and though he intends the advantage of this to* I. S. *it does not signify. So* 28 H. 8. Dyer, 33. *Devise to the prior of St. B. so that he pays to the Dean and Chapter of St.* Paul's, *and that if he does not so, the Dean and Chapter shall have it, that is a void condition to make it a remainder, but it is good for the devisor to re-enter. Difference between a rent upon a lease and a rent upon a feoffment: in the last case rent would be void to a stranger, and yet not good to the feoffor, because the law does not create it, and it is not so reserved; but the case of a feoffment is like to a grant of rent to* I. S. *and that if it be in arrear that* I. D. *shall distrain, there the distress is of no value,* 40 Ass. 26. *But here the words are sufficient to create a rent, and in an entire clause, part may be void.* 4 E. 4. *Obligation to* I. S. *payable to* I. D. *it is good to* I. S. *Difference where the repugnancy of words appears, as here, and where it does not: as a release of all actions which I have as executor, and I have none as executor; this is void, because it does not appear.* 22 H. 7. Kel. 83. *b.* Cestuy que use *leases, rendering rent to himself, and dies; the heir shall have the rent. Yet in* 5 H. 7. 5. b. *the rent, with the reversion, goes to the feoffees, though reserved to the* cestuy que use; *yet in law the feoffees are donors; so it is, in effect, the feoffees lease, rendering rent to the* cestuy que use, *it is good for themselves, which is stronger. Sir* Geo. *makes a feoffment to the use of himself for life; remainder to* William Huntley *his son and heir apparent and his heirs: sir* Geo. *and* William *join in a lease for years, rendering rent to sir* Geo. *his heirs and assigns: sir* Geo. *dies. Resolved, that the reservation and the rent are determined; for* William *is not in as heir, and therefore he cannot have the rent.* Huntley's *case,* Palm. 485. Lord Nott. MSS.—[Note 115.]

note

5 E. 4. 4. a. 27 H. 8. 16. Vide Sect. 58. (Post. 318. a. Ant. 47. a.)

"But if two jointenants make a lease by deed indented, &c." (1) This case being by deed indented, is evident, and it hath been touched before; but if that two joyntenants without a deed indented make a lease for life, reserving a rent to one of them, it shall enure to them both in respect of the joynt reversion. And so it is of a surrender to one of them, it shall enure to them both.

(Ant. 192. a. 6 Rep. 15. Ant. 42. a. 45. a. 53. b. 193. a.)

If two joyntenants, the one for life, and the other in fee, joyne in a lease for life, or a gift in tayle, reserving a rent, the rent shall enure to them both; for if the particular estate determine, they shall be joyntenants again in possession. But if tenant for life, and he in the reversion joyn in a lease for life, or a gift in taile by deed, reserving a rent, this shall enure to the tenant for life, only, during his life, and after to him in the reversion, for every one grants that which he may lawfully grant; and if at the common law they had made a feoffment in fee generally, the feoffee should have holden of the tenant for life during his life, and after of him in reversion, and so it was holden [g] in the King's Bench.

Vide Sect. 58.

[g] Mich. 36. & 37 Eliz.

Sect. 347.

THE second thing is, that no entry nor reentry (which is all one) may be reserved or given* (que nul entrie ou reentrie (que est tout un) † poit etre reserve ne done) *to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heires: and such reentrie* (& tiel ‡ reenter) *cannot be given to any other person. For if a man letteth land*

* *is* not in Roh. but in L. and M.
† ne *added in L. and M. and Roh.*
‡ reenter—rent *in L. and M. and Roh.*

(1) The principle which gave rise to this rule is, that rent is considered as a retribution for the land, and is therefore payable to those who would otherwise have had the land.—It is to be observed, that remainder-men in a settlement, being, at first view, neither feoffors, donors, lessors, nor the heirs of feoffors, donors, or lessors, there seems to have been, for some time after the statute of uses, a doubt, whether the rents of leases made by virtue of powers contained in settlements, could be reserved to them. In Chudleigh's case, 1 Rep. 139. it is positively said, that if a feoffment in fee be made to the use of one for life, remainder to another in tail, with several remainders over, with a power to the tenant for life to make leases, reserving the rent to the reversioners, and the tenant for life accordingly makes leases, neither his heirs nor any of the remainder-men shall have the rent. But in Harcourt *v.* Pole, 1 Anders. 273. it was adjudged, that the remainder-men might distrain in these cases. And in sir Thomas Jones, 35. the *dictum* in Chudleigh's case is denied to be law. The determination in Harcourt *v.* Pole will appear incontrovertibly right, if we consider that both the lessees and remainder-men derive their estate out of the reversion, or original inheritance of the settler: and therefore the law, to use sir Edward Coke's expression in Whitlock's case, 8 Rep. 71. will distribute the rent to every one to whom any limitation of the use is made.—[Note 116.]

land (Car si home lessa ‖ terre) *to another for term of life by indenture, rendring to the lessor and to his heires a certain rent, and for default of payment a reentry, &c. if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for terme of life attorne, &c. if the rent be after behind, the grantee of a* (A) *reversion* (le grantee de le reversion) *may distrein for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entrie is taken away for ever; for the grantee of the reversion cannot enter,* causâ quâ suprà. *And the lessor nor his heires cannot enter; for if the lessor might enter, then he ought to be in his former state* (donques il covient que il serroit § en son primer estate) *&c. and this may not be, because he hath aliened from him the reversion.*

"THAT *no entry, &c.*" Here *Littleton* reciteth one of the maxims of the common law; and the reason hereof is, for avoyding of maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entrie, or re-entrie, can be granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession. (1 Roll. Abr. 473.)

[214. b.] "*For default of payment a* ☞ *re-entry, &c.*" Hereupon is to be collected divers diversities. First, between a condition that requireth a re-entrie, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger, as *Littleton* saith, shall take any advantage, as hath been said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, untill *I. S.* come from *Rome*, the lessor grant the reversion over to a stranger, *I. S.* comes from *Rome*, the grantee shall take advantage of it and enter, because the estate by the express limitation was determined. (10 Rep. 42.) (Plo. 242. a. 1 Roll. Abr. 411 r. Post. 379. a.)

So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow, *si tamdiu in purâ viduitate viveret*. So it is if a man make a lease for a 100 years if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causâ quâ suprà*. Register, 246. Pl. Com. 27. 34 E. 3. Formedon, 68. F. N. B. 201. Lib. 10. fo. 36. Mary Portington's case.

2. Another diversitie is between a condition annexed to a freehold, and a condition annexed to a lease for years.

For if a man make a gift in taile or a lease for life upon condition, that if the donee or lessee goeth not to *Rome* before such a day the gift or lease shall cease or be void, the grantee of the reversion shall never take advantage of this condition, because the estate cannot cease before an entrie; but if the lease had been but for yeares, there the grantee should have taken advantage of the like condition, because the lease for yeares *ipso facto* by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a void thing an estranger may take benefit, but not of a voidable estate by entry. (Plo. 242. a.) Brooke, tit. Condition in Abr. 11 H. 7. L'oppinion de Bromley. 10 E. 252. 10 Ass. Pl. 24. Pl. Com. 36. 11 H. 7. 17. 19 R. 2. Done, 10. (1 Roll. Abr. 475. Noy, 7. 3 Rep. 64. b. 65. 8 Rep. 95. Post. 215. b.)

"*To*

‖ certeine *added in L. and M. and Roh.* § en—a *in L. and M. and Roh.*

(A) "a" seems to be here printed by mistake instead of *the*.

Pl. Com. 313, 314, in Scholasticae's case. (Hob. 130.)

"*To the feoffor, or to the donor, &c. or to their heirs, &c.*" Here is to be observed a diversitie between a reservation of a rent and a re-entry: for (as it hath been said) a rent cannot be reserved to the heir of the feoffor, but the heir may take advantage of a condition, which the feoffor could never do. As if I

15 E. 4. 14. a.

infeoffe another of an acre of ground upon condition that if mine heir pay to the feoffee, &c. 20 shillings, that he and his heir shall re-enter, this condition is good; and if after my decease my heir pay the 20 shillings, he shall re-enter, for he is privy in blood, and enjoy the land as heir to me.

21 H. 7. 18. a. (Ant. 46. b.)

"*But only to the feoffor, &c. or to their heirs.*" Our author speaketh here of naturall persons for an example, for if a bishop, archdeacon, parson, prebend, or any other body politique or corporate, ecclesiastical or temporal, make a lease, &c. upon condition, his successor may enter for the condition broken, for they are privy in right.

And so if a man have a lease for years and demise or grant the same upon condition, &c. and die, his executors or administrators shall enter for the condition broken, for they are privie in right, and represent the person of the dead.

[*y*] 27 H. 8. 1.

[*y*] ☞ If *cestuy que use* had made a lease for years, &c. upon condition, the feoffees should not enter for the condition broken, for they are privie in estate, but not privie in blood. [215. a.]

(4 Rep. 52, Ant. 211. b.) 1 Roll.Abr. 475. 3 Rep. 64.

Another diversitie is in case of a lease for years, where the condition is that the lease shall cease, or be void, as is aforesaid, and where the condition is, that the lessor shall re-enter, for there the grantee, as *Littleton* saith, shall never take benefit of the condition.

Pl.Com. Browning's case, 136.

And it is to be observed, that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance: otherwise it is of an estate or lease voydable by entrie (1).

Another diversitie is between conditions in deed, whereof sufficient hath been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c. that then the lessor may enter. Of this and the like conditions in law, which do give an entrie to the lessor, the lessor himself and his heirs shall not only take benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in their own time. Another diversity there is between the judgement of the common law, whereof *Littleton* wrote, and the law at this day by force of the statute [*] of 32 *H.* 8. cap. 34. [*a*] For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entrie by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c. and if

(1 Saun. 237, 238, 239, 240, 241.)

[*] 32 H. 8. cap. 34. in le preamble.

[*a*] 26 H. 6. tit. Ent. con. 49.

(1) Because the acceptance of rent cannot make a new lease, and the old one was determined; but the acceptance of the rent is a sufficient declaration, that it is the lessor's will to continue the lease, for he is not entitled to the rent but by the lease. *Note to the 11th edition.* And see Symson *v.* Butcher, Doug. Rep. 51; and the cases of Wynne *v.* Humphreys, and Carter *v.* Strathan, reported in the notes of that case.—[Note 117.]

if the rent be behind a re-entrie, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said statute of 32 *H.* 8, the grantee may take advantage thereof, and upon demand of the rent, and non-payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the king of any reversion, &c. of any lands, &c. which pertained to monasteries, &c. as also all other persons being grantees or assignees, &c. to or by any other person or persons, and their heirs, executors, successors, and assignees shall have like advantage against the lessees, &c. by entry for non-payment of the rent, or for doing of waste or other forfeiture, &c. as the said lessors or grantors themselves ought or might have had. Upon this act divers resolutions and judgments have been given, which are necessary to be known. (Plo. 175. b.)

1. That the said statute is generall, *viz.* [*b*] that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions. [*b*] Pl. Com. Hill and Grange's case. 175, 176. M. 10 & 11 Eliz. 180.

2. That the statute doth extend to grants made by the successors of the king, albeit the king be only named in the act.

3. That where the statute speaketh of lessees, that the same doth not extend to gifts in tail. Dier, ibid. 14 Eliz. Dyer 309. Wynter's case.

4. That where the statute speaks of grantees and assignees of the reversion, [*d*] that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c. and the reversion is granted for life, &c. So if lessee for yeares, &c. be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect of this word *(executors)* in the act. [*d*] Pl. Com. Kidwellye'scase, 69. Vid. Dyer Mich. 14 & 15 Eliz. 309. (1 Roll. Abr. 472. Post. 385. a.

Ante 148. a. 1 Roll. Abr. 471. Mo. 93.) Vide 7 E. 3. 54. Simile adjudged in Communi Banco in the Lord Dyer's time. P. 17 Eliz. Mich. 14 & 15 Eliz. Dyer, 309. adjudged, Winter's case.

5. That a grantee of part of the reversion shall not [*e*] take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right. [*e*] Lib. 5. fo. 54. Knight's case. Winter's case ubi supra. Knight's case ubi supra.

6. That in the king's case, the condition in that case is not destroyed, but remains still in the king.

7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of Burrough English, the other at the common law, and the lessor having issue two sons, dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents (A). Lib. 4. fo. 120. Dumper's case. (4 Leo. 27, 28, 29, 30. Mo. 202, 203.) Resolved in Duke's case. Pasch. 20 Eliz. in Communi Banco. Mallorie's case, lib. 5. 112. b.

8. If a lease for life be made, reserving a rent upon condition, &c. the lessor levies a fine of the reversion, he is grantee or assignee of the reversion; but without atturnment he shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee (2).

9. There

(A) *See ante* 148. *b. near the end.*

(B) *This act is styled* 4 *Ann. c.* 16. *in Ruffhead's edition of the Statutes at large.*

(2) Attornment being taken away per 4 & 5 (B) Ann. c. 16. the law seems to be otherwise now. *Note to the* 11*th edition.*—[Note 118.]

(1 Roll. 472. Hob. 313. Post.237.265.b. 1 Rep. 112, 113.)

9. There is a diversity between a condition that is compulsory, and a power of revocation that is voluntary: for a man that hath a power of revocation may by his own act extinguish his power of revocation in part, as by levying of a fine of part; and yet the power shall remain for the residue, because it is in nature of a limitation, and not of a condition; and so it was resolved [*b*] in the earle of Shrewsburie's case in the court of wards, *Pasch.* 39 *Eliz. and Mich.* 40 *&* 41 *Eliz.*

[*b*] 14 Eliz. Dyer, 39.

(1 Rep. 173. b. 4 Rep. 119. b.) (1 Roll. Abr. 422.) (3 Rep. 62. b.)

10. If the lessor bargain and sell the reversion by deed indented and inrolled, the bargainee is not in the *per* by the bargainor, and yet he is an assignee within the statute.

☞ So if the lessor grant the reversion in fee to the use of *A.* and his heirs, *A.* is a sufficient assignee within the statute, because he comes in by the act and limitation of the partie, albeit he is in the *post*, and the words of the statute be, *to or by*, and they be assignees to him, although they be not by him: but such as come in meerly by act in law, as the lord of the villeine, the lord by escheat, the lord that entreth or claimeth for mortmaine, or the like, shall not take benefit of this statute.

[215. b.]

Lib. 5. fo. 113. Mallorie's case. Lib. 8. fol. 92. France's case. (Cro. Jac. 9. 1 Roll. 46.)

11. If the lessor in the case before bargain and sell the reversion by deed indented and inrolled, or if the lessor make a feoffment in fee, and the lessee re-enter, the grantee or feoffee shall not take any advantage of any condition, without making notice to the lessee.

And so was it resolved in Wynter's case, Mich. 14 and 15 Eliz. in Communi Banco, and oftentimes since. Vide Dyer, 309. (Plo. 242. 1 Saun. 240. 1 Leo. 62.)

12. Albeit the whole words of the statute be, for non-payment of the rent, or for doing of wast or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture, by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the state, as for not doing of wast, for keeping the houses in reparations, for making of fences, scouring of ditches, for preserving of woods, or such like, and not for the payment of any sum in grosse, delivery of corne, wood, or the like, so as other forfeiture shall be taken for other forfeitures like to those examples which were there put, *(videlicet)* of payment of rent, and not doing of wast, which are for the benefit of the reversion (1).

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(1) *It has also been held upon this statute, that if a man makes a lease for years upon condition, that if the rent should be in arrear, it should be lawful to the lessor and his assigns to re-enter, and then the lessor assigns the reversion over, and the lessee attorns, and the lessor dies, the grantee shall not take advantage of the condition for want of these words* "his heirs," *in the reservation of the condition; the condition being that he and his assigns shall enter. By Brown, serj. who moved the case in C. B.* ex relatione *T. Hurst.—It appears therefore, that this reservation of condition is to be resembled to such a reservation of rent as is mentioned before, in page* 47. *a. which determined by the death of the lessor; but that nevertheless the grantee shall have advantage of the condition, during the life of the grantor, by the* 32 *H.* 8. Infra, 215. *b. So note, the grantee of part of the reversion in the whole shall take advantage of a condition; for to this purpose the grantee of a reversion for life or years is an assignee within the* 32 *H.* 8, *who may enter: which nevertheless is very different in the case of a warranty; for a lessee for life, who has but part of the estate in the whole, is not assignee for voucher.* Infra, 385. *b. On the other hand, the grantee of the whole estate in reversion in part is not an assignee within the* 32 *H.* 8:

Sect. 348.

*ALSO, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annuall rent, and for default of payment a re-entrie, &c. if after the lessor dyeth without heir during the life of the tenant for life, whereby the reversion commeth to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrein the tenant for the rent behind; but he may not enter into the land by force of the condition, &c. because that he is not heir to the * lessor, &c.*

"*TO the lord by way of escheat, &c.*" (F.N.B.144.b.)

Note, here it appeareth, that the lord by escheat shall distrein for the rent, and yet the rent was reserved to the lessor and his heirs; but both assignees in deed and assignees in law shall have the rent, because the rent being reserved of inheritance to him and his heirs, is incident to the reversion, and goeth with the same. But if the rent were reserved to him and his assigns, and the lessor assigned over the reversion, and dyeth, the assignee shall not have the rent after his decease, because the rent determined by his death, for that it was not reserved to him, his heirs, and assigns. 19 E. 3. Resceit, 1 (Ant. 1. b. 47. a.)

"*But he may not enter into the land by force of the condition, &c.*"

Hereby it appeareth, that at the common law neither assigns in deed nor assigns in law could have taken the benefit of either entrie or re-entrie, by force of a condition.

"*Because that he is not heir to the lessor, &c.*"

The gardian in chivalrie [*f*] or in socage shall in the right of the heir take benefit of a condition by entrie or re-entrie, by the common law, and so it is here implyed. [*f*] 21 H. 7. 18. 17 Ass. 20. 19 E. 3. Gard. 113, 114. 18 Ass. pl. 18. lib. 7. fol. 7. The earl of Bedford's case.

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* *lessor—feoffor*, in L. and M. and Rob.

32 *H.* 8: *as if the reversioner in fee of* 4 *acres grants* 2 *acres in fee, the grantee cannot enter; which also is very different in the case of warranty, for the feoffee of* 2 *acres is an assignee for voucher.* Infra 315. *a.*—Lord Not. MSS. If a mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants; because they are collateral to his grantor's interest in the land, and therefore do not run with it. If a tenant for years lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged, the covenants incident to that reversionary interest are thereby extinguished. Webb *v.* Russell, 3 Durn. and East, 393.—In the former case, the mortgagor may maintain an action on the breach of the covenant. Stokes *v.* Russell, ibid. 678.—[Note 118 †.]

(8 Rep. 73. Plow. 481.) (Ant. 26.)

☞ Sect. 349.

[216. a.]

ALSO, if land be granted to a man for term of two years (si terre soit graunt a un * home pur terme de deux ans) *upon such condition, that if he shall pay to the grantor within the said two years fortie marks, then* († adonques) *he shall have the land to him and to his heirs, &c. in this case if the grantee enter by force of the grant, without any liverie of seisin made unto him by the grantor, and after he payeth the grantor the forty marks within the two years, yet he hath nothing in the land but for term of two years, because no liverie of seisin was made unto him at the beginning. For if he should have a freehold and fee in this case, because he hath performed the condition, then he should have a freehold by force of the first grant, where no liverie of seisin was made of this, which would be inconvenient* (que serroit ‡ inconvenient, &c.), *&c. But if the grantor had made liverie of seisin to the grantee by force of the grant, then should the grantee have the freehold and the fee upon the same condition.*

HERE six things are to be observed. First, *Littleton* here putteth an example of a condition precedent (1). Secondly, that such a condition which createth an estate may be made by paroll without deed. Thirdly, that liverie of seisin in this case must be made before the lessee enter, (as *Littleton* here saith at the beginning) for after his entrie liverie made to him that is in possession is void, as hath been said. Fourthly, that if no liverie of seisin be made, that no fee simple doth pass, although the money be paid. Fifthly, that it is inconvenient that the fee simple should pass in this case without liverie of seisin. Sixthly, that *argumentum ab inconvenienti*, is forcible in law, as often hath been and shall be observed (A). See more of this kind of condition in the Section next following (2).

Vide Sect. 60. (Ant. 48. a.)

"*And to his heirs, &c.*" Here (*&c.*) implyeth an estate in taile, or a lease for life.

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* home *not in L. and M. or Roh.*
† que *added in L. and M. and Roh.*
‡ inconvenient, &c.—encontre reason *in L. and M. and Roh.*

(A) *See ante* 66. *a. and note* 1 *there.*

(1) See some observations on conditions precedent, and conditions subsequent, in the last note upon this chapter.

(2) The necessity which there was in the old law, that there should always be some person to do the feudal duties, to fill the possession, and to answer the actions which might be brought for the fief, introduced the maxim, that the freehold could never be in abeyance. See 2 Wilson, Bund v. West, 165. But it was admitted, that there were some cases in which the inheritance, when separated from the freehold, might be so. The question agitated in the Commentary upon this and the following Section, arises from the difficulty of ascertaining where the freehold, in the case mentioned by Littleton, is to be. By the livery, it is taken out of the grantor; it must therefore vest in the feoffee.

[216. b.]

☞ Sect. 350.

ALSO, if land be granted to a man for term of five years, upon condition, that if he pay to the grantor within the two first years forty marks, that then he shall have fee, or otherwise but for term of the five years, and livery of seisin is made to him by force of the grant, now he

feoffee. Yet it seems difficult to conceive how it could be in the grantee, consistently with the term of years. The opinion adopted by Littleton and sir Edward Coke is conformable to what is said in lord Stafford's case, 8 Rep. 73. b. —It is to be observed, that though by conveyance at common law the freehold necessarily passes out of the grantor; and that if there is not some person in being in whom it can immediately vest, the conveyance is void; that is not the case with respect to wills, conveyances under the statute of uses, trusts in equity, or grants of rents *de novo*. For, as to wills;—there is no immediate transfer of the freehold, as, upon the death of the testator, it vests in the heir to answer the lord's services and the stranger's writs. As to conveyances under the statute of uses;—till there is some person in being in whom the use can vest, the possession is not altered, but continues in the feoffor and his heirs. See 1 Inst. 23. As to trusts, the legal estate, upon which the trust is charged, immediately vests and continues in the trustee: and as to rents *de novo*, the tenant continues in possession of the land out of which they issue. However, it is to be observed, that in cases of wills, uses, and trusts, if it be inconsistent with the estates *expressly* declared, that the freehold should remain with the party (as if he has a term of years *expressly* given him), the law will not give him, by *implication*, an estate of freehold, if, consistently with the rules of law, it can be considered to reside elsewhere. See Pybus *v.* Mitford, 1 Vent. 372. Adams *v.* Savage, 2 Salk. 679. Penhay v. Hurrel, 2 Vern. 370. Davies *v.* Speed, 2 Salk. 675. In the same manner, if a person limits his estate to such uses as he shall appoint; and in the mean time, and until he makes an appointment, to the use of himself and his heirs; or if he limits it to the use of himself for life, and after his decease, to such uses as he shall appoint, and for want of appointment, to the use of his right heirs;—in both these cases the fee simple continues to reside in the settler, subject to be divested from him by an exercise of his power of appointment. If the settler makes an appointment, a new use springs up and vests in the appointee; the fee originally limited to the settler ceases; and, from that time, speaking generally, the use appointed under the power takes effect, in the same manner as if it had been inserted in the original deed, in the place of the power. But, if no appointment is made, the fee, from being determinable, becomes simple and absolute. It may be objected, that in the second of these cases, an estate for life is expressly limited to the settler, and that the fee is therefore put in abeyance. But, in the case of Leonard Lovie, 10 Rep. 78. where the estate was devised to Leonard Lovie expressly for his life, without impeachment of waste, and afterwards to such uses as he should appoint, and after several intermediate remainders to the use of his right heirs, it was resolved, that the fee vested in him till the appointment was made. See also sir Edward Cleere's case, 6 Rep. 18. The doctrine which is the subject of this note has received a full investigation in the late case of Maundrell *v.* Maundrell, 7 Ves. jun. 567. and 10 Ves. jun. 246. and is very ably discussed by Mr. Sugden, in his Practical Treatise of Powers, page (266. 1st ed.) 332. 2d ed.—[Note 119.]

he hath a fee simple conditionall, &c. And if in this case the grantee do not pay to the grantor the fortie marks within the first two years, then immediately after the said two years past, the fee and the freehold is and shall be adjudged in the grantor, because that the grantor cannot after the said two years presently enter upon the grantee, for that the grantee hath yet title by three yeares to have and occupie the land by force of the same grant. And so because that the condition of the part of the grantee is broken, and the grantor cannot enter, the law will put the fee and the freehold in the grantor. For if the grantee in this case makes wast, then after the breach of the condition, &c. and after the two years, the grantor shall have his writ of waste. And this is a good proof then, that the reversion is in him, &c.

(5 Rep. 98.) "*NOW he hath a fee simple conditionall, &c.*" The like is of an estate in taile, or for life. Many are of opinion against *Littleton* in this case, and their reason is, because the fee simple is to commence upon a condition precedent, and therefore cannot pass until the condition be performed; and that here *Littleton* of a condition precedent doth (before the performance thereof) make it subsequent: and for proof of their opinion they avouch many successions of authorities that no fee simple should pass before the condition performed. 31 *E.* 1. *tit. Feoffments & faits*, 119. *A.* letteth a mannor to *B.* for term of twenty years, and the deed would, that after the term of twenty years that *B.* and his heirs should hold the said mannor for ever by twelve pounds rent, *A.* taketh a wife, and dyeth before the term be past, the wife of *A.* demands dower. And there *Wayland* chief justice saith, that the fee and the frank-tenement doth repose in the person of the lessor untill the term be past, for before that the condition is not performed; for if the lessor had aliened the land before the end of the term, *B.* should not recover by a writ of assise, and by the death of the lessor the chief lord should have had the wardship ☞ of the heir of the lessor, and by judgment the wife recovered dower, for the termor could not have fee, all which be the words of that book. [217. a.]

31 E. 1. tit. Feoffements & faits, 119.

12 E. 2. tit. Voucher, 265. (8 Rep. 73. Plow. 481.)

12 *E.* 2. *tit. Voucher*, 265. *I.* letteth lands to *B.* for eight years, and if the lessor pay not a hundred marks to the lessee at the end of the term, that then he shall have fee: by the non-payment of the money, the fee and franktenement accrueth to him, and before, the lessee cannot be impleaded in a *præcipe*, neither shall he vouch.

[x] 7 E. 3. 10. Pl. Com. Saye's case, 272.

[*x*] 7 *E.* 3. 10. *I.* letteth certain lands to *N.* for the term of ten years, rendring a hundred shillings by the year to him and his heirs, and granted by deed, that if he held the lands over to him and his heirs, that he should render by the year twenty pounds: the lessor during the term brought an action of debt for the rent. And there *Herle* chief justice of the common pleas giveth the rule, that during the term the lessee had but for years, and therefore the action of debt maintenable.

[y] 44 E. 3. tit. Attaint, 22. 43 Ass. p. 41.

[*y*] 44 *E.* 3. *tit. Attaint.* 22, and 43 *Ass. p.* 41. *D.* and *A.* infeoff the two plaintifs in the assise, they let those lands to *S.* for term of nine yeares, upon condition, that if the plaintif in the assise pay a hundred shillings to *S.* during the term, that *S.* shall have it but for nine years, and if they pay it not, that *S.* shall have fee. *S.* continueth his estate by one year, and after granteth

granteth his estate to one *H.* which *H.* continueth his estate by two years, and granteth the residue of the term to *R.* and within the term of nine years the plaintifs in the assise pay the hundred shillings to *S.* *R.* continueth his possession after the term, and infeoffeth *D.* which infeoffeth the lord *Furnivall* against whom and others, without any claim or entry made by the plaintifs, after the nine years ended, he brought his assise, and after adjournment recovered.

[z] 10 *E.* 3. 39 and 40. *R.* doth let certain lands to *I.* for term of twelve yeares, and in suretie of his term he maketh a charter of the fee upon condition, that if he be disturbed within the term, that he cannot hold the lands untill the end of the term, that then he shall hold the lands to him and his heirs for ever, and seisin was delivered upon the one charter and the other. *R.* within the term plowed and sowed the land, and took the profits against the will of *I.* and *I.* upon this disturbance had fee and recovered in assise.

[z] 10 E. 3. 39. 40. 10 Ass. 15. tit. Ass. 161. Pl. Com. Browning's case, 135.

6 *R.* 2. *tit. Quid juris clamat.* 20. If a lease be made for a term upon condition, if the lessee pay a certain sum within the term, that then he shall have fee, if he pay the money he shall have the fee, but if before the day of payment the lessor levieth a fine to another, the lessee ought to attorn by protestation, and if he pay the money, the conusee shall have it, and the conusee shall have the rent reserved untill the day of payment; and if land be letten for term of years upon condition, that if the lessee be ousted within the term by the lessor, that he shall have fee, if he be ousted, he shall have fee by the condition, and notwithstanding he shall not have any assise, but he must have possession after the ouster, and of this he shall have an assise.

6 R. 2. tit. Quid juris clamat. 20.

And generally the books (*) are cited that make a diversitie between a condition precedent and a condition subsequent.

(*) 15 H. 7. 1. a. 14 H. 8. 18. 20. 3 H. 6. 6. b.

And lastly, they cite *Dier*, [a] 10 *Eliz.* 281. and in *Say* and *Fuller's* case, *Pl. Com.* 272. the opinions of *Dyer* and *Browne*.

[a] Dyer, 10 Eliz. 281. Pl. Com. 272.

Notwithstanding all this there are those that defend the opinion of *Littleton*, both by reason and authority. By reason, for that by the rule of law a liverie of seisin must pass a present freehold to some person, and cannot give a freehold *in futuro*, as it must do in this case, if after liverie of seisin made the freehold and inheritance should not pass presently, but expect untill the condition be performed; and therefore if a lease for years be made to begin at *Michaelmas*, the remainder over to another in fee, if the lessor make liverie of seisin before *Michaelmas*, the liverie is void, because if it should worke at all it must take effect presently, and cannot expect.

Vide Litt. in the chapter of tenants for yeares (A).

Secondly, they say that when the lessor makes liverie to the lessee, it cannot stand with any reason that against his own liverie of seisin a freehold should remain in the lessor, seeing there is a person able to take it. But if a man by deed make a lease for years, the remainder to the right heirs of *I. S.* and the lessor make liverie to the lessee *secundum formam chartæ*, this liverie is voyd, because during the life of *I. S.* his right heir cannot take (for *nemo est hæres viventis*), and in that case the freehold shall not remain in the lessor, and expect the death of *I. S.* during the term; for albeit *I. S.* die during the term, yet the remainder is void, because a liverie of seisin cannot expect.

(1 Rep. 130. 2 Rep. 67. a. Post. 378. a.)

(A) *See ante* Sect. 59.

(2 Rep. 55.)

☞ And they say further, that seeing all the books aforesaid prove that such a condition is good, and that the liverie made to the lessee is effectuall, by consequence the freehold and inheritance must pass presently or not at all. [217. b.]

And it is not rare, say they, in our books that words shall be transposed and marshalled so as the feoffment or grant may take effect. [*b*] As if a man in the month of *February* make a lease for years reserving a yearly rent payable at the feasts of Saint *Michael* the Archangell, and the Annuntiation of our Lady, during the term, the law (in this case of reservation) shall make transposition of the feasts, *viz.* at the feasts of the Annunciation, and of Saint *Michael* the Archangel, that the rent may be paid yearly during the term. And so it is [*c*] in case of a grant of an annuitie. And further they take a diversitie in this case between a lease for life and a lease for years. For in case of a lease for life with such a condition to have fee, they agree that the fee simple passeth not before the performance of the condition, for that the livery may presently work upon the freehold; but otherwise it is in the case of a lease for years. Also they take a diversitie between inheritances that lie in grant and inheritances that lie in livery. For they agree that if a man grant an advowson for years upon condition, that if the grantee pay twenty shillings, &c. within the term, that then he shall have fee, the grantee shall not have fee untill the condition be performed. *Et sic de similibus.* But otherwise it is where liverie of seisin is requisite, and therefore if the king make such a lease for years upon such a condition, the fee simple shall not pass presently, because in that case no liverie is made.

[*b*] Hill & Grange, Pl. Com. 171.

[*c*] 10 E. 3. Seignior Stafford's case, lib.8. fol. 74. Pl. Com. Nichol's case, 487.

They also make severall answers to the authorities before cited. For as to the case in 31 *E.* 1, they say that either the case is mis-reported, or else the law is against the judgment. For the case is but this, that a man make a lease of a mannor to *B.* for twenty years, and that after the twentie years *B.* shall hold the mannor to him and his heirs by 12 pound rent, and (as it must be intended) maketh livery of seisin, in this case it is clear (say they) that *B.* hath a fee simple *maintenant*, for there is no condition precedent in the case.

Seignior Stafford's case ubi supra.

As for the case in 12 *E.* 2, the case (as it is put in the book) is, that *John de Marre* made a charter to *John de Burford* of fee simple, and the same day it was covenanted between them that *John de Burford* should hold the same tenements for eight years, and if he did not pay a hundred marks at the end of the term that the land shall remain to *John de Burford* and his heirs. In which case, say they, there is direct repugnancy; for, first, the charter of the fee simple was absolute, and after, the same day, it was covenanted between them, &c. this covenant being made after the charter, could neither alter the absolute charter, nor upon a condition precedent give him a fee simple that had a fee simple before.

To all the other books, *viz.* 7 *E.* 3. 10 *E.* 3. 10 *Ass.* 44 *E.* 3. 43 *Ass.* and 6 *R.* 2. they say, that being rightly understood they are good law; for in some of these books, as namely in 10 *E.* 3. 10 *Ass. &c.* it appeareth that there was a charter made in surety of the term, which, say they, must be intended thus, *viz.* a man maketh a lease for years, the lessee enters, and the lessor makes a charter to the lessee, and thereby doth grant unto him, that

if

if he pay unto the lessor a hundred marks during the term, that then he shall have and hold the lands to him and to his heirs.

In this case, say they, there need no livery of seisin, but doth enure as an executory grant by increasing of the state, and in that case, without question, the fee simple passeth not before the condition is performed. Pl. Com. in Nichol's case, 487.

And therefore *Littleton* warily putteth his case of an estate made all at one time by one conveyance, and a livery made thereupon.

For *Littleton* himself in the *Section* before saith, that in that case without a livery nothing passeth of the freehold and inheritance.

And this diversity (say they) is proved by books; and thereupon they cite [*d*] 10 *E.* 3. 54. In a writ of dower the tenant vouched to warranty; the vouchee as to part pleaded that the husband was never seised of any estate whereof she might be endowed; as to the residue the tenant pleaded that he ~~lessed~~ leased to the husband in gage upon condition that if the lessor ~~paid~~ ten marks at a certain day, that he should re-enter, and if he failed of payment, that the land should remain to the husband and his heires, which must be intended to be done by one entire act, and pleaded that he paid the money at the day, which is allowed to be a good plea: *Ergo*, the fee simple passed by the livery, otherwise the plea had amounted that the husband was never seised, &c. And say they, that it cannot be intended that the judges should be of one opinion in *Trinitie* term, and of another opinion in *Michaelmas* term in the same year, and therefore (they hold) their severall opinions are in respect of the said diversitie of the cases. [*d*] 10 E. 3. 54.

[*e*] 32 *E.* 3. *tit. Garr.* 30. A tenant by the curtesie made a lease for years, and in surety of the term, &c. made a charter in fee simple, and made livery according to the charter (note a speciall mention made of livery in this case); and issue being taken in an assise, whether the ☞ tenant by the courtesie demised in fee, upon the special matter found, it was adjudged that a fee simple passed, and that the heir might enter for a forfeiture, which, say they, in case of livery is an express judgment in the point agreeing with the opinion of *Littleton*. [*e*] 32 E. 3. tit. Garr. 30.

[218. a.]

[*f*] 43 *E.* 3. 35. In an action of wast against one in lands which he held for term of years, *Belknap* pleaded thus for the defendant; that the defendant was seised in fee, and infeoffed the plaintif, &c. and after the plaintif demised the land back again to the defendant for years upon condition, that if the defendant paid certain money, &c. that then the defendant might retain the land to him and to his heirs, and if not, the plaintif might enter, &c. and pleaded that the term endured, and that the day of payment was not come, and demanded judgment, if the plaintif may maintain an action of waste, inasmuch as the defendant had now a fee simple, and shewed forth the indenture of lease with the condition (which agreeth with *Littleton*'s case) all being done at one time, and by one deed, and a livery intended, and with *Littleton*'s opinion also. It is true, say they, that *Cavendish* counsel with the plaintif offered to demur, but never proceeded. [*g*] *Vide* 20 *Ass. pl.* 20. [*f*] 43 E. 3. 35. [*g*] 20 Ass. pl. 20.

Other authorities they cite, but these (as I take it) are the principall, and therefore for avoyding of tediousness, having I

fear been too long upon this point, the others I omit. Only this they add, that *Littleton* had seen and considered of the said books, and have set down his opinion where livery of seisin is made upon a conveyance made at one time, as hath been said, that he hath fee simple conditionall.

Lib. 8. fo. 90. France's case. (Dyer, 45. Plow. 7. a.)

Benigne lector, utere tuo judicio, nihil enim impedio. Conditio beneficialis quæ statum construit benignè secundum verborum intentionem est interpretanda, odiosa autem quæ statum destruit strictè secundum verborum proprietatem est accipienda.

A lease is made to a man and a woman for their lives upon condition, that which of them two shall first marry, that one shall have fee, they entermarry, neither of them shall have fee, for the incertainty.

(Plo. 481. a. Apt. 206. a. b.)

Note, if the condition be to increase an estate (that is to say) to have fee upon payment of money to the lessor or his heirs at a certain day, before the day the lessor is attainted of treason or felony, and also before the day is executed, now is the condition become impossible by the act and offence of the lessor, and yet the lessee shall not have fee, because a precedent condition to encrease an estate must be performed, and if it become impossible, no estate shall rise.

Pl. Com. Browning & Beston's case, 133. b. (2 Rep. 53. b.)

"*Because that the grantor cannot enter, &c.*" Regularly when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a free-hold and inheritance shall not cease without entry or claym, and also the feoffor or grantor may waive the condition at his pleasure.

Vid. Littleton, cap. Villein.

As if a man grant an advowson to a man and to his heirs upon condition, that if the grantor, &c. pay 20 pound on such a day, &c. the state of the grantee shall cease or be utterly void, (1) the grantor payeth the money, yet the state is not revested in the grantor before a claim, and that claim must be made at the church. (*d*) And so it is of a reversion or remainder of a rent, or common, or the like, there must be a claim before the state be revested in the grantor by force of the condition, and that claim must be made upon the land.

(*d*) Pl. Com. Browning's case, 133. b.

42 E. 3. 1.

A fortiori, in case of a feoffment which passeth by livery of seisin, there must be a re-entry by force of the condition before the state be voyd.

Lib. 2. fo. 50. Sir Hugh Cholmley's case.

If a man bargaineth and selleth land by deed indented and inrolled with a *proviso*, that if the bargainor pay, &c. that then the state shall cease and be void, he payeth the money, the state is not revested in the bargainor before a re-entry (2), and so it is if a bargain and sale be made of a reversion, remainder, advowson, rent, common, &c. And so it is if lands be devised to a man

(6 Rep. 34. a. b. Plo. 242. a.)

(1) Acc. 2 And. 8.

(2) Acc. 1 Rep. 174. a. as to the general principle; but the particular case there was, that *A.* covenanted to stand seised to the use of himself for life, with several remainders over; with a power of revocation.—By an exercise of this power, he revoked the uses; and it was held, that the ancient uses were determined, without entry or claim, because he himself was tenant for life of the land, and he could not enter upon himself; and no claim was necessary, as an express revocation was as strong as any claim could be.—See fol. 218. b.—[Note 120.]

man and to his heirs upon condition, that if the devisee pay not 20 pound at such a day, that his estate shall cease and be void, the money is not paid, the state shall not be vested in the heir before an entry. And so it is of the reversion or remainder, an advowson, rent, common, or the like (3).

But the said rule hath divers exceptions. First, in this present case of *Littleton*, for that he can make no entry, he shall not be driven to make any claim to the reversion: for seeing by construction of law the freehold and inheritance passeth *maintenant* out of the lessor; by the like construction, the freehold and inheritance by the default of the lessee shall be revested in the lessor without entrie or claim. Vid. Lib. 1. fo. 174. Digges' case. 20 E. 4. 18, 19.

2. If I grant a rent charge in fee out of my land upon condition, there if the condition be broken, the rent shall be extinct in my land, because I (that am in possession of the land) need make no claim upon the land, and therefore the law shall adjudge the rent void without any claim. Pl. Com. Browning's case, 133. b. 20 E. 4. 19.

3. If a man make a feoffment unto me in fee upon condition that I shall pay unto him 20 pound at a day, &c. before the day I let unto him the land for years, reserving a rent, and ☞ after fail of payment, the feoffee (A) shall retaine the land to him and to his heirs, and the rent is determined and extinct, for that the feoffor could not enter, nor need not claim upon the land, for that he himself was in possession, and the condition being collaterall is not suspended by the lease, otherwise it is of rent reserved. 20 E. 4. 19. 20 H. 7. 4. b. (4 Rep. 53.) (1 Rep. 97.)

[218. b.]

4. If a man by his deed in consideration of fatherly love, &c. covenant to stand seised to the use of himself for life, and after his decease to the use of his eldest son in tail, the remainder to his second son in tail, the remainder to his third son in fee, with a *proviso* of revocation, &c. the father doth make a revocation according to the *proviso*, the whole estate is *maintenant* revested in him without entry or claim for the cause aforesaid. Lib. 1. 174. Digges' case. (Parl. Rot. 237. a. 265. b. Ante 215. a.)

"*The grantee hath yet title by three yeares.*" By this it appeareth that albeit the lessee had *pro tempore* a fee simple, yet after that fee simple is divested out of him, and vested in the lessor, he shall hold the lands for three years by the express limitation of the parties.

If a man make a lease for 40 years, the lessee afterwards taketh a lease for 20 years upon condition that if he doth such an act, that then the lease for 20 years shall be void, and after the lessee break the condition, by force whereof the second lease is void, notwithstanding the lease for 40 years is surrendered, for the condition was annexed to the lease for 20 years, but the surrender was absolute. So it is if a man make a lease for 40 years, and the lessor grant the reversion to the lessee upon condition, and after the condition is broken, the term was absolutely surrendred. And the diversitie is when the lessor grants the reversion Pl. Com. in Fulmerstone's case, 107. b. (2 Roll. Abr. 494, 495. 497. 498, 499.) (5 Rep. 11. a. 1 Roll. Abr. 412.)

(A) *The sense appears to require that lord Coke should have used the word* feoffor *here instead of* feoffee. *See Mr. Ritso's Intr. p.* 119.

(3) The entry, or claim, may be made either by the party himself, or by a stranger, by his order. 2 Cro. 57.—[Note 121.]

reversion to the lessee upon condition, and when the lessee grants
7 E. 4. 29. or surrenders his estate to the lessor; for a condition annexed
14 E. 4. 6. to a surrender may revest the particular estate, because the sur-
45 E. 3. render is conditionall. But when the lessor grants the reversion to the lessee upon condition, there the condition is annexed to the reversion, and the surrender absolute (1).

8 E. 2. Ass. 395. A gardian in chivalrie took a feoffment of the infant within age, that was in his ward, and the infant brought an assise, and the gardian shall be adjudged a disseisor, which proveth that the feoffment as against the infant was voyd, and yet by acceptance thereof the interest of the gardian was surrendred.

50 E. 3. 27. A man maketh a lease for term of life by deed, reserving the first seven years a rose, and if the lessee will hold the land after the seven years, to pay a rent in money; the lessee will not hold over, but surrender his term: in this case in judgement of law he had but a term for seven years. And so it is if a man make a lease for life, and if the lessee within one year pay not 20 shillings, that he shall have but a term for two years, if he pay not the money the estate for life is determined, and he shall have the land but for two years.

"*This is a good proof then, that the reversion is in him, &c.*" Here is implyed that no man can have an action of waste, unless the reversion be in him, and by the authoritie of our author the reason of a case, and well applyed, is a good proof in law (2).

Sect.

(1) See also Dyer, 143. 2 Roll. Abr. 495.

(2) No person is entitled to an action of waste against a tenant for life, but he who has the *immediate* estate of inheritance in remainder or reversion, expectant upon the estate for life. If between the estate of the tenant for life who commits waste, and the subsequent estate of inheritance, there is interposed an estate of freehold, to any person *in esse*, then during the continuance of such interposed estate, the action of waste is suspended; and if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever. But though, while there is an estate for life interposed between the estate of the person committing waste, and that of the reversioner or remainder-man in fee; the remainder-man cannot bring his action of waste: yet, if the waste be done by cutting down trees, &c. such remainder-man in fee may seize them; and if they are taken away, or made use of, before he seizes them, he may bring an action of trover. For, in the eye of the law, a remainder-man for life has not the property of the thing wasted; and even a tenant for life in possession has not the absolute property of it, but merely a right to the enjoyment or benefit of it, as long as it is annexed to the inheritance, of which it is considered a part, and therefore it belongs to the owner of the fee. See ante 53. b. 5th Rep. 76. b. Pagett's case; Udal *v.* Udal, Alleyn, 81. 3 P. Wms. 267. Bewick *v.* Whitefield. 22 Vin. Abr. 523. Rolt *v.* Somerville, 2 Eq. Cas. Abr. 759; Garth *v.* Cotton, 3 Atk. 757.—[Note 122.]

Sect. 351.

BUT in such cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c. there the feoffor hath not the freehold before his entrie, &c.* (3).

This upon that which hath been said is evident, and needeth no further explanation.

Sect. 352.

ALSO, if a feoffment be made upon such condition, that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodyes engendered, and for default of such issue, the remainder to the right heirs of the feoffor. In this case if the husband dyeth, living the wife, before any estate in tail made unto them, &c. then ought the feoffee by the law to make an estate to the wife as near the condition, and also as near to the entent of the condition as he may make it (donques doit le feoffee per la ley faire estate a la feme cy pres le condition, et auxy cy pres l'entent de le condition que il poit faire) (1), *that is to say, to let the land to the wife for term of life without impeachment of waste* (sauns impeachment de wast (2), *the remainder after his* (B) *decease to the heirs of the body of her husband on her begotten* (le remainder apres son decease a les heires de † corps sa baron de luy engendres) (3), *and for default of such*

* *&c.* not in L. and M. or Roh.

† les corps de son baron et de luy engendres, *in L. and M. and Roh.*

(B) *Here the sense requires the word* her *instead of* his, *as it seems.*

(3) For till entry it doth not appear; the feoffor having power at his election to void or continue the estate of the feoffee, which he will do. *Note to the 11th edition.*—[Note 123.]

(1) ‡ So where a feoffment was made on condition that the feoffees re-infeoffed the feoffor and his wife in tail, the remainder to the right heirs of the husband; the husband died, the wife married a second husband; the feoffees enfeoffed the second husband and his wife, for her life;—the remainder to the right heirs of the first husband; it was held that the condition was well performed. Br. Abr. tit. Cond. pl. 33. And see ibid. 70. Plo. 291.—[Note 124.]

(2) § *Note, if land be given to the wife, and the heirs of the husband of his body begotten, the wife shall have the estate for life, subject to waste.—Sup. 26. b. therefore such conveyance is not by force.* Lord Nott. MS.—[Note 125.]

(3) ‖ It is with great pleasure we present the reader with the following observations on this passage. Lord chief-justice Wilmot, in his argument in giving judgment in the case of Frogmorton on demise of Robinson *v.* Wharrey, 2 Blackst. 728. remarks: "When an estate is limited to a husband and wife, "and the heirs of their two bodies; the word Heirs is a word of limitation, "because

‡ § ‖ *These notes are in 219. a. in the 13th and 14th editions.*

such issue, the remainder to the right heirs of the husband. And the cause why the lease shall be in this case to the wife alone without impeachment of waste is, for that the condition is, that the estate shall be made to the husband and to his wife in tail (en ‡ taile). *And if such estate had been made in the life of the husband, then after the death of the husband she should have had* (el ‖ ust ewe) *an estate in tail, which estate is without impeachment of waste. And so it is reason, that as near as a man can make the estate to the intent of the condition, &c. that it should be made* (que il serroit § fait), *&c. albeit she cannot have* (comment que ¶ el ne poit aver) *estate in tail* (en ⸸ taile), *as she might have had if the gift in tail had been made to her husband and to her in the life of her husband* (sicome el ** puissoit aver si le done en le taile ust estre fuit a †† sa baron et ‡‡ a luy en le vie ⸸⸸ sa baron), *&c.*

3 Mar. 134. Dyer. 14 Eliz. Dyer, 311. b. 2 H. 4. 5. 44 E. 3. 9. Lib. 2. fo. 79, 80, 81, in Seignior Cromwel's case.

"*THAT the feoffee shall give, &c.*" Here is no time limited, therefore the feoffee by the law hath time ☞ during his life, unless he be hastened by the request of the feoffor or the heirs of his body, as *Littleton* saith in the next section. [219. a.]

(Ant. 208. b. 1 Roll. Abr. 429. 1 Roll. Abr. 614, 615. a) (2 Rep. 59.)

(Sect. 337.)

"*If the husband dyeth, &c.*" But in this case, if the feoffee dyeth before any feoffment made, then is the condition broken, because he made not the estates, &c. within the time prescribed by the law. But if the feoffment be made upon condition that the feoffee before the feast of St. *Michael* the Archangell next following

15 H. 7. 13. 33 H. 6. 26, 27. 9 Eliz. Dyer, 262. Pl. Com. 456. Lib. 2. fo. 79. Seignior Cromwell's case. (Sect. 334.)

‡ le *added in L. and M. and Roh.*
‖ ust ewe—ad ewe, *in L. and M. and Roh.*
§ fait *not in L. and M. or Roh.*
¶ el—il *in L. and M. and Roh.*
⸸ le *added in L. and M. and Roh.*
** el—il *in L. and M. and Roh.*
†† sa—son *in L. and M. and Roh.*
‡‡ a *not in L. and M. or Roh.*
⸸⸸ sa—son *in L. and M. and Roh.*

" because an estate is given to both the persons, from whose bodies the heirs " are to issue. But when it is given to one only, and the heirs of two, (as to " the wife and the heirs of her and *A. B.*) there the word Heirs is a word of " purchase; for no estate tail can be made to one only, and the heirs of the " body of that person and another. This appears from Littleton, Sect. 352, " according to the true reading collected from the original editions. The " common editions make the estate *cy pres*, therein mentioned, to be, to the " widow and *les heirs de corps sa baron de luy engendres*; which is not as near " as might be to the original estate intended, if the husband had lived; *viz.* " to the husband and wife, and the heirs of their two bodies. But the origi- " nal edition by Lettou and Machlinia, in Littleton's life-time, and the Rohan " edition, which is the next (both which my brother Blackstone has) read it " thus: *les heirs de les corps de son baron et de luy engendres:* which is quite " consonant to the original estate; and this estate, to the widow for life, and " the heirs of the body of her husband and herself begotten, Littleton, in the " same section, declares not to be an estate tail. The same is held in Dyer, " 99.—in Lane and Pannel, 1 Roll. Rep. 438. and in Gossage and Taylor, " Style, 325. which, from a manuscript of lord Hale, in possession of my " brother Bathurst, appears to have been first determined in Hil. 1651; which " accounts for some expressions of lord chief-justice Rolle, in Style's case, " which was in T. Pasch. 1652."—[Note 126.]

following give the land to the feoffor and to his wife in tail, *ut supra*, and before the day the feoffee dieth, the state of the heir of the feoffee shall be absolute, because a certain time is limited by the mutual agreement of the parties, within which time the condition becommeth impossible by the act of God, as hath been said before, and therefore it is necessary when a day is limited, to add to the condition, that the feoffee or his heirs do perform the condition; but when no time is limited, then the feoffee at his perill must perform the condition during his life (although there be no request made) or else the feoffor or his heirs may re-enter. (1 Roll. Abr. 449. Ant. 206. a.) (2 Rep. 79. a. 6 Rep. 30. b.)

"*Made unto them, &c.*" Here the (*&c.*) implyeth according to the condition with the remainder over.

"*To the feoffor and to the wife, &c.*" Here it appeareth that albeit the *feme* be a stranger, yet the feoffee is not bound to make it within convenient time, because the feoffor who is privy to the condition is to take ☞ joyntly with her. And so it is if the condition be to enfeoff the feoffor and an estranger, the feoffee hath time during his life, unless he be hastened by request. Otherwise it is (as hath been said) where the condition is to enfeoff a stranger or strangers only. 27 E. 3. Dower, 135. Seignior Cromwell's case, ubi supra. (6 Rep. 30. b.) (1 Roll. Abr. 452.)

[219. b.]

If a man make a feoffment in fee, upon condition that the feoffee shall make a gift in tail to the feoffor, the remainder to a stranger in fee, there the feoffee hath time during his life, as is aforesaid, because the feoffor who is partie, and privy to the condition, is to take the first estate. But if the condition were to make a gift in tail to a stranger, the remainder to the feoffor in fee, there the feoffee ought to do it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently, as before hath been said. (1 Roll. Abr. 428.) Seignior Cromwell's case, ubi supra. (2 Rep. 79. Ant. 208. b.)

"*To make an estate to the wife as neer the condition, and also as near to the entent of the condition as he may make it* (de faire estate al feme cy pres le condition, et auxy cy pres l'entent del condition que il poit faire), *&c.*"

A. infeoffs *B.* upon condition that *B.* shall make an estate in frankmarriage to *C.* with one such as is the daughter of the feoffor; in this case he cannot make an estate in frankmarriage, because the estate must move from the feoffee, and the daughter is not of his blood, but yet he must make an estate to them for their lives, for this is as near the condition as he can. And so it is if the condition be, to make to *A.* (which is a meer layman) an estate in frankalmoigne, yet must he make an estate to him for his life, for the reason here yielded by *Littleton*. (Ant. 21. b.)

A diversitie is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate: for here it appeareth, that a condition that is to create an estate, is to be performed by construction of law, as near the condition as may be, and according to the intent and meaning of the condition, albeit the letter and words of the condition cannot be performed: but otherwise it is of a condition that destroyeth an estate, for that is to be taken strictly, unless it be in certain speciall cases: and of this somewhat hath been said before in this chapter. (1 Roll. Abr. 426. Plow. 7. a. Dyer, 45. a.)

As if a man mortgage his land to *W.* upon condition, that if the mortgagor and *I. S.* pay twenty shillings at such a day to the mortgagee, that then he shall re-enter, the mortgagor dieth before the day, 30 H. 8. tit. Condit. Br. 190. V. 33 H. 8. tit. Joint Br. 62.

day, *I. S.* paies the money to the mortgagee, this is a good performance of the condition, and yet the letter of the condition is not performed. But if the mortgagor had been alive at the day, and he would not pay the money, but refused to pay the same, and *I. S.* alone had tendred the money, the mortgagee might have refused it. But if a man make a lease to two for years, with a *proviso*, if the lessees dye during the term, the lessor shall re-enter, one lessee alien his part and dye, the other lessee (A) cannot re-enter, but the assignee shall enjoy the term so long as the survivor liveth, and the reason is, because the lease by the *proviso* is not to cease till both be dead. But in the former case, albeit the mortgagor be dead, yet the act of God shall not disable *I. S.* to pay the money, for thereby the mortgagee receives no prejudice. And so it is in that case, if *I. S.* had died before the day, the mortgagor might have paid it.

Lib. 2. fo. 79, 80, 81. Seignior Cromwel's case. 2 H. 4. 5.

And here is to be observed a diversity when the feoffee dyeth, for then (as hath been said) the condition is broken, and when the feoffor dieth, for then the estate is to be made as near the intent of the condition as may be.

"*To the wife for term of life without impeachment of waste.*"

Here it appeareth, that this estate for life ought to be without impeachment of wast, and yet if the wife doth accept of any estate for life without this clause, without impeachment of wast, it is good, because the state for life is the substance of the grant, and the privilege to be without impeachment of wast is collaterall, and only for the benefit of the wife, and the omission of it only for the benefit of the heir (1).

2 H. 4. 5. Seignior Cromwel's case, ubi supra. (1 Sid. 268. 303, 304. 442. Ant. 207. a. Cro. El. 45.) (1 Roll. Abr. 426.)

Also if the wife take husband before request made, and then they make request, and the state ☞ is made to the husband and wife, during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where *Littleton* saith it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife.

[220. a.]

(Cro. Car. 242.) (Cro. Jac. 216.) See in my Reports, lib. 11. fo. 83. lib. 9. fo. 9. lib. 2. 23.

"*Without impeachment of waste* (sauns impeachment de wast)," *Absque impetitione vasti*, (that is) without any challenge or impeachment of waste, and by force hereof the lessee may cut down the trees and convert them to his own use. Otherwise it is if the words were *sauns impeachment per ascun action de wast*, for then the discharge extends but to the action, and not to the trees themselves, and in that case the lessor shall have them (1)*.

And

(A) *It seems that the text should be read as if the word* lessor *had been here inserted instead of the words* "other lessee."

(1) Mr. serj. Hawkins observes here, that the omission of the privilege of being without impeachment of waste shall not give the heir of the feoffor, for whose benefit it was omitted, a re-entry, which would defeat the estate of the wife. P. 307. 2 Rep. 82. a.—[Note 127.]

(1) * The privilege given by the words without impeachment of waste, is annexed to the privity of estate;—so that if the person to whom that privilege is given, changes his estate, he loses the privilege. 11 Rep. 83. b. Latch. 270. —It has been held that the intent of this clause is only to enable the tenant to cut down timber and open new mines, and that it does not extend to allow destructive

And it is to be observed, that after the decease of the husband the state is not to be made to the wife and the heirs of her body by her late husband ingendred, and so to have an estate of inheritance as she should have had by survivor, if the estate had been made according to the condition, but only an estate for life without impeachment of wast, &c. for that by the authoritie of *Littleton* is not so near the intent of the condition, as the case that *Littleton* putteth. But I will search no further into this case, but leave it to the learned and judicious reader. (4 Rep. 63. a.)

"*And after her decease to the heirs of the body of her husband on her begotten.*" (Ant. 20. b. 26. b. 27. a.)

Note here, admit that there were two issues in tail, the remainder shall presently vest only in the eldest, and yet if he dieth without issue, it shall *per formam doni* vest in the youngest, as hath been said in the chapter of Estate tail (2); and so it is *tacitè* proved here, for otherwise the condition (if there were two issues) could not be performed.

Sect. 353.

ALSO in this case if the husband and wife have issue, and die before the gift in tail made to them, &c. then the feoffee ought to make an estate to the issue, and to the heirs of the body of his father and his mother begotten, and for default of such issue, &c. the remainder to the right heirs of the husband, &c. And the same law is in other like cases: and if such a feoffee will not take (B) *such estate* (et si tiel feoffee ne voet faire tiel estate), *&c. when he is reasonably required by them which ought to have the state by force of the condition, &c. then may the feoffor or his heirs enter**.

"*WHEN he is reasonably required by them which ought to have the estate by force of the condition.*" Note here it appereth, that the feoffee hath time during his life to make the estate, unless he be reasonably required by them that are to take the estate. This is to be intended of parties or privies, and not of meer strangers, for there (as hath been said) the state must be made in convenient time. (2 Rep. 78. b. 79.) (Ant. 222. b. 214. b. 208. b.)

And

* *&c.* added in L. and M. and Roh.

(B) *This word "take" is not agreeable to the sense of the passage; neither does it express the meaning of the French word* faire *used by Littleton, which signifies* make *in English. See Mr. Ritso's Intr. p.* 112.

structive or malicious waste; such as cutting down timber which serves for the shelter or ornament of the estate. See Vane *v.* Lord Bernard, 2 Vern. 738. Packington *v.* Packington, 7 Bac. Abr. 289. 8vo. ed. Rolt *v.* Lord Somerville, 2 Ab. Eq. 759. Aston *v.* Aston, 1 Ves. 264. Piers *v.* Piers, 1 Ves. 521. —[Note 128.]

(2) See 1 Rep. 95. 3 Rep. 61. 11 Rep. 80. and the note in Mr. Douglas's Reports, page (488, 1st ed.) 505. a. 4th ed.

And concerning the request it is to be known, that when the request is made, the party or privy must request the feoffee at a time certain to be upon the land, and to make the state according to the condition, for seeing no time certain is prescribed for the
(8 Rep. 89. b.) making of the state, and it is incertain when the request shall be made, such request and notice must be made as hath been said before in this chapter. And of this section, with the *(&c.)* there needeth not, upon that which hath been said, any farther explication.

☞ Sect. 354. [220. b.]

ALSO if a feoffment be made upon condition, that if (C) *the feoffee shall re-enfeoff many men* (que le feoffee * re-infeoffera plusors homes) *to have and to hold to them and to their heirs for ever, and all they which ought to have estate dye before any estate made to them, then ought the feoffee to make estate to the heire of him which survives of them, to have and to hold to him and to the heirs of him which surviveth* † (1).

(2 Rep. 70.) "*THAT the feoffor shall re-enfeoff many men.*" By the re-feoffment it is implied to be made to the feoffors, for a feoffment over to strangers cannot be said a re-feoffment, and if the feoffment should be made over to strangers only, then, as hath been often said, it must be made in convenient time.

"*To the heir of him which survives, to have and to hold to him and to the heirs of him which surviveth.* Hereupon questions have been made, wherefore the *habendum* is not to the heirs of the heir, and for what reason it is by *Littleton* limited to the heirs of the survivor. And the cause is, for that if it were made to the heirs of the heir, then some persons by possibility should be inheritable to the land, which should not have inherited if the estate

* re-infeoffera—infeoffera, *L. and M. and Roh.*

† *&c.* added in L. and M. and Roh.

(C) *The sense as well as the original French seems to require that this passage should be read as if the word "if" had been omitted. See Mr. Ritso's Intr. p.* 112.

(1) *See whether there is a difference between an obligation and feoffment with condition to re-enfeoff. Obligation on condition to give to the baron and feme and the heirs of the body of the feme before a certain day; and before the day the feme dies. The court was divided whether he ought to make it* cy pres, *in 8 Jac. B. R. Rot.* 303. *Roger and Scudamore, T.* 37.—*P.* 4 *E.* 6. *Bendl. n.* 56. *Obligation on condition to enfeoff B. and C. and their heirs before such a day, and before the day B. dies, the obligation is discharged. Sir Ant. Brown's case. But this case was denied by the whole court. T.* 40 *El. C. B. C. C. n.* 16. *Obligation with condition that the obligor or his heirs should enfeoff the obligee and his heirs before a certain day;—before the day the obligee dies: it was ruled that he should enfeoff the heir. T.* 40 *El. C. B. Hone v. May, C. C. n.* 16. —Lord Hale's MSS.—[Note 129.]

estate had been made to the survivor and his heirs, and consequently the condition broken.

For example, if the survivor took to wife *Alice Fairefield*, in this case if the limitation were to the son and his heirs, then if the son should dye without heirs of his father, the blood of the *Fairefields* (being the blood of his mother) should inherit. But if the limitation be to the right heirs of the father, then should not the blood of the *Fairefields* by any possibility inherit, for then it is as much as if the state had been made to the survivor and his heirs: and therefore these words *(and to the heirs of him which surviveth)*, which many have thought superfluous, are verie materiall. Note well this kind of fee simple, for it is worthy the observation: but sufficient hath been said to open the meaning of *Littleton*, and therefore I will dive no deeper into this point, but leave it to the further consideration of the learned reader (2).

(Ant. 12. a.)

Vide Sect. 4.

Sect. 355.

ALSO if a feoffment be made upon condition to enfeoff another, or to make a gift in tail to another (si feoffment soit fait sur condition d'enfeoffer un auter, ou ‡ de doner en ‖ taile a un auter), *&c. if the feoffee before the performance of the condition enfeoff a stranger, or make a lease for life, then may the feoffor and his heirs enter, &c. because he hath disabled* (1) *himself to perform the condition, inasmuch as he hath made an estate to another, &c.*

LITTLETON having spoken of defaults of performance, or express breaches of conditions, speaketh now in what cases the feoffee in judgment of law doth disable himselfe to perform the condition: and of disabilities some be by act of the party, and some by act in law.

"*Or to make a gift in tail to another, &c.*" Here is implied an estate for life or for years, &c.

[221. a.] ☞ "*Enfeoff a stranger, or make a lease for life.*" This is a disabilitie by the act of the partie, for herein the feoffee hath disabled himself to make the feoffment or other estate according to the condition. And to speak once for all, the feoffee is disabled when he cannot convey the land over according to the condition in the same plight, qualitie, and freedom as the land was conveyed to him, for so the law requireth the same, as shall manifestly appear hereafter. And here where our author speaketh of a feoffment, he includeth an estate tail as well as the fee simple.

13 H. 7. 23. b. 32 E. 3. Barre, 264. 21 Ass. 28. 38 Ass. pl. 7.

(2 Rep. 59. 1 Roll. Abr. 447.)

Sect.

‡ de *not in L. and M. or Roh.* ‖ le *added in L. and M. and Roh.*

(2) See the note 2, on page 12. b.

(1) Upon the doctrine of this and the three following Sections, see Vin. Abr. vol. 5. p. 221. 225.

(4 Rep. 52.)
(5 Rep. 95.)

Sect. 356.

*IN the same manner it is, if the feoffee, before the condition performed, letteth the same land to a stranger for term of years; in this case the feoffor and his heirs may enter, &c. because the feoffee hath disabled him to make an estate of the tenements according to that which was in the tenements, when the state thereof was made unto him. For if he will make an estate * of the tenements according to the condition, &c. then may the lessee for years enter and oust him to whom the estate is made, &c. and occupy this during his term†.*

"*IF the feoffee, before the condition performed, letteth the same land to a stranger for term of years, &c.*" Here the *&c.* implyeth a lease to take effect *in futuro* as well as *in præsenti*, also a lease for one year or half a year, &c.

The reason of this is evidently set down before. And again, of disabilities some be by act *in præsenti*, whereof *Littleton* hath put two examples, and some *in futuro*, whereof now he will speak in the next Section.

Sect. 357.

AND many have said, that if such feoffment be made to a single man upon the same condition, and before he hath performed the same condition he taketh wife, then the feoffor and his heirs maintenant *may enter, because, if he hath made an estate according to the condition, and after dieth, then the wife shall be endowed* (Et plusors ont dit, que si tiel feoffment soit fait a un home sole sur mesme condition, et devant que il ad performe mesme la condition il prent feme, § donques le feoffor et ses heires maintenant poient entrer, pur ceo que s'il fesoit estate accordant a la condition, et puis morust, donques ‡ la feme serra endowe), *and may recover her dower by a writ of dower, &c. and so by the taking of a wife, the tenements be put in another plight than they were at the time of the feoffment upon condition, for that then no such wife was dowable* (pur ceo que adonques nul tiel ‡ feme fuit dowable), *nor should be endowed by the law, &c.*

FIRST, here is an example of a disability both by act in law and *in futuro*, for by marriage the wife is entitled by law to dower, after the death of her husband.

Secondly,

* *of the tenements* not in L. and M. or Roh.

† *&c.* added in L. and M. and Roh.

§ donques—que *in L. and M. and Roh.*

‡ la—sa *in L. and M. and Roh.*

‡ feme *not in L. and M. or Roh.*

[221. b.] Secondly, it [a] appeareth that albeit the wife by the marriage is but intitled to have ☞ dower, and the estate which she is to have *in futuro*, viz. after the decease of her husband, yet it is a present cause of entrie. As a lease for years to begin at a day to come is a present disabilitie and cause of re-entrie, for that the land is not in that freedom and plight as it was conveyed to the feoffee, and after the state made over according to the condition the land shall be charged therewith.

[a] 13 H. 7. 23. b. 34 E. 3. Dower, 127. M. 27 E. 3. tit. Dower, 135. 28 Ass. pl. 4. 11 H. 7. 76. lib. 2. fol. 59. b. (5 Rep. 20. b. 21. a.) Julius Winnington's case, lib. 2. fol. 59, 60.

"*In another plight.*" Plight is an old English word, and here signifieth not only the estate but the habit and qualitie of the land, and extendeth to rent charges, and to a possibility of dower. *Vide* Sect. 289. where plight is taken for an estate or interest of and in the land itself, and extendeth not to a rent charge out of the land.

(1 Roll. Abr. 447.)

"*To a single man.*" For if the feoffee were married at the time of the feoffment, then the dower can be no disabilitie, because the land shall remain in such plight as it was at the time of the feoffment made unto him.

"*Then the feoffor and his heirs maintenant may enter.*" Here it appeareth, that seeing that for this title or possibilitie the feoffor may presently enter, that albeit the wife happen to dye before the husband, so as this title or possibilitie took no effect, yet the feoffor may re-enter, for the feoffee being disabled at any time though the same continue not, yet the feoffor may re-enter, for in that case he that is once disabled is ever disabled. And herein a diversitie is to be observed between a disabilitie for a time on the part of the feoffee, and a disability for a time of the part of the feoffor. For if a man maketh a feoffment in fee, upon condition that the feoffee before such a day shall re-infeoff the feoffor, the feoffee taketh wife, and the wife dyeth before the day, yet may the feoffor re-enter.

(5 Rep 21. a.)

[222. a.] So it is if the feoffee before the day entreth into religion, and is professed, and before ☞ the day is deraigned yet the feoffor may re-enter.

21 E. 4. 55.

So it is if the feoffee before the day make a feoffment in fee, and before the day take back an estate to him and his heirs, yet the feoffor may re-enter.

Albeit in these cases a certain day is limited, yet the feoffee being once disabled is ever disabled. And so it is when no time is limited by the parties, but the time is appointed by the law.

But if a man make a feoffment in fee upon condition, that if the feoffor or his heirs pay a certain sum of money before such a day, the feoffor commit treason, is attainted and executed, now is there a disabilitie on the part of the feoffor, for he hath no heir; but if the heir be restored before the day he may perform the condition, as it was resolved * *Trin.* 18 *Eliz. in Communi Banco* in sir *Thomas Wiat's* case, which I heard and observed. Otherwise it is if such a disabilitie had grown on the part of the feoffee; and the reason of the diversitie is, for that, as *Littleton* saith, *maintenant* by the disabilitie of the feoffee, the condition is broken, and the feoffor may enter, but so it is not by the disability of the feoffor, or his heirs; for if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day. And so it is

(2 Rep. 79. a.)

* Trin. 18 Eliz. in Communi Banco in Sir Thomas Wiat's case.

(Plo. 553. a 554. Cro. Car. 427. Hob. 334.)

if the feoffor enter into religion, and before the day is deraigned, he may perform the condition for the cause aforesaid. *Et sic de similibus.* The *(&c.)* in this Section are sufficiently explained.

Sect. 358.

IN the same manner it is, if the feoffee charge the land by his deed with a rent charge before the performance of the condition, or be bound in a statute staple, or statute merchant, in these cases the feoffor and his heirs may enter, &c. causâ quâ suprà. *For whosoever commeth to the lands by the feoffment of the feoffee, they ought to be lyable, and put in execution by force of the statute merchant, or of the statute staple* (Car quecunque que venust a les tenements per le feoffment de le feoffee, * eux covient estre liables, et estre mis en execution per force de l'estatute merchant ou de statute del staple). † Quære. *But when the feoffor or his heirs, for the causes aforesaid, shall have entred, as it seems they ought, &c. then all such things which before such entry might trouble or incumber the land so given upon condition, &c. as to the same land, are altogether defeated.*

13 H. 7. 23. b.
44 E. 3. 9. b.
20 E. 3. 73.
20 H. 6. 34.
Julius Wynnington's case, ubi supra.
(1 Roll. Abr. 447.)
(5 Rep. 20. b.)

"*MAY enter, &c.*" And here it is to be understood, that the grant of the rent charge is a present disability of the feoffee, and therefore albeit the grantee doth bring a writ of annuitie, and discharge the land of it, *ab initio*, yet the cause of entrie being once given by the act of the feoffee the feoffor may re-enter. And so it is if the grant of the rent charge were made for life, and the grantee died before any day of payment, yet the feoffor may re-enter.

The like law is of any judgment given against the feoffee wherein debt or damages are recovered.

Lib. 2. fol. 59, 60. Julius Wynnington's case.
(2 Rep. 79. a.
10 Rep. 49. b.)

"*Or be bound in a statute staple, &c.*" If the feoffee be disseised, and after bind himself in a statute staple, or merchant, or in a recognizance, or take wife, this is no disabilitie in him, for that during the disseisin the land is not charged therewith, neither is the land in the hands of the disseisor liable thereunto. And in that case if the wife die, or the conusee release the statute or recognizance, and after the disseisee doth enter, there is no disabilitie at all, because the land was never charged therewith, and therefore in that case the feoffee may enter and perform the condition in the same light and freedom as it was conveyed unto him.

18 Ass. Pl. ult.
19 E. 3. 39.
Lib. 2. fol. 80. b. Seign. Cromwel's case.
(4 Rep. 119.)

And it is to be observed, that *Littleton* putteth these cases as examples, for there are some other disabilities implyed, that are not here expressed.

The lord *Clifford* did hold his barony and the sherifwick of *Westmerland* of the king by grand serjanty *in capite*, and the king gave him licence that he might infeoff thereof divers chaplains in fee, so that they should give the same to the lord *Clifford*

* eux—donques les tenements, *in L. and M. and Roh.*

† Quære.—&c. *in L. and M. and Roh.*

[222. b.] *Clifford* and the heirs ☞ male of his body, the remainder over, &c. the lord *Clifford* according to the licence infeoffed the chaplains, and before they made the reconveyance the lord *Clifford* dyed, and it was adjudged that the heir might enter for the condition broken. For in this case the feoffees were bound by law to have made the gift in tail to the lord *Clifford* himself, albeit he never made any request, for otherwise they pursued not the licence, and if they should make the state to the issue of the lord *Clifford*, then might the king seise the barony, &c. for default of a licence, and that in default of the feoffees. And then the same should not be in the same plight and freedom as it was at the time of the feoffment made upon condition, which is worthy of observation. (Ant. Sect. 354. 1 Roll. Abr. 454.)

If a man grant an advowson upon condition that the grantee shall regrant the same to the grantor in tail; in this case, if the church become void before the regrant, or before any request made by the grantor, he may take advantage of the condition, because the advowson is not in the same plight as it was at the time of the grant upon condition. And so was it resolved, (*) *Pasch.* 14 *Eliz. in Communi Banco*, between *Andrewes* and *Blunt*, which I heard and observed, and which my lord *Dier* hath omitted out of his report of that case, and therefore the grantee in that case at his perill must regrant it before the church become voide, or else he is disabled, otherwise he hath time during his life if he be not hastened by request. (2 Rep. 79. 1 Leo. 167.) (*) Pasch. 14 Eliz. 311. Dier.

If the feoffee suffer a recovery by default upon a faigned title, before execution sued the feoffor may re-enter for this disability. *Et sic de similibus.* 44 E. 3. 9.

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ALSO, if a man make a deed of feoffment to another, and in the deed there is no condition, &c. and when the feoffor will make liverie of seisin unto him by force of the same deed, he makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had been made.*

"*AND in the deed there is no condition, &c.*" either in deed or in law.

"*And the feoffment is in like force as if no such deed had been made.*" And the reason hereof is, for that the estate passeth by the livery of seisin (1). And in this case the feoffor upon the deliverie of seisin must express the state to him and his heirs, or to the heirs of his body, &c. (4 Rep. 25. a.) 18 E. 3. 19. 36. 17 Ass. p. 20. 8 H. 5. 8. 27 H. 6.

If an agreement be made between two, that the one shall enfeoff the other upon condition in surety of the paiment of certain money, and after the livery is made to him and his heirs generally, 34 Ass l. 1.

* *&c.* added in L. and M. and Roh.

(1) Vid. ant. 48.

generally, the state is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the livery (2).

13 E. 3. tit. Estoppell, 177. 19 E. 3. ibid. 184.

If a man make a charter of feoffment in fee, and the feoffor deliver seisin for life, the feoffee shall hold it but for life; but if the livery be expresly for life, and also according to the deed, the whole fee simple shall pass, because it hath a reference to the deed.

Sect. 360.

ALSO, if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is infeoffed of lands or tenements (pur ceo que quant home est enfeoffe * de terres ou tenements), *he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void.*

(Ant. 206. 1 Rep. 85.) 21 H. 6. 34. a. 8 H. 7. 10. b. 33 Ass. 11. 24. Doct. and Stud. 39. 124. 13 H. 7. 23. (5 Rep. 56. a.) Argumentum ex absurdo. Vide Sect. 722.

"*ALSO, if a feoffment be made, &c.*" And ☞ the like law is of a devise in fee upon condition that the devisee shall not alien (1), the condition is void, and so it is of a grant, release, confirmation, or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattell reall or personall, and give or sell his whole interest or propertie therein upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of a reverter, and it is against trade and traffique, and bargaining and contracting between man and man: and it is within the reason of our author that it should ouster him of all power

[223. a.]

* de—en, *in L. and M.*

(2) As to deeds, see Burglacy v. Ellington, 1 Brownlow's Rep. 191. The court held, that, when a deed is perfect and delivered as his deed, then no verbal agreement made after may be pleaded in destruction or alteration thereof; but, when the agreement is parcel of the original contract, and may well stand with the deed, and is not in terms repugnant to it, then such verbal agreement may be pleaded. As, if a man for money mortgage land to *B.* by deed being of greater yearly value than the interest money, and before the sealing of the deed it was agreed by word, that the mortgagor should have and receive the profits, not the mortgagee, this is good and usual in such cases, and *B.* may plead the verbal agreement to avoid the danger of usury. But, if it had been expressed within the deed, that the mortgagee should have the profits, and the deed was delivered accordingly, then no agreement, covenant, or assignment of the profits could keep it, but that it was an usurious contract, and consequently the deed and mortgage void.—[Note 130.]

(1) *A devise in fee, on condition not to alien but to* I. S. *whether void? See Muschamp's case, Bridg.* 132.—Lord Nott. MSS.—[Note 131.]

power given to him. *Iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem*; and *rerum suarum quilibet est moderator, & arbiter.* And again, *regulariter non valet pactum de re mea non alienanda.* But these are to be understood of conditions annexed to the grant or sale itself in respect of the repugnancy, and not to any other collaterall thing, as hereafter shall appear. Where our author putteth his case of a feoffment of land, that is put but for an example: for if a man be seised of a seigniory, or a rent, or an advowson, or common, or any other inheritance that lyeth in grant, and by his deed granteth the same to a man and to his heirs upon condition that he shall not alien, this condition is void. But some have said that a man may grant a rent charge newly created out of lands to a man and to his heirs upon condition that he shall not alien that, that is good, because the rent is of his own creation; but this is against the reason and opinion of our author, and against the height and puritie of a fee simple. (10 Rep. 39. Hob. 170.)

A man before the statute of *quia emptores terrarum* might have made a feoffement in fee, and added further, that if he or his heirs did alien without licence, that he should pay a fine, then this had been good. And so it is said, that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibilitie of reverter; and so it is in the king's case at this day, because he may reserve a tenure to himself. 14 H. 4. 13 H. 7. 23. 21 H. 7. 8. lib. 5. 56. Knight's case.

If *A.* be seised of Black Acre in fee, and *B.* infeoffeth him of White Acre upon condition that *A.* shall not alien Black Acre, the condition is good, for the condition is annexed to other land, and ousteth not the feoffee of his power to alien the land whereof the feoffment is made, and so no repugnancy to the state passed by the feoffment; and so it is of gifts, or sale of chattels real or personal.

Sect. 361.

BUT if the condition be such, that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one (Mes si le condition soit tiel, que le feoffee ne alienera a un tiel, nosmant son nosme, ou a ascun de * ses heires, ou de issues d'un tiel), *&c. or the like, which conditions do not take away all power of alienation from the feoffee, &c. then such condition is good.*

IF a feoffment in fee be made upon condition that the feoffee shall not infeoffe *I. S.* or any of his heirs or issues, &c. this is good, for he doth not restrain the feoffee of all his power: the reason here yielded by our ☞ author is worthy of observation. And in this case if the feoffee enfeoffe *I. N.* of entent and purpose that he shall infeoffe *I. S.* some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri, ex directo prohibetur & per obliquum.* Pl. Com. 77. a. 8 H. 7. 10. b. 21 E. 4. 47. (Dyer, 45. a. 11 Rep. 74. a.)

[223. b.]

If a feoffment bee made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited 10 H. 7. 11. Doct. and Stud. 124. 13 H. 7. 23.

* ses *not in L. and M.*

prohibited by law, and regularly whatsoever is prohibited by the law, may be prohibited by condition, be it *malum prohibitum*, or *malum in se*. In ancient deeds of feoffment in fee there was most commonly a clause, *quòd licitum sit donatori rem datam dare vel vendere cui voluerit, exceptis viris religiosis & Judæis.*

Bracton, lib. 1. fol. 13. a.

Sect. 362.

ALSO, if lands be given in tail upon condition, that the tenant in tail nor his heirs shall not alien in fee, nor in tail, nor for term of another's life, but only for their own lives (si tenements soient donees en le taile sur tiel condition, que le tenant en le taile ne ses heires† ne alieneront en fee, ‡ ne en le taile, ne pur terme d'auter vie, forsque pur lour vies demesne), *&c. such condition is good. And the reason is, for that when he maketh such alienation and discontinuance of the entail, he doth contrary to the intent of the donor, for which the statute of* W. 2. ‖ cap. 1. *was made, by which statute the estates in tail are ordained* (1).

NOTE

† &c. *added in L. and M.*
‡ ne—ou *in L. and M.*
‖ cap. 1, *added in L. and M.*

(1) A power of suffering a common recovery, and of levying a fine within the statutes of 4 Hen. 7, and 32 Hen. 8, is so inseparably inherent to the estate of a tenant in tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But it does not vitiate the grant of the estate tail to which it is annexed; because (to use an expression of lord Hobart) a condition annexed to an estate given is a divided clause from the grant, and therefore cannot frustrate the grant preceding it, neither in any thing expressed, nor in any thing implied, which is, of its nature, incident to and inseparable from the thing granted. Hob. 170. But this doctrine does not extend to a feoffment, a fine at common law, or any other alienation which works a discontinuance, and is therefore considered in the law as tortious. A proviso restrictive of an alienation of this nature may be annexed to an estate in tail, either as a condition to determine the estate, and give the donor and his heirs a right of re-entry, or by way of limitation, to make the estate of the tenant in tail cease, and the lands remain over to a third person. But in these cases the estate in tail must be made to cease absolutely; for a proviso to make it void only during the life of the tenant in tail is void. See Litt. Sect. 720, 721, 722, 723. Scholastica's case, Plo. 403. Corbett's case, 1 Rep. 83. b. Jermyn *v.* Arscot, cited in 1 Rep. 85. Mildmay's case, 6 Rep. 40. Mary Portington's case, 10 Rep. 37. b. The courts however have allowed both conditions and covenants, restraining or prohibiting lessees for life or years assigning their estates without the consent of the lessors. Blencowe *v.* Bugby, 3 Wilson, 234. In Hunter *v.* Galliers, Term Reports, vol. 2. 133. a proviso in a lease for 21 years that the landlord should re-enter on the tenant's committing any act of bankruptcy whereon a commission should issue, was held to be good. In Davidson *v.* Foley, Brown's Reports in Cha. 2 vol. 203. the reader will find a curious instance of a trust under which two persons are become virtually entitled to a very considerable annuity, at the same time that the trust is so framed as to exclude their creditors from having any charge or lien upon the annuity, either at

NOTE here, the double negative in legall construction shall not hinder the negative, *viz. sub conditione quòd ipse nec hæredes sui non alienarent.* And therefore the grammaticall construction is not always in judgment of law to be followed. 21 H. 7. 11. Vid. Sect. 220. acc. (Cro. Car. 555. Hob. 191. Ant. 146. b. 10 Rep. 130. 4 Rep. 14.)

33 Ass. 11. 24. lib. 6. 40, 41. Mildmaye's case 21 H. 6. 33. 13 H. 7. 23. Cro. Jac. 307.

"*But only for their own lives, &c.*" And yet if a man make a gift in taile, upon condition that he shall not make a lease for his own life, albeit the state be lawfull, yet the condition is good, because the reversion is in the donor. As if a man make a lease for life or years upon condition, that they shall not grant over their estate or let the land to others, this is good, and yet the grant or lease should be lawfull. (*) If a man make a gift in tail upon condition that he shall not make a lease for three lives or 21 years according to the statute of 32 *H.* 8, the condition is good, for the statute doth give him power to make such leases, which may be restrained by condition, and by his own agreement; for this power is not incident to the estate, but given to him collaterally by the act, according to that rule of law, *quilibet potest renunciare juri pro se introducto.*

(6 Rep. 43. a. contra.) 21 H. 6. 33. 13 H. 7. 23, 24. 27 H. 8. 17. 19. 31 H. 8. Dyer, 45. (3 Rep. 64.) (*) Dier, 33 H. 8. fo. 48, 49. (10 Rep 38, 39. 1 Roll. Abr. 418.)

"*When he maketh such alienation and discontinuance of the entail.*" And therefore if a gift in tail be made upon condition, that the donee, &c. shall not alien, this condition is good to some intents, and void to some; for, as to all those alienations which amount to any discontinuance of the state tail (as *Littleton* here speaketh;) or is against the statute of *Westminster* 2, the condition is good without question. But as to a common recoverie the condition is voyd, because this is no discontinuance,

[224. a.]

but a bar, and this common ☞ recovery is not restrained by the said statute of *W.* 2. And therefore such a condition is repugnant to the estate tail; for it is to be observed, that to this estate tail there be divers incidents. First, to be dispunished of waste. Secondly, that the wife of the donee in tail shall be endowed. Thirdly, that the husband of a feme donee after issue shall be tenant by the curtesie. Fourthly, that tenant in tail may suffer a common recoverie: and therefore if a man make a gift in tail, upon condition to restrain him of any of these incidents, the condition is repugnant and void in law. And it is to be observed, (*) that a collateral warranty (1) or a lineal

Vid. lib. 6. 40, 41. Sir Arch. Mildmaie's case. (1 Rep. 84. 1 Roll. Abr. 418.)

(1 Roll. Abr. 412. 418. 10 Rep. 35. b.)

22 E. 3. 9. 17 El. 343. Dyer.

(*) 13 H. 7. 24. b.

at law or equity. The illusory nature of estates and trusts of this description raises a powerful objection to them on the ground of policy; nor are they, perhaps, quite reconcileable to some of the fundamental principles of our law. Serious consequences, it is presumed, would ensue their coming into general, or even frequent, use.—[Note 132.]

(1) But this is altered by the 4 and 5 (B) Ann. c. 16, whereby all collateral warranties by ancestors, who have no estate of inheritance in possession in the lands warranted, are made void against their heirs. The restraints which at different times have been laid on the free alienation of property, and the methods used to set them aside, form one of the most interesting parts of the history of every nation in which the feudal institutions have prevailed. So far as the history of England is concerned in them, they have been discussed with great accuracy by sir William Blackstone, vol. 2. chap. 7. and sir John Dalrymple, in the History of the Feudal Law, chap. 3, and 4. The introduction of

(B) *This act is styled 4 Ann. c. 16, in Ruffhead's edition of the Statutes at large.*

lineal with assets in respect of the recompence, is not restrained by the statute of *Donis conditionalibus*, no more is the common recovery in respect of the intended recompence. And *Littleton*, to the intent to exclude the common recovery, saith, *such alienation and discontinuance*, joyning them together.

If a man before the statute of *Donis conditionalibus* had made a gift to a man and to the heirs of his body, upon condition, that after issue he should not have power to sell, this condition should have been repugnant and void (2). *Pari ratione*, after the statute a man makes a gift in tail, the law *tacitè* gives him power to suffer a common recovery; therefore to add a condition, that he shall have no power to suffer a common recoverie, is repugnant and voyd.

10 H. 7. 11. 13 H. 7. 23. Lib. 6. 41. b. in Sir Anthony Mildemaye's case, ubi supra. (Hob. 261. 1 Roll. Abr. 421.)

If a man make a feoffment to a baron and feme in fee, upon condition, that they shall not alien, to some intent this is good, and to some intent it is void: for to restrain an alienation by feoffment, or alienation by deed, it is good, because such an alienation is tortious and voidable: but to restrain their alienation by fine is repugnant and void, because it is lawfull and unavoidable.

It is said, that if a man infeoffe an infant in fee, upon condition that he shall not alien, this is good to restrain alienations during his minoritie, but not after his full age.

Doctor & Student, 124.

It is likewise said, that a man by licence may give land to a bishop and his successors, or to an abbot and his successors, and add a condition to it, that they shall not without the consent of their chapter or covent, alien, because it was intended a mortmain,

of recoveries, and the circumstances which led the way to them, are accurately stated and explained by Mr. Cruise, in his most excellent Essay on the Law of Recoveries. The restraints on the alienation of property are much greater in Scotland than they are in England. There, if a *tailzie* is guarded *with irritant and resolutive clauses*, the estate intailed cannot be carried off by the debt or deed of any of the heirs succeeding to it, in prejudice of the substitutes. This degree of tailzie differs from that of a *tailzie with prohibitory clauses*. The proprietor of an estate of this nature cannot convey it gratuitously, but he may dispose of it for onerous causes, and it may be attached by his creditors; yet the substitutes, as creditors by virtue of the prohibitory clause, may by a process, called in the law of Scotland *an Inhibition*, secure themselves against future debts or contracts. A third degree of tailzie used in Scotland is called a *simple Distination*. This amounts to no more than a designation who is to succeed to the estate, in case the temporary proprietors of it make no disposition of it; for it is defeasible, and attachable by creditors. See Ersk. Inst. 238. 360.—[Note 133.]

(2) Britton, in his chapter *on Conditional Purchases*, observes, that "if any "purchase to him and his wife, and to the heirs of them lawfully begotten, "the donees have presently but an *estate of freehold* for the term of their "lives, and *the fee accrueth to their issue*, if they had not issue before; and if "they had no issue, then *the fee remains in the person of the donor until they "have issue*, and the purchase returns to the donor, if the purchaser has no "offspring, or if they have issue and that issue fails." But lord Coke in his 2d Inst. 333. observes, that Britton takes the condition to be precedent, but that the donees had, at the common law, a fee simple conditional immediately by the gift. As a proof of this, he mentions, that if a gift was made to a man and the heirs of his body, and before issue, he had *before the stat. de donis* made a feoffment in fee, the donor could not enter for the forfeiture, but that the feoffment would have barred the issue had afterwards.—[Note 134.]

main, that is, that it should for ever continue in that see or house, for that they had it *en auter droit*, for religious and good uses.

"*The statute of W.* 2. *cap.* 1." Hereby it appeareth, that whatsoever is prohibited by the intent of any act of parliament, may be prohibited by condition, as hath been said. 10 H. 7. 11. Doct. & Stud. 124. 13 H. 7. 23.

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FOR it is proved by the words comprised in the same statute, that the will of the donor in such cases shall be observed, and when the tenant in tail maketh such discontinuance (Car il est prove per les parols comprises en mesme l'estatute,* que la volunt del donor en tiels cases serroit observe, et quant le tenant en le taile fait† tiel discontinuance), *he doth contrary to that, &c. And also in estates in tail of any tenements, when the reversion of the fee simple,‡ or the remainder of the fee simple is in other persons, when such discontinuance is made, then the fee simple‖ in the remainder is discontinued. And because* (Et pur § ceo que) *tenant in tail shall do no such thing against the profit¶ of his issues, and good right, such condition is good, as is aforesaid,+ &c.*

"*WHEN the reversion or remainder in fee is in other persons.*" Put the case that a man make a gift in tail to *A.* the remainder to him and to his heires, upon condition that he shall not alien; as to the state tail the condition is good, for such alienation is prohibited, as hath been said, by the said statute. But as to the fee simple, some say it is repugnant and voyd, for the reason that *Littleton* hath yielded; and therefore some are of opinion, that this is a good condition, and shall defeat the alienation for the estate tail only, and leave the fee simple in the alience, for that the condition did in law extend only to the state taile, and not to the remainder. (Post. 298. 333-338.) (1 Roll. Abr. 407. 472. 474. Cro. Eliz. 360.) 11 H. 7. 6. 13 H. 7. 23, 24. Dyer, 2 & 3 Phil. & Ma. 127. b.

[224. b.] "*Against the ☞ profit of his issues.*" Hereby it appeareth, that to restrain tenant in tail from alienation against the profit of his issues, is good, for that agreeth with the will of the donor, and the intent of the statute*. But a gift in tail may be made upon condition, that tenant in tail, &c. may alien for the profit of his issues, and that hath been holden to be good, and not restrained by the said statute, and seemeth to agree with the reason of *Littleton*, because in that case, *Voluntas donatoris observetur, &c.* and it must be for the profit of the issues. * 46 E. 3. 4. (1 Roll. Abr. 418.)

Sect.

* que fuit al entent de le fesance de mesme l'estatute, *added in L. and M. and Roh.*

† tiel—un, *in L. and M. and Roh.*

‡ *or the remainder of the fee simple*, not in L. and M. or Roh.

‖ *in the reversion or the fee simple*, added in L. and M. and Roh.

§ ceo—ouster *in L. and M. and Roh.*

¶ *of his issues*, not in L. and M. or Roh.

+ *&c.* not in L. and M. or Roh.

Sect. 364.

ALSO a man may give lands in tail upon such condition, that if the tenant in tail or his heirs alien in fee or in tail, or for term of another man's life, &c. and also that if all the issue comming of the tenant in tail be dead without issue, that then it shall be lawfull for the donor and for his heirs to enter, &c. And by this way the right of the tail (le droit ‖ de le taile) *may be saved after discontinuance* (apres ¶ discontinuance), *to the issue in tail, if there be any* (si ascun ‡ y soit); *so as by way of entry of the donor or of his heirs, the tail shall not be defeated by such condition:* ✣ Quære hoc. *And yet if the tenant in tail in this case, or his heirs, make any discontinuance, he in the reversion or his heirs, after that the tail is determined for default of issue, &c. may enter into the land by force of the same condition, and shall not be compelled* (et ne serront my § cohert) *to sue a writ of formedon in the reverter.*

21 H. 7. 11. (1 Rep. 16. 84.) "*ALIEN, &c. and also if all the issue be dead, &c.*" Note, *Littleton* purposely made parcell of the condition in the copulative, that the tenant in tail should alien, &c. For if a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall (Dyer, 343. b.) re-enter, this is a voyd condition; for when the issues fail, the estate determineth by the expresse limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate, is void (1), and in that case the wife of the donee shall be endowed, &c. And therefore *Littleton* to make the condition good, added an alienation, which amounted to a wrong, and he restrained not the alienation only, (for then presently upon the alienation the donor, &c. might re-enter, and defeat the estate tail) ☞ but added, and [225. a.] die without issue, to the end that the right of the estate in tail might be preserved, and not defeated by the condition, but might be recovered again by the issue in tail in a *formedon*.

(Mo. 39.) And *Littleton* expressly saith, that the donor and his heirs after the discontinuance, and after that the estate tail is determined, may re-enter, which is the intention and true meaning of *Littleton* in this place. And where it is said in this section (*quære*

‖ de—en *in L. and M. and Roh.*
¶ tiel *added in L. and M. and Roh.*
‡ issue *added in L. and M. and Roh.*
✣ Quære hoc, *not in L. and M. or Roh.*
§ cohert—arte *in L. and M. and Roh.*

(1) See Boraston's case, 3 Rep. 19. Webb *v.* Hearing, Cro. Ja. 416. King *v.* Rumball, Cro. Ja. 448. Chadock *v.* Cowley, ibid. 695. Fortescue *v.* Abbott, Poll. 479. and Sir Thomas Jones, 79; and Goodtitle *v.* Whitby, 1 Burr. 228. See also 1 P. W. 170;—and Mr. Fearne's Essay on Contingent Remainders, p. 241. 6th ed.

(*quære hoc*), this is added by some that understood not this case, and is not in the originall.

Note, that in a condition consisting of divers parts in the conjunctive, as here in the case of *Littleton*, both parts must be performed, according to the old rule, [*a*] *Si plures conditiones ascriptæ fuerunt donationi conjunctim, omnibus est parendum, et ad veritatem copulativè requiritur quòd utraque pars sit vera.* But otherwise it is when the condition is in the disjunctive (1), for the same author in that case saith, *Si divisim, cuilibet vel alteri eorum satis est obtemperare. Et in disjunctivis sufficit alteram partem esse veram.* What then if the condition or limitation be both in the conjunctive and disjunctive: As if a man make a lease to the husband and wife, for the term of one and twenty years, if the husband and wife or any child between them so long shall live, and then the wife dyeth without issue; shall the lease determin, or continue during the life of the husband? And the answer is, that it shall continue, for the disjunctive referreth to the whole, and disjoyneth not only the latter part, as to the child, but also to the baron and feme, so as the sense is, if the baron, fem. or any child shall so long live.

(Sid. 437. 8 Rep. 85. b.)

[*a*] Bract. lib. 2. fo. 19. Vide Pl. Com. 76. in Wimbeshe's case & fol. 107. in Fulmerston's case. Bracton, ubi supra. (4 Rep. 52. b.) So it was adjudged in Communi Banco, Pasch. 30 Eliz. inter Baldwyn & Cooke, commonly called Trupennie's case. (5 Rep. 112.)

[*b*] And so it is if an use be limited to certain persons, untill *A.* shall come from beyond sea, and attain unto his full age, or dye, if he doth come from beyond sea or attain to his full age, the use doth cease.

[*b*] Hil. 35 Eliz. en trespasse per le Seignior Mordant vers. George Vaux, so adjudged in the King's Bench.

Sect. 365.

ALSO a man cannot plead in any action, that an estate was made in fee, or in fee tayl, or for term of life, upon condition, if he doth not vouch a record of this, or shew a writing under seal, proving the same condition (home ne poit pleder en ascun action, que estate fuit fait en fee, ou en fee taile, ou pur terme de vie, sur condition, † s'il ne voucha un record de ceo, ou monstra un escript south seale, provant mesme la condition). *For it is a common learning, that a man by plea shall not defeat any estate of freehold by force of any such condition, unless he sheweth the proof of the condition in writing, &c. unless it be in some special cases, &c. But of chattels real, as of a lease for years, or of grants of wards made by gardians in chivalrie, and such like, &c. a man may plead that such leases or grants were made upon condition, &c. without shewing any writing of the condition. So in the same manner a man may do of gifts and grants of chattels personals, and of contracts personals, &c.*

"*IN*

† que *added in L. and M. and Roh.*

(1) If the condition of the obligation be in the disjunctive, and give the obligor liberty to do one thing or another, at his election, and one of the things becomes impossible, the obligation in some cases will be saved. See the distinctions taken in Eaton & Monox *v.* Laughter, Cro. Eliz. 398. Baker *v.* Morecomb, ibid. 864. Basket *v.* Basket, 2 Mod. 200.—Ant. 145.—[Note 135.]

39 E. 3. 22.
4 E. 4. 35. a.
9 E. 4. 25. b.
26. a.
6 H. 7. 8. b.
11 H. 7. 22. b.
7 H. 6. 7.
14 H. 8. 22. b.
28 Ass. p. 1.
(1 Sid. 50.)
[a] Lib. 10. fol. 92. Doctor Layfield's case.
7 E. 3. 57.
25 E. 3. 41.

"*IN any action.*" Be the action real, personal, or mixt, if a condition be pleaded to defeat a freehold, it is regularly true, that a deed must be shewed forth [a] in court (2). And the reason why the deed shall be shewed forth to the court is, for that to every deed there be two things requisite: the one, that it be sufficient in law, and this is called the legall part, and therefore the judgment of that belongeth to the judges of the law: the other concernes matter of fact, as sealing and delivery, and this belongs to the jurors. And because every deed ought to approve itself, and be proved by others too; it must approve itself upon the shewing of it forth in court in two manners.

41 E. 3. 10. acc. (Ant. 6. a.) (10 Rep. 92.)

First, as to the composition of the words, that it be sufficient in law, and that the court shall adjudge.

(11 Rep. 26. b. Dyer, 261. b. 1 Roll. Abr. 208. Cro. Car. 399. Doct. Pla. 260.) (Post. 227. 2 Cro. 217.)

☞ Secondly, of ancient time if the deed appeared to be rased or interlined in places materiall, the judges adjudged upon their view, the deed to be voyd (1). But of latter time the judges have left that to the jurors to try whether the rasing or interlining were before the deliverie. [225. b.]

(45 E. 3. 21. a. Post. 308. b. 338. a. s. 214.) Lib. 5. fol. 52, 53, &c. Page's case.

And there is a difference between a rent, and a re-entry; for upon a gift in tail, or a lease for life, a rent may be reserved without deed, but a condition with a re-entrie cannot be reserved in those cases without deed.

6 Rep. 2. cap. 4. (5 Rep. 74. 76. 10 Rep. 92.)

"*Writing under seal.*" Which *Littleton* intendeth to be a deed under seal.

And well said *Littleton*, *a deed under seal*. For though the deed be inrolled, yet he cannot plead the inrolment thereof, though it be of record. And though it be exemplified under the great seal, [b] yet must he shew forth the deed itself under seal, as *Littleton* here saith, and not the exemplification (2) †. And so when *Littleton* wrote, no *constat*, or *inspeximus*, of the king's letters patents were availeable to be shewed forth in court, but the letters patents themselves under seal. For both the *constat* and *inspeximus* are but exemplifications of the inrolment of the charters, or letters patents: and this appeareth by the resolution of two severall [c] parliaments, one holden in the third and fourth year of king *Edward* the sixth, and the other in the thirteenth year of queen *Elizabeth*. But now by those statutes the exemplification or *constat* under the great seal of the inrolment of any letters patents made since the fourth day of February *anno* 27 *H.* 8, or after to be made, shall be sufficient to be pleaded and shewed forth in court, as well against the king, as any other person by the patentees themselves (whereof there was

[b] Vide 32 H. 8. in Pattents Br. 12 H. 7. 12. b.

(2 Inst. 672. 5 Rep. 52, 53.)

[c] 3 & 4 E. 6. cap. 4 and 13 Eliz. cap. 6.

(2) See Bulst. 259. 160. 6 Mod. 237. 2 Salk. 498.

(1) 'Tis to be presumed, that an interlining, if the contrary is not proved, was made at the time of making the deed. 1 Keb. 21. *Note to the 11th edition.* On the rasure, or interlining of deeds, breaking or defacing the seals of deeds, and cancelling deeds, see 1 Wood's Conv. 808, 809. Com. Dig. Faits, T. 1, 2; and Vin. Abr. Faits, T. U. U. 2. X. X. 2. It is to be observed, that the cancelling of a deed does not divest the estate from the persons in whom it is vested by the deed. 1 Rep. in Cha. 100. and Gilb. Rep. 236.—[Note 136.]

(2) † On giving deeds of bargain and sale in evidence, see Bull. Ni. Pri. 255. 10 Ann. c. 18. and 8 G. 2. c. 6. s. 21.

was some doubt [*d*] conceived upon the said statute of *E.* 6.) and by all and every other person and persons clayming by, from, or under them. Which statutes are generall and beneficiall, and especially the act of 13 *Eliz.* for that extends not only to lands, tenements, and hereditaments, but to every other thing whatsoever, and ought to be favourably construed for advancement of the remedie and right of the subject (3).

[*d*] Dyer, 1 Eliz. 167. (Hard. 118.) (2 Sid. 145.) (1 Mod. 117.)

The difference between a *constat*, *inspeximus*, and a *vidimus*, you may read [*e*] at large in *Page*'s case. But none of them by law ought to be had, but only of the inrolment of record, and not of a deed or any other writing that is not of record, and no deed, &c. can be inrolled, unless it be duly and lawfully acknowledged.

[*e*] Lib. 8. fol. 8. in the Prince's case. Vide Page's case ubi supra.

"*Unless it be in some special cases, &c.*" Hereby is implyed, that if a gardian in chivalrie in the right of the heir entreth for a condition broken, he shall plead the state upon condition without shewing of any deed, because his interest is created by the law. And so it is [*f*] of a tenant by statute merchant or staple, or tenant by *elegit*.

33 E. 3. Gard. 162. 20 H. 3. Darr. pres. 13. 35 H. 6. tit. Monstrans des Faits, 118. [*f*] 20 H. 7. 5. (5 Rep. 75. a.) (2 Cro. 217.) (10 Rep. 93, 94.)

Likewise tenant in dower shall plead a condition, &c. without shewing of the deed. And the reason of these and the like cases, is, for that the law doth create these estates, and they come not in by him that entred for the condition broken, so as they might provide for the shewing of the deed, but they come to the land by authoritie of law, and therefore the law will allow them to plead the condition without shewing of it.

35 H. 6. tit. Monstrans des Faits, 11. b. 7 H. 6. 7 H. 5. 5. 3 H. 6. 21. 33 H. 6. 1. 14 H. 8. 8.

[226. a.] [*f**] ☞ But the lord by escheat, albeit his estate be created by law, shall not plead a condition to defeat a freehold without shewing of it, because the deed doth belong unto him.

[*f**] 35 H. 6. ubi supra.

A tenant by the curtesie shall not [*g*] plead a condition made by his wife, and a re-entry for the condition broken without shewing the deed; for albeit his estate be created by law, yet the law presumeth that he had the possession of the deeds and evidences belonging to his wife.

[*g*] 35 H. 6. ubi supra.

[*h*] But lessees for years, and all others that claim by any conveyance from the party, or justifie as servant by commandment, &c. must shew the deed.

[*h*] 14 H. 8. 8. Pl. Com. 149. (10 Rep. 92, 93.)

[*i*] *R.* brought an *ejectione firmæ* against *E.* for ejecting him out of the mannor of *D.* which he held for term of years of the demise of *C.*—*E.* the defendant pleaded that *B.* gave the said mannor to *P.* and *Katherine* his wife in tail, who had issue *E.* the defendant, and after the donees infeoffed *C.* of the mannor, upon condition that he should demise the mannor for years to *R.* the plaintiff, the remainder to the husband and to the wife, &c. *C.* did demise the land to *R.* the plaintiff for years, but kept the reversion to himself, wherefore *Katherine* after the decease of her husband entred upon the plaintiff, &c. for the condition broken, and died; after whose decease the land descended to *E.* the issue in tail, &c. now defendant, judgment upon action, exception was taken against this plea, because *E.* the defendant maintained his entry by force of a condition broken, and shewed forth no deed, and the plea was ruled to be good, because the thing

[*i*] 44 E. 3. 22. (6 Rep. 38.) (Cro. Car. 442.) See after this chapter, sect. 366. 7 Rep. Ughtred's case.

(3) See also 27 Eliz. 9. and Bull. Ni. Pri. 226.

thing was executed, and therefore he need not shew forth the deed. *Nota*, the defendant being issue in tail was remitted to the estate tail (1).

11 Ed. 3. tit. Monstrans des Faits, 175. 45 E. 3. 8. (Cro. Car. 372.)

In a *præcipe quòd reddat* against *S.* who pleaded that *R.* was seised, and infeoffed him in mortgage upon condition of payment of certain money at a day, and said that *R.* paid the money at the day, and entred judgment of the writ: exception was taken to this plea, for that he shewed forth no deed of the condition, and it was ruled that he need not shew forth the deed for two causes. 1. That he ought not to shew any deed to the demandant, because the demandant is a stranger. 2. It might be when *R.* paid the money, and the condition performed, that the deed was rebailed to *R.* and thereupon the plea was adjudged good, and the writ abated.

45 E. 3. 8. b. Finch.

If land be mortgaged upon condition, and the mortgagee letteth the lands for years, reserving a rent, the condition is performed, the mortgagor re-enters, in an action of debt brought for the rent the lessee shall plead the condition and the re-entry without shewing forth any deed.

10 H. 4. 9. b. 43 E. 3. Vide 10 E. 3. 41. Simile in dower.

In an assise the tenant pleads a feoffment of the ancestor of the plaintiff unto him, &c. the plaintiff saith that the feoffment was upon condition, &c. and that the condition was broken, and pleads a re-entry, and that the tenant entred and took away the chest in which the deed was, and yet detaineth the same, the plaintiff shall not in this case be enforced to shew the deed.

12 E. 1. Feoffments & Faits, 114. F. N. B. 105. b. 13 R. 2. Monstrans des Faits, 165. 4 E. 4. 35, &c. 11 H. 7. 22. b. 6 H. 7. 8. 9 E. 4. 25, 26.

If a woman give lands to a man and his heirs by deed or without generally, she may in pleading aver the same to be *causâ matrimonii prælocuti*, albeit she hath nothing in writing to prove the same, the reason whereof see *Sect.* 330.

"*But of chattels real, as of a lease for years, &c.*" This is apparent.

14 H. 8. 22. b. (Doc. Pla. 51.) (See Plo. 23. a.) (1 Roll. Abr. 413.)

Sect. 366.

ALSO albeit a man cannot in any action plead a condition which toucheth, & concernes a freehold, without shewing writing of this, as is aforesaid, yet a man may be aided upon such a condition by the verdict of 12 *men taken at large in an assise of* novel disseisin, *or in any other action where the justices will take the verdict of* 12 *jurors at large* (l'ou les justices voilent prender* le verdict de xii. jurors a large). *As put the case, a man seised of certain land in fee letteth the same land to another for term of life without deed, upon condition to render to the lessor a certain rent, and for default of payment a re-entrie, &c. by force whereof the lessee is seised as of freehold, and after the rent is behind, by which*

* le—per *in L. and M. and Roh.*

(1) *This is the reason of this case, for now he claims above the condition, and therefore need not shew the deed. Infra*, 227. *b.* Lord Nott. MSS.—[Note 137.]

which the lessor entereth into the land, and after the lessee arraine an assise of novel disseisin *of the land against the lessor, who pleads that he did no wrong nor disseisin, and upon this the assise is taken; in this case the recognitors of the assise may say and render to the justices their verdict at large upon the whole matter, as to say, that the defendant was seised of the land in his demesne as of fee, and so seised, let the same land to the plaintife for terme of his life, rendring to the lessor such a yearely rent payable at such a feast, &c. upon such condition, that if the rent were behinde at any such feast at which it ought to bee paid* (que si le rent fuit aderere a ascun tiel feast † a que doit estre paie), *then it should bee lawfull for the lessor to enter, &c. by force of which lease the plaintife was seised in his demesne as of freehold, and that afterwards the rent was behinde at such a feast, &c.* (et que puis apres le rent fuit aderere a tiel feast, ‡ &c.) *by which the lessor entred into the land upon the possession of the lessee, and prayed the discretion of the justices, if this bee a disseisin done to the plaintife or not; then for that it appeareth to the justices* (‖ donque per ceo que appiert a les justices), *that this was no disseisin to the plaintife, insomuch as the entrie of the lessor was congeable on him, the justices ought to give judgement that the plaintife shall not take any thing by his writ of assise. And so in such case the lessor shall bee aided, and yet no writing was ever made of the condition. For as well as the jurors may have conusance of the lease, they also as well may have conusance of the condition which was declared and rehearsed upon the lease* (Car cibien que les jurors poient aver conusance de le § lease, auxy bien ils poient aver conusance de le condition que fuit declare & rehearse sur le leas.)

"*VERDICT of* 12 *men* (2)." *Veredictum quasi dictum veritatis*, as *judicium est quasi juris dictum. Et sicut ad questionem juris, non respondent juratores sed judices: sic ad quæstionem facti non respondent judices sed juratores.* For jurors are to try the fact, and the judges ought to judge according to the law that riseth upon the fact, for ☞ *ex facto jus oritur.* (Post. 253. b. 261. b.) Lib. 8. fo. 155. Lib. 9. fo. 13. Lib. 11. fo. 10. (Plo. 93. 2 Inst. 425. 2 Roll. Abr. 693, 694. 698, 699, 700. 711. 717. 725. Hob. 117. 4 Rep. 65. b. Cro. El. 699. 1 Sid. 27. 191. 194. 203. 9 Rep. 67. b.)

[226. b.]

"*Taken at large.*" There be two kindes of verdicts; *viz.* one generall, and another at large or especiall. As in an assise of *novel disseisin*, brought by *A.* against *B.* the plaintife makes his plaint, *Quòd B. disseisivit eum de* 20 *acris terræ cum pertinentiis*; the tenant pleades, *Quòd ipse nullam injuriam seu disseisinam præfato A. inde fecit, &c.* The recognitors of the assise doe finde, *Quod prædict. A. injustè & sine judicio disseisivit prædict. B. de prædict.* 20 *acris terræ cum pertinent', &c.* This is a generall verdict. (9 Rep. 12, 13.)

† a *not in L. and M. or Roh.*
‡ An *added in L. and M. and Roh.*
‖ Et *added in L. and M. and Roh.*
§ lease, auxy bien ils poient aver conusance de le, *not in L. and M. or Roh.*

(2) See Bacon's Abr. vol. 5. 281. Vin. vol. 21. 373. Com. Dig. Abatement, (I. 34.) Amendment, (P.) Appeals, (G. 14.) Estoppel, (E. 10.) Evidence, (A. 5.) Pleader, (C. 87. E. 38. R. 13. S. 1.) Prerogative, (D. 76.)

verdict. The like law it is if they finde it negatively. And *Littleton* here putteth a case of a verdict at large, or a speciall verdict; and it is therefore called a speciall verdict, or a verdict at large, because they finde the speciall matter at large, and leave the judgement of law thereupon to the court, of which kinde of verdict it is said, [*l*] *Omnis conclusio boni & veri judicii sequitur ex bonis & veris præmissis et dictis juratorum.*

(Plo. 93. a.) (Post. 227, 228.)

[*l*] Trin. 33 E. 1. Coram Rege Nott. in Thesaur.

And though *Littleton* here puts his case of a verdict at large upon a generall issue (which in the case he putts, it was necessary for the tenant to pleade) yet when issue is joyned upon some speciall point, the jury, as shall be said hereafter in this section, may finde the speciall matter if it be doubtfull in law, for as much doubt may arise upon one point upon the speciall issue as upon the generall issue. And as a speciall verdict may be found in Common ☞ Pleas, so may it also bee found in Pleas of the Crowne, or criminal causes that concerne life or member.

[227. a.]

43 Ass. 31. Staunf. Pl. Cor. 164, 165. 3 E. 3. Coron. 284. 286, 287.

44 E. 3. 44. 41 E. 3. Coron. 451. (Cro. Eliz. 474. Ib. 471. 113, 114. 653. 6 Rep. 46. b.)

A verdict finding matter incertainely or ambiguously is insufficient, and no judgement shall be given thereupon; as if an executor plead *pleinment administre*, and issue is joyned thereupon, and the jury finde that the defendant have goods within his hands to be administred, but finde not to what value, this is incertaine, and therefore insufficient.

40 E. 3. 15. 20 E. 3. Amendment, 57. 18 E. 3. 49. in Cessavit. 30 E. 3. 23. 7 H. 4. 39. (8 Rep. 65.)

A verdict that finds part of the issue, and finding nothing for the residue, this is insufficient for the whole, because they have not tried the whole issue wherewith they are charged. As if an information of intrusion bee brought against one for intruding into a mesuage, and 100 acres of land, upon the generall issue the jury finde against the defendant for the land, but saith nothing for the house, this is insufficient for the whole, and so was it twice adjudged. [*m*] But if the jury give a verdict of the whole issue, and of more, &c. that which is more is surplusage, and shall not [*a*] stay judgement; for *Utile per inutile non vitiatur*, but necessary incidents required by law the jury may finde.

17 E. 3. 47. 18 E. 3. 48. 22 E. 3. 1. 18 E. 3. 56. 15 E. 3. Judgement, 58. 2 H. 5. 3. 7 H. 6. 5. 7 E. 4. 24. 28 H. 6. 10. (Cro. Jac. 31. 2 Roll. Abr. 722. 10 Rep. 119. Hob. 64. 6 Rep. 47. 2 Roll. Abr. 702. 706. Dyer, 346. b. 300. b. Post. 303. a. b. Doctr. Pla. 288, 289. Hob. 54. Cro. El. 174. 2 Roll. Abr. 708. Hob. 18. 9 Rep. 67. b. 112. 4 Rep. 65. Ante, 114. b. Cro. El. 110. 10 Rep. 97. b.)

[*m*] Hil. 25 Eliz. in a writ of error betweene Brace and the Queene, in the Exchequer chamber, Mich. 28 & 29 Eliz. inter Gomersal & Gomersal in account in the King's bench.

[*a*] 32 E. 3. Cessavit, 25. Vide Sect. 484, 485. (Post. 282.) Vide Sect. 58. 13 E. 3. Garr. 26. 15 E. 3. Ass. 322. 17 E. 3. 6. 18 Ass. 2. 35 Ass. 8.

If the matter and substance of the issue bee found, it is sufficient, as *Littleton* himselfe sayeth hereafter.

Estoppells which bind the interest of the land, as the taking of a lease of a man's owne land by deed indented, and the like, being specially found by the jurie, the court ought to judge according to the speciall matter; for albeit estoppels regularly must be pleaded and relied upon by an apt conclusion, and the jury is sworne *ad veritatem dicendam*, yet when they finde *veritatem facti*, they pursue well their oath, and the court ought to adjudge according to law. [*b*] So may the jurie find a warrantie being given in evidence, though it be not pleaded, because it bindeth the right, unlesse it be in a writ of right, when the mise is joyned upon the meere right.

[*b*] 1 H. 4. 6. b. 27 H. 8. 22. b. Pl. Com. 515. Lib. 4. fol. 53. Rawlins' case, & ibid. Pledol's case. Hil. 31 Eliz. betweene Sutton and Dicons in the Common Place, the case of the lease for yeares by deed indented. 34 E. 3. Droit, 29. (Post. 352. Ant. 47. b. Doc. Pla. 164. Post. 283. Cro. El. 141.)

After

[227. b.] [c] ☞ After the verdict recorded the jury cannot vary from it, but before it be recorded they may vary from the first offer of their verdict, and that verdict which is recorded shall stand: also they may vary from a privy verdict.

[c] 7 R. 2. Corone, 108. Plo. Com. Freman's case, 211. 11 H. 4. 2. 20 Ass. 19. 16 Ass. 16. 22 Ass. 23. 5 H. 7. 22. Pasch. 24 H. 8. of the Report of Justice Spilman in the King's Bench. 11 H. 4. 17. 35 H. 6. Examin. 17. 29 H. 8. 37. Dier. (1 Vent. 125.) 35 H. 8. 55. 4 et 5 Eliz. 218. 14 H. 7. 1.

An issue found by verdict shall alwayes be intended true untill it be reversed by attaint, and thereupon upon the attaint no *supersedeas* is grantable by law.

If the jurie after their evidence given unto them at the barre, doe at their owne charges eat or drinke either before or after they be agreed on their verdict, it is finable, but it shall not avoid the verdict: but if before they be agreed on their verdict, they eate or drinke at the charge of the plaintife, if the verdict be given for him, it shall avoid the verdict: but if it be given for the defendant, it shall not avoid it, *& sic è converso.* [d] But if after they be agreed on their verdict they eat or drinke at the charge of him for whom they do passe, it shall not avoid the verdict.

20 H. 7. 3. [d] Pasch. 6 E. 6. in the Common Place.

[e] If the plaintife after evidence given, and the jury departed from the barre, or any for him, do deliver any letter from the plaintife to any of the jury concerning the matter in issue, or any evidence, or any escrowle touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintife, but not if it be found for the defendant, *& sic è converso.* But if the jury carry away any writing unsealed, which was given in evidence in open court, this shall not avoid their verdict, albeit they should not have carryed it with them.

[e] 11 H. 4. 16, 17. 3 Mar. Jurors Br. 8. Vide Dier ubi supra. (2 Roll. Abr. 713. 8'4. 1 Leo. 18. Cro. Jac. 121. Sid. 225.) Pasch. 6 E. 6. ubi supra. (Mo. 452. 2 Roll. Abr. 14, 715, 716.)

By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle, which some bookes [f] call an imprisonment, and without speech with any, unlesse it be the bailife, and with him onely if they be agreed. After they be agreed they may in causes between party and party give a verdict, and if the court be risen, give a privy verdict before any of the judges of the court, and then they may eat and drinke, and the next morning in open court they may either affirme or alter their privy verdict, and that which is given in court shall stand. But in criminall cases of life or member, the jury can give no privy verdict, but they must give it openly in court. And hereby appeareth another division of verdicts, *viz.* a publique verdict openly given in court, and a privy verdict given out of the court before any of the judges, as is aforesaid.

[f] 24 E. 3. 75. (1 Cro. Jac. 141. 616.)

A jury sworne and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict. And the king cannot be non-suit, for he is in judgement of law ever present in court: but a common person may be nonsuit.

21 E. 3. 18. (Ant. 139. b. 9 Rep. 13.)

"*In an assise of novel disseisin, or in any other action, &c.*" Here it is to bee observed, that a speciall verdict, or at large, may be given in any action, and upon any issue, be the issue generall or speciall: and albeit there be some contrary opinions in our bookes, yet the law is now settled in this point.

W. 2. cap. 30. 7 H. 4. 11. 8 E. 4. 29. 9 H. 7. 13. 23 H. 8. tit. Verdit. Br. 85. 11 Eliz. Dier, 283, 284. 3 E. 3. Itinere North. 284. 286. 43 Ass. 31. 26 H. 8. 5. 44 E. 3. 44. F. tit. Coron. 94. 44 Ass. 17. 45 E. 3. 20. Pl. Com. 92. 9 H. 7. 3. Vide lib. 9. 12, 13. Dowman's case. And see there many other authorities. 31 Ass. pl. 21. 10 H. 4. 9.

"*By which the lessor entereth.*" Here it appeareth that the condition is executed by re-entry, and yet the lessor after his re-entry shall not, by the opinion of *Littleton*, plead the condition without shewing the deed, because he was party and privy to the condition, for the parties must shew forth the deed, unlesse it be by the act and wrong of his adversary, as hath beene said; [*m*] but an estranger which is not privie to the condition, nor claimeth under the same, as in the cases abovesaid appeareth, shall not after the condition is executed in pleading be inforced to shew forth the deed: and by this diversitie all the bookes and authorities in law which seeme to be at variance are reconciled. See also for this matter the section next following.

[*m*] See more before in this chapter, sect. 365. (Sid. 369. 6 Rep. 33.)

"*The recognitors of the assise may say, &c.*" Here it appeareth that the jurors may finde the fact, albeit the deed be not shewed in evidence, and the rather for that the condition upon the livery (as hath beene said) is good, albeit there be no deed at all.

10 Ass. p. 9. 21 Ass. 28. 17 Ass. 20. 31 Ass. 21. 23 Ass. 2. 39 E. 3. 28. 44 E. 3. 22. 11 H. 7. 22.

10 H. 4. 9. 7 H. 5. 5. 9 E. 4. 26. 18 E. 4. 12. 15 E. 4. 16, 17. (Ant. 225. Cro. Jac. 336.)

"*And prayed the discretion of the justices.*" That is to say, they (having declared the speciall matter) pray the discretion of the justices; which is as much to say, as, that they would discerne what the law adjudgeth thereupon, whether for the demandant, or for the tenant; for as by the authoritie of *Littleton*, *discretio est discernere per legem, quid sit justum*, that is, to discerne by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion: *Si à jure discedas, vagus eris, & erunt omnia omnibus incerta:* and therefore commissions that authorise any to proceed, *secundam sanas discretiones vestras*, is as much to say, as, *secundum legem & consuetudinem Angliæ.*

Lib. 10. fo. 4. case de Sewers.

"*For as well as the jurors may have conusance, &c.*" Hereby it appeareth that they that have conusance of any thing, are to have conusance also of all incidents and dependants thereupon, for an incident is a thing necessarily depending upon another.

☞ If a deed be made and dated in a forraine kingdome, of lands within England, yet if liverie and seisin be made, *secundum formam cartæ*, the land shall passe, for it passeth by the liverie.

1 E. 3. 17. in Gracye's case.

[228. a.]

Sect. 367.

IN the same manner it is of a feoffement in fee, or a gift in taile, upon condition, although no writing were ever made of it. And as it is sayd of a verdict at large in an assise, &c. in the same manner it is of a writ of entrie founded upon a disseisin; and in all other actions where the justices will take the verdict at large, there where such verdict at large is made, the manner of the whole entrie is put in the issue* (et en touts auters

* *&c.* in L. and M. and Roh.

auters actions ou les justices voylent prender le verdict a large, y † la ou tiel verdict a large est fait, la manner del entrie entire est mis en l'issue), &c.

AND it is to be observed, that the court cannot refuse a speciall verdict, if it bee pertinent to the matter put in issue. See the section next preceding.

"*Verdict at large.*" It is called a verdict at large because it findeth the matter at large, and leaves it to the judgement of the court: or it is called a special verdict, because it findeth the speciall matter, &c. So as hereby it appeareth, that a verdict (as hath beene said) is two fold, *viz.* a verdict at large, or a speciall verdict, (which is all one) whereof *Littleton* here speaketh; and a generall verdict that is generally found according to the issue, as if the issue be not guilty, to finde the partie guiltie or not guiltie generally, *& sic de cæteris.* There is also a verdict given in open court, and a privy verdict given out of court before any of the judges of the court, so called because it ought to bee kept secret and privie from each of the parties, before it be affirmed in court.

(9 Rep. 13.) See the Section next following. (10 Rep. p. 118. Ante, 226.)

See the next preceding section.

Sect. 368.

ALSO in such case where the enquest may give their verdict at large, if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge; as in the case aforesaid they may well say, that the lessor did not disseise the lessee, if they will, &c.

ALTHOUGH the jurie if they will take upon them (as *Littleton* here saith) the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they runne into the danger of an attaint; therefore to find the speciall matter is the safest way where the case is doubtfull.

(8 Rep. 65.)

(4 Rep. 53.)

[228. b.]

☞ Sect. 369.

ALSO in the same case, if the case were such, that after that, that the lessor had entred for default of payment, &c. that the lessee had entered upon the lessor, and him disseised, in this case if the lessor arraigne an assise against the lessee, the lessee may barre him of the assise; for hee may pleade against him in bar, how the lessor who is pl. made a lease to the defen. for term of his life, saving the reversion to the pl. which is a good plea in bar, insomuch as hee acknowledges the reversion to be to the pl. * *In this case the plaintif hath no matter to ayd himselfe* (le plaintife n'ad ‡ ascun matter de luy ayder), *but the condition made upon the lease, & this*

† par la ou tiel verdict a large fait la nature de matter mys en l'issue, *L. and M. and Roh.*

* *And* added in L. and M. and Roh.

‡ ascun *not in L. and M. or Roh.*

& this he cannot plead, because he hath not any writing of this: and inasmuch as he cannot answere the bar, he shal be barred. And so in this case you may see that a man is disseised (en cest casa poyes veier que home est ‡ disseisie), *& yet he shal not have assise. And yet if the lessee be pl. and the lessor def. he shall bar the lessee by verdict of the assise, &c. But in this case where the lessee is def. if he wil not plead the said plea in bar, but plead* nul tort, nul diss. *then the lessor shall recover by assise,* causâ quâ suprà.

"*BECAUSE he hath not any writing of this.*" Hereby it also appeareth, that albeit the condition was executed by re-entrie, yet the lessor cannot plead it without shewing of a deed. But of this matter sufficient hath beene said before in the two next preceding sections.

18 E. 4. 10.
12 Ass. 38.
10 Ass. 16.
26 H. 6. Bar. 9.
38 Ass. 26. 4.
31 Ass. 26.
39 Ass. 3.
43 Ass. 18.
44 Ass. 3.
18 E. 3. Ass. 77.
31 E. 3. ibid. 97.
18 Ass. 22.
4 Eliz. Dy. 207.
8 Eliz. Dy. 246.
(Ant. 201. a.)

"*Which is a good plea in bar.*" In a case where there have beene some varietie of opinions in our books, *Littleton* here cleereth the doubt, and that upon a good ground. For hee himselfe reporteth in our bookes, that it was holden by all the justices of England, that a lease for life, the reversion to the plaintife, was a good barre in an assise, and also that a lease for yeares, the reversion to the plaintife, might be pleaded in an assise: and so of a feoffment in fee with warrantie. And herein the diversitie of pleading is to be observed; for in the case here put by *Littleton* of a lease for life, the tenant shall pleade it in barre; but in a case of a lease for ☞ yeares, or an estate of tenant by statute or *elegit*, the defendant shall not plead in bar, as to say, *assisa non, &c.* but justifie by force of the lease, &c. and conclude, *& issint sans tort.* And if the tenant of the freehold be not named, he shall pleade *nul tenant de franktenement nosme en le briefe:* and in the case of the feoffment with warranty he must relie upon the warrantie. [229. a.]

Sect. 370.

AND for that such conditions are most commonly put and specified in deeds indented, somewhat shall bee here said (to thee, my sonne) of an indenture (1), *and*

‡ disseisie—seisie *in L. and M. and Roh.*

(1) In addition to what has been observed in note 4, to page 143. b. it may be remarked, that all deeds were formerly called charters.—Before the indenting of them came into use, when there were more parties than one interested in them, there were as many parts of them taken as there were parties interested, and one part was delivered to each of the parties: these multiplied parts were called *Chartæ pariclæ*, or *paricolæ*. *The Chartæ pariclæ*, or *paricolæ*, were superseded, in a great measure, by the *Chartæ partitæ*. One part of the *Chartæ partitæ* was written on a piece of vellum or parchment, beginning about the middle and continuing to the end of each side. This prevailed as early as the times of the Saxons, as appears by the will of *Æthelwyrd*, a nobleman of Kent, dated in 958; by that of prince Æthelstan, eldest

and of a deed pol (2) *concerning conditions. And it is to bee understood, that if the indenture be bipartite, or tripartite or quadripartite, all the parts of the indenture are but one deed in law, and every part of the indenture is of as great force and effect as all the parts together be* (3).

"*IN deeds indented.*" Those are called by severall names, as *scriptum indentatum, carta indentata, scriptura indentata, indentura, literæ indentatæ.* An indenture is a writing containing a conveyance, bargaine, contract, covenants, or agreements betweene two or more, and is indented in the top or side answerable to another that likewise comprehendeth the self same matter, and is called an indenture, for that it is so indented, and is called in Greeke συμγεαφον. Vide sect. 217. (Ante 143. b.)

If a deed beginneth, *hæc indentura, &c.* and in troth the parchment or paper is not indented, this is no indenture, because words cannot make it indented. But if the deed be actually indented, and Lib. 5. fo. 20. Stile's case. (2 Roll. Abr. 22. 2 Inst. 672.)

eldest son of king Ethelred the 2d; by a charter of archbishop Eadsi, made about the year 1045; and by other Saxon documents preserved in the library of Mr. Astle; in all which the parchments are cut in straight lines. Straight lines continued to be generally used till the latter end of the reign of king Henry III. Afterwards the cut through the parchment was made in a waving or undulating line; and the practice of writing an intermediate sentence, or drawing an intermediate figure, was generally disused, and the word *Cyrographum* adopted. In process of time it became the practice to indent this line in small notches or angles. This practice began with the lawyers, as early as the reign of king John; but was not adopted by the ecclesiastics till a much later period. This made the intermediate writing or drawing unnecessary; and it seems to have been abandoned about the reign of Edward III. But the practice of indenting deeds in the intermediate line, remained in use till the close of the 14th century; it then seems to have declined: yet the practice of cutting a waving or undulating line at the top of the parchment, on which every deed that is not a deed poll is written, has ever since continued. If the deed contains more than one skin of parchment, only the first skin of parchment is indented. Foreign diplomatists contend, that when the parchment on which a deed is written, is cut through the intermediate word or figure in a straight line, it is properly called *Chirographum*; that when it is cut through the intermediate word or figure in a waving line, it is properly called *Charta undulatoria*; and that it is then only properly called *Charta indenta*, or *indentura*, when it is cut through the intermediate word or figure in a waving line, and that waving line is indented or notched in the manner I have mentioned. But with us, every deed, the top of which is cut in the undulating or waving manner I have mentioned, is called an indenture. See Mr. Madox's Preface to his Formulare, and the Nouveau Traité de Diplomatique, vol. 1. 351.—[Note 138.]

(2) This was called *charta de unâ parte.* Some deeds must be indented to be valid for the purposes for which they are used, as bargains and sales by the stat. 27 H. 8. c. 16. leases by persons seised in tail in right of their wives, or ecclesiastical persons, by 32 H. 8. c. 28. a bargain and sale of a bankrupt's estate by the 13 El. c. 7; and see 43 El. c. 18.—[Note 139.]

(3) When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the original, and the rest are called counterparts; though of late it is most frequent for all the parties to execute every part, which renders them all originals. 2 Bla. Com. ch. 20. s. 1.—[Note 140.]

and there be no words of indenture in the deed, yet it is an (1 Rep. 173. b.) indenture in law; for it may be an indenture without words, but not by words without indenting.

(Ant. 35. b. 36. a.) 14 E. 3. Ley, 79. 4 E. 2. Fines, 116. 4 E. 2. Ley, 68. 2 R. 2. Det. 4. 27 H. 6. 9. F. N. B. 122. I. (2 Roll. Abr. 21.)

"*In deeds indented.*" And here it is to be understood, that it ought to be in parchment or in paper. For if a writing be made upon a peece of wood, or upon a peece of linen, or in the barke of a tree, or on a stone, or the like, &c. and the same be sealed or delivered, yet is it no deed, for a deed must be written either in parchment or paper, as before is said, for the writing upon these is least subject to alteration or corruption.

"*If the indenture be bipartite, or tripartite, or quadripartite, &c.*" *Bipartite* is, when there be two parts and two parties to the deed. *Tripartite*, when there are three parts and three parties; and so of *quadripartite*, *quinquepartite*, *&c.*

"*And of a deed poll.*" A deed poll is that which is plaine without any indenting, so called because it is cut even, or polled, Every deed that is pleaded shall be intended to be a deed poll, unlesse it be alleaged to be indented.

38 H. 6. 24, 25. 9 H. 6. 35. 35 H. 6. 34. 9 E. 3. 18. 9 E. 4. 18. Pl. Com. 134.

"*All the parts of the indenture are but one deed in law.*" If a man by deed indented make a gift in taile, and the donee dyeth without issue, that part of the indenture which belonged to the donee doth now belong to the donor, for both parts doe make but one deed in law.

"*And every part of the indenture is of as great force, &c.*" This is manifest of it selfe, and is proved by the bookes aforesaid.

It is to be observed, that if the feoffor, donor, or lessor seale the part of the indenture belonging to the feoffee, &c. the indenture is good, albeit the feoffee never sealeth the counterpart belonging to the feoffor, &c.

☞ Sect. 371. [229. b.]

AND the making of an indenture is in two manners. One is to make them in the third person. Another is to make them in the first person. The making in the third person is in this forme.

This indenture made between *R.* of *P.* of the one part, and *V.* of *D.* of the other part, witnesseth, that the said *R.* of *P.* hath granted, and by this present charter indented confirmed to the aforesaid *V.* of *D.* such land, &c. To have and to hold,* &c. upon condition,† &c. In witnesse whereof the parties aforesaid‡ to these presents interchangeably have put their seales. *Or thus:* In witnesse whereof to the one part of this indenture remaining with the said *V.* of *D.* the said *R.* of *P.* hath put his seale, and to the other part of the same indenture remaining with the said *R.* of *P.* the said *V.* of *D.* hath put his seale. Dated, &c.

Such

* *&c.* not in L. and M. or Roh.

† *&c.* not in L. and M. or Roh.

‡ *to these presents*, not in L. and M. or Roh.

Such an indenture is called an indenture made in the third person, because the verbes, &c. are in the third person. And this forme of indentures is the most sure making, because it is most commonly used, &c.

"*AND the making of an indenture is in two manners, &c.*" Here is another of our author's perfect divisions. In this and the next section following *Littleton* doth illustrate his meaning, by setting downe formes and examples which do effectually teach. 9 E. 3. 18. Vide the books afore rehearsed.

In these two formes there are to be observed (amongst other) three generall parts of the same, *viz.* the premises, the *habendum*, and the *in cujus rei testimonium*. But hereof hath been spoken at large, *Sect.* 1. 4. & 40.; for *Littleton* speaketh not here of the deliverie, but onely of the context or words of the deed. Vide 40 E. 3. 2. 7 H. 7. 14. Dier, 28 H. 8. 19. lib. 2. fol. 4 & 5. Goddard's case. (Ant. 6. a.)

"*Because it is most commonly used.*" Here it appeareth that which is most commonly used in conveyances is the surest way. *A communi observantiâ non est recedendum, & minimè mutanda sunt quæ certam habuerunt interpretationem. Magister rerum usus.* It is provided by the statute of 38 *E.* 3. *cap.* 4. that all penal bonds in the third ☞ person be void and holden for none, wherein some of our bookes [*d*] seem to differ, but they being rightly understood, there is no difference at all. For the statute is to be intended of bonds taken in other courts out of the realme, and so it appeareth by the preamble of that act. And it was principally intended of the courts of *Rome*, and so it appeareth by justice *Hankford*, in 2 H. 4. in which courts bonds were taken in the third person, so as such bonds made out of the realm are void; but other bonds in the third person are resolved to be good, as wel as indentures in the third person, by the opinion of the whole court in 8 *E.* 4. (1) 17 Eliz. Dier, 342. 1 R. 3. 14 H. 6. 28. Bab. 12 H. 4. 12. 30 Ass. 31. [*d*] 40 E. 3. 1. 2 H. 4. 10. 8 E. 4. 5.

[230. a.]

Sect. 372.

THE making of an indenture in the first person is as in this forme (Le feasance de indenture en le primer person est * come en tiel forme). To all Christian people to whom these presents indented shall come, *A.* of *B.* sends greeting in our Lord God everlasting. Know yee mee to have given, granted, and by this my present deed indented confirmed to *C.* of *D.* such land, &c. *Or thus:* Know all men present and to come, that I *A.* of *B.* have given, granted, and by this my present deed indented, confirmed to *C.* of *D.* such land, &c. To have and to hold (*habendum* † *& tenendum*), &c. upon condition following, &c. In witnesse whereof, aswell I the said *A.* of *B.* as the aforesaid *C.* of *D.* to these indentures have interchangeably put our seales. *Or thus:* In witnesse whereof I the aforesaid *A.* to the one part of this indenture have

* *come* not in L. and M. or Roh. † *et tenendum*, not in L. and M. or Roh.

(1) See Mr. Reeves's accurate and learned History of the English Law, vol. 2. p. 67.

have put my seale (*in cujus rei testimonium* ‡ *ego præfatus* A. *uni parti hujus indenturæ sigillum meum apposui*), and to the other part of the same indenture the said *C.* of *D.* hath put his seale, &c.

HERE *Littleton* sets down three formes of deeds indented in the first person, *brevis via per exempla, longa per præcepta.* It is requisite for everie student to get presidents and approved formes not onely of deeds according to the example of *Littleton*, but of fines, and other conveyances, and assurances, and specially of good and perfect pleading, and of the right entries, and formes of judgements, which will stand him in great stead, both while he studies, and after when he shall give counsell. It is a safe thing to follow approved presidents, for *nihil simul inventum est, & perfectum.*

Vide Sect. 371.

Sect. 373.

AND it seemeth that such indenture which is made in the first person (tiel indenture ‖ que est fait en le primer person) *is as good in law, as the* ☞ *indenture made in the third person, when both parties have put to this their seales; for if in the indenture made in the third person, or in the first person, mention be made* (car * si en l'indenture fait en le tierce person, ou en le primer person, † mention soit fait) *that the grantor onely hath put his seale, and not the grantee, then is the indenture onely the deed of the grantor. But where mention is made that the grantee hath put to his seale to the indenture, &c.* (Mes l'our mention est fait que le grauntee ad mis § son seale a l'indenture, &c.) *then is the indenture as well the deed of the grantee as the deed of the grantor. So is it the deed of them both, and also each part of the indenture is the deed of both parties in this case.*

[230. b.]

(2 Inst. 673. Ant. 52. b. 2 Roll. Abr. 22.)

HERE is to be observed, that albeit the words in this indenture be onely the words of the feoffor, yet if the feoffee put his seale to the one part of the indenture, it is the deed of them both. And in this speciall case to make it the deed of the feoffee, it appeareth by *Littleton*, that mention must be made in the deed, that hee hath put to his seale, for that he is no way made partie to make it, being made in the first person, but onely by the clause of putting his seale thereunto. Otherwise it is of a deed indented in the third person as before, it appeareth, for there hee is made partie to the deed in the beginning. And *Littleton*'s rule is true, that every part of an indenture is the dede of both parties; for, as it hath beene said, both parts make but one deed in law in that case.

‡ *ego præfatus* A. not in L. and M. or Roh.

‖ que est, *not in L. and M. or Roh.*

* si *not in L. and M. or Roh.*

† si *added in L. and M. and Roh.*

§ son seale *not in L. and M. or Roh.*

Sect. 374.

ALSO if an estate bee made by indenture to one for terme of his life, the remainder to another in fee upon a certaine condition, &c. and if the tenant for life have put his seale to the part of the indenture, and after dieth, and he in the remainder entreth into the land by force of his remainder, &c. in this case he is tied to performe all the conditions comprised in the indenture, as the tenant for life ought to have done in his life time, and yet he in the remainder never sealed any part of the indenture. But the cause is, for that inasmuch as he entred and agreed to have the lands by force of the indenture, hee is bound to performe the conditions within the same indenture, if he will have the land, &c.

"*UPON a certaine condition, &c.*" Here by this (*&c.*) is implied, that the condition in this case doth extend both to the estate for life, and to the remainder, but by speciall limitation it may extend to any one of them, and not to the other. And albeit he in the remainder be no party to the indenture (the parties thereunto only being the lessor and the tenant for life) yet when hee in the remainder entreth and agreeth to have the lands by force of the (1) indenture, he is bound to performe the conditions contained in the ☞ indenture. And here is also a diversitie to be understood, that any estranger to the indenture may take by way of remainder, but he cannot in this case take any present estate in possession, because he is an estranger to the deed (1)*.

(1 Roll. Abr. 422. 474.)

(10 Rep. Doct. Ball's case, cited in Portington's case.)

[231. a.]

(2 Cro. 240. 399. 522.)

(2 Inst. 673.)

(2 Roll. Abr. 22.)

If *A.* by deed indented betweene him and *B.* letteth lands to *B.* for life, the remainder to *C.* in fee, reserving a rent, tenant for life dieth, he in the remainder entreth into the lands, he shal be bound to pay the rent, for the cause and reason before yeelded by *Littleton*. An indenture of lease is engrossed betweene *A.* of the one part, and *D.* and *R.* of the other part, which purporteth a demise for yeares by *A.* to *D.* and *R.* *A.* sealeth and delivereth the indenture to *D.* and *D.* sealeth the counterpart to *A.* but *R.* did not seale and deliver it. And by the same indenture

50 E. 3. 22. 3 H. 6. 26. b. (1 Roll. 474.) (5 Rep. 16.)

38 E. 3. 8. a. 3 H. 6. 26. b. Vide 45 E. 3. 11, 12.

(1) So, where three were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and only two of the feoffees sealed the deed, the third entered and agreed to the estate conveyed by the deed, he was bound in a writ of covenant by the sealing of his companions. 2 Roll. Rep. 63. —In 38 Ed. 3. p. 9. it is said, that if land is leased to two for years, and only one puts his seal, but the other agrees to the lease, and enters, and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, though he is party to the lease, he is not party to the condition. —[Note 141.]

(1)* In Salter *v.* Kidgly, Carth. 76. lord chief justice Holt held, that a party to a deed cannot covenant with one who is no party to it;—but that one who is no party to a deed may covenant with one who is a party, and oblige himself by sealing of the deed.—[Note 142.]

indenture it is mentioned, that *D.* and *R.* did grant to be bound to the plaintife in 20 pound in case that certaine conditions comprised in the indenture were not performed. And for this 20 pound *A.* brought an action against *D.* onely, and shewed forth the indenture. The defendant pleaded, that it is proved by the indenture that the demise by indenture was made to *D.* and *R.* which *R.* is in full life, and not named in the writ, judgment of the writ. The plaintife replyed, that *R.* did never seale and deliver the indenture, and so his writ was good against *D.* sole. And there the counsell of the plaintife took a diversitie betweene a rent reserved which is parcell of the lease, and the land charged therewith, and a summe in grosse, as here the twenty pound is; for as to the rent they agreed that by the agreement of *R.* to the lease, he was bound to pay it, but for the 20 pound that is a summe in grosse, and collateral to the lease, and not annexed to the land, and groweth due only by the deed, and therefore *R.* said hee was not chargeable therewith, for that he had not sealed and delivered the deed. But inasmuch as he had agreed to the lease which was made by indenture, he was chargeable by the indenture for the same summe in grosse; and for that *R.* was not named in the writ, it was adjudged that the writ did abate.

"*To have the lands, &c.*" Here is implyed an ancient maxime of the law, *viz. Qui sentit commodum sentire debet et onus, et transit terra cum onere.*

(5 Rep. 76.)
(1 Rep. 38.)

Sect. 375.

ALSO if a feoffment bee made by deed poll upon condition, and for that the condition is not performed the feoffor entreth and getteth the possession of the deed poll, if the feoffee brings an action for this entrie against the feoffor, it hath beene a question if the feoffor may plead the condition by the said deed poll against the feoffee. And some have said ☞ he cannot, inasmuch as it seemes unto them that a deed poll, and the propertie of the same deed belongeth to him to whom the deed is made, and not to him which maketh the deed.* [231. b.]
And inasmuch as such a deed doth not appertaine to the feoffor, it seemes unto them that he cannot plead it †. And others have said the contrary, and have shewed divers reasons. One is, If the case were such, that in an action betweene them, if the feoffee pleade the same deed, and shew it to the court (si le feoffee pleder mesme le fait, et monstre ↓ est ‡ al court), *in this case insomuch as the deed is in court, the feoffor may shew to the court how in the deed there are divers conditions to be performed of the part of the feoffee, &c. and because they were not performed he entred, &c.* (le feoffor poit monstrer al court coment en le fait sont divers conditions d'estre performes ‖ de le part le feoffee, &c. et pur ceo que ils ne fueront performes, il enter, &c.) *and to this he shall be received. By the same*

* *&c.* added in L. and M. and Roh.
† *&c.* added in L. and M.
↓ ceo, *in L. and M. and Roh.*
‡ est *not in L. and M. or Roh.*
‖ de le part le feoffee, &c. et pur ceo que ils ne fueront performes, *not in L. and M. or Roh.*

same reason when the feoffor hath the deed in hand, and shew this to the court, he shall well be received to pleade it (il serra § bien resceive de ceo pleder), *&c. and namely when the feoffor is privy to the* fait, *for hee must be privie to the deed when he makes the deed* (car ¶ covient estre privie al fait quant il fist le fait), *&c.*

HERE the latter opinion is cleere law at this day, and is *Littleton*'s owne opinion [*a*], as before hath beene observed. [*a*] Vid. sect. 170. 302. 340.

" *Have shewed divers reasons.*"

Felix qui potuit rerum cognoscere causas.
Et ratio melior semper prævalet.

" *Insomuch as the deed is in court, &c.*" And herewith doe agree [*b*] many authorities in law. [*c*] And if the deed remaine in one court, it may be pleaded in another court, without shewing forth; *quia lex non cogit ad impossibilia.* 24 E. 3. 73. 45 E. 3. Monstrans des faits, 55. [*b*] 40 Ass. 34. lib. 5. 75. b. Wymark's case. [*c*] 12 H. 4. 8. 42 E. 3. 27. Wymark's case, ubi supra. 38 H. 6. 2. 41 Ass. 29. 12 H. 4. 4. 8. 7 H. 4. 39. 11 H. 4. 73. 45 E. 3. 11. F. N. B. 243.

" *Of the part of the feoffee, &c.*" Here also is implyed if the condition be to be performed on the part of the feoffor or by a stranger; and it is to be understood that when a deed is shewed forth to the court, the deed shall remaine in court all that tearm in the custody of the *custos brevium*, but at the end of the tearme (if the deed be not denied) then the law adjudgeth the deed in the custody of the party to whom it belongeth, for a man's evidences are as it were the sinewes of his land. But if the deed be denied, then the deed in judgment of law remaineth in court untill the plea be determined (1). The residue of this section needeth no explication. (5 Rep. 75, 76.)

[232. a.]

☞ Sect. 376.

ALSO if two men doe a trespasse to another, who releases to one of them by his deed all actions personalls, and notwithstanding sueth an action of trespasse against the other, the defendant may wel shew that the trespasse was done by him, and by another his fellow, and that the plaintife by his deed (which he sheweth forth) released to his fellow all actions personals (et que le plaintife per * son fait que il monstre avant relessa a son companion touts actions personals), *and demand the judgement,*

§ de ceo *added in L. and M.*
¶ il *added in L. and M. and Roh.*
* son—le, *L. and M. and Roh.*

(1) But after, though the jury find the deed not to be the deed of the party, yet will not the court on motion detain the same, but will order it to be delivered to the party that brought it into court. 2 Sid. 131. Vid. Salk. 215. *Note to the 11th edition.*—[Note 143.]

ment, &c. and yet such deed belongeth to his fellow and not to him. But because hee may have advantage by the deed, if he will shew the deed to the court, he may well plead this (mes pur ceo que il poit aver advantage per le fait, si voit monstrer le fait al court, il poit † ceo bien pleder), *&c. By the same reason may the feoffor in the other case, when he ought to have advantage by the condition comprised within the deed poll* (per mesme le reason ‡ poit le feoffor en l'auter cas, quant § il doit aver advantage per le condition ‖ compris deins le fait poll ¶).

27 E. 3. 83.
13 E. 4. 2.
15 E. 4. 26.
21 E. 4. 72.
22 E. 4. 7.
8 H. 6. 15.
20 H. 6. 41.
21 H. 6. Arbitrement, 41.
2 R. 3. 9. a.
14 H. 8. 10.
34 H. 8. tit. Estrange al falt, 21.
3 H. 6. 18. 26.

"IF *two men doe a trespasse to another, &c.*" Here by this section it is to bee understood, that when divers doe a trespasse, the same is joynt or severall at the wil of him to whom the wrong is done, yet if he release to one of them, all are discharged, because his own deed shall be taken most strongly against himselfe, but otherwise it is in case of appeale of death, &c. As if two men bee joyntly and severally bounden in an obligation, if the obligee release to one of them, both are discharged; and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth, albeit the deede appertaine to the other (1).

(11 Rep. 5. 2 Roll. Abr. 412. Hob. 66. 2 Sid. 41. Ant. 125. b.)

If

† pur *added in L. and M.*
‡ poit le feoffor *not in L. and M. or Roh.*
§ le feoffor, *in L. and M. and Roh.*
‖ compris *not in L. and M. or Roh.*
¶ *&c.* added in L. and M. and Roh.

(1) 26 *H.* 6. *T. Barre*, 37. *Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards; the other obligor pleads this in bar, and it was adjudged a* good *plea in bar. Nota, each was bound in the entirety, therefore it was joint and several.* 34 *H.* 6. *So in the case of the king, if he releases to one of the obligors, the other shall take advantage.* 5 *Rep.* 56, *contra.—And as a release in deed to one obligor discharges the other, so of a release in law, as* 8 *Rep.* 136. *Needham's case. A woman obligee marries the obligor, that is another sort of discharge*, 264. *b.—But* 17 *Car. B. R. two were bound jointly and severally. The plaintife sued both, and afterwards entered a retraxit against one; whether that discharged the other was the question. Berkley said it was, for it amounts to a release in law, as the plaintife confesses thereby that he had not cause of action, and therefore he cannot have judgment, as in Hickmot's case,* 9 *Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to several, and therefore the other shall have advantage of it. Co. Inst. contra; for a retraxit is only in the nature of an estoppel; and therefore the other shall not have advantage; neither is it a release, though it be in the nature of a release; and if the obligee sues both, and then covenants with one not to sue farther, that is in the nature of a release, but the other shall not take advantage of it; and in* 21 *H.* 6. *it is said, that there must be an actual release to one obligor to discharge the other. See March. Rep.* 165.—*Pas.* 18 *Car. Hannan v. Roll. The obligee releases to one obligor; the other, in consideration of the forbearance, undertakes to pay, and in an action upon the case the matter was found specially; and Rolls argued, that the debt was not absolutely discharged, but only* sub modo, *viz. if the other can have the release to plead, and because the forbearance was a good consideration. But the court was of opinion, that the debt was absolutely discharged, and therefore the consideration was insufficient.—See Hobart, Rep.* 70. *Parker v. sir John Lawrence.*

If an action of debt upon an obligation bee brought against an heire, he may pleade in barre a release made by the obligee to the executors. But albeit the deed belong to another, yet must he shew it forth, for both of them are privie to the testator. (13 E. 2. tit. Monstrans des faits, 42. (Plo. 439. b. Dyer, 344. 6 Rep. 7. 10 Rep. 93. b.)

"*By the same reason.*" *Ubi eadem ratio, ibi idem jus.*

Sect. 377.

ALSO if the feoffee granteth the deed to the feoffor, such grant shall bee good, and then the deed and the propertie thereof belongeth to the feoffor, &c. And when the feoffor hath the deed in hand, and is pleaded to the court (Et quant le feoffor ad le fait en poigne, et * est plead al court), *it shall be rather intended, that he commeth to the deed by lawfull meanes, then by a wrongfull mean. And so it seemeth unto them, that the feoffor may wel plead such deed poll which compriseth the condition, &c. if he hath the same in hand* †. Ideo semper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, &c.

"*THE propertie of the deed belongeth to the feoffor.*" Hereby it appeareth that a man may give or grant his deed to another, and such a grant by *paroll* is good. ☞ And it is also implied, that if a man hath an obligation, though he cannot grant the thing in action, yet hee may give or grant the deed, *viz.* the parchment and waxe to another, who may cancell and use the same at his pleasure (1). (1 Rep. 1.) [232. b.] (Ant. 214. a. Post. 260. 280. 2 Roll. Abr. 45, 46. 48. 1 Sid. 212, 213.)

"*It*

* est—ceo, *in L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

rence. In trespass against three, they divided on the pleading. Judgment against one. Then he entered a noli prosequi *against the two others; it was held to be no discharge to him against whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not subject to the damages recovered against him; but a* noli prosequi, *or non-suit before judgment against one, would discharge all.* Lord Nott. MS.—[Note 144.]

(1) It is to be observed, that the king was always an exception to this rule; for he might always either grant or receive a *chose in action* by assignment.—The reason why, by the strict rules of the common law, a *chose in action* cannot be assigned or granted over, was, that it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a *chose in action* is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when, in common acceptation, a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose in action*, as much as the law will that of a *chose in possession*. Dyer, 30. Br. Ab. tit. Chose in Action. 3 P. W. 199. 2 Bla. Com. Ch. 30.—[Note 145.]

"*It shall be rather intended, that he commeth to the deed by lawfull meanes, than by a wrongfull mean.*" *Omnia presumuntur legitimè facta, donec probetur in contrarium. Injuria non præsumitur.*

"*Quære de dubiis.*" There be three kinds of unhappie men.

1. *Qui scit & non docet*, Hee that hath knowledge and teacheth not.

2. *Qui docet & non vivit*, He that teacheth, and liveth not thereafter.

3. *Qui nescit, & non interrogat*, He that knoweth not, and doth not enquire to understand. Therefore *Littleton* saith, *Quære de dubiis.*

Infelix cujus nulli sapientia prodest.
Infelix qui recta docet, cum vivit iniquè.
Infelix qui pauca sapit spernitque doceri.

"*Quia perrationes perveniturad legitimam rationem.*" For *Ratio est radius divini luminis.* And by reasoning and debating of grave learned men the darknesse of ignorance is expelled, and by the light of legall reason the right is discerned, and thereupon judgment given according to law, which is the perfection of reason. This is of *Littleton* here called *legitima ratio*, whereunto no man can attaine but by long studie, often conference, long experience, and continuall observation.

Certaine it is, that in matters of difficultie the more seriously they are debated and argued, the more truely they are resolved, and thereby new inventions justly avoided.

Inter cuncta leges, & percunctabere doctos.

Sect. 378.

ESTATES which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupie the same office for terme of his life the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keepe the parke, and shall doe that which to such office belongeth to doe, or otherwise it shall be lawful to the grantor and his heires to oust him, and to grant it to another if he will, &c. And such condition as is intended by the law to be annexed to any thing, is as strong as if the condition were put in writing (sicome la condition fuissoit mis* en escript).

"*CONDITION in law, &c.*" *Littleton* having spoken of conditions in deed, now according to his owne division commeth to speake of conditions in law.

"*That it be not specified in writing.*" A condition in law is that which

* ou mustre, *added in L. and M. and Roh.*

which the law intendeth or implyeth without expresse words in the deed.

[233. a.] ☞ "*That the parker shall well and lawfully keepe the parke* (que le parker bien et loyalment gardera le parke), *&c.*" *Parke*, this should be written *parque*, which is a *French* word, and signifieth that which we vulgarly call a parke, of the *French* word *parquer*, to imparke, to inclose. It is called in *Domesday*, *Parcus*. In law it signifieth a great quantity of ground inclosed, priviledged for wild beasts of chase by prescription, or by the king's grant. (Ant. 2.a. 115.a. Cro. Car. 59, 60. 3 Inst. 76. 4 Inst. 289. Hutt. 86, 87.)

The beasts of parque, or chase, properly extend to the bucke, the doe, the foxe, the marten, the roe, but in a common and legall sense, to all the beasts of the forrest. There be both beasts and fowles of the warren. Beasts, as hares, conies, and roes called in records [*d*] *Capreoli*. Fowles of two sorts, viz. *Terrestres* and *Aquatiles*. *Terrestres* of two sorts, *Silvestres* and *Campestres*: *Campestres*, as partridge, quaile, raile, &c. *Silvestres*, as phesant, woodcocke, &c. *Aquatiles*, as mallard, herne, &c. whereof I have seen in this record [*]: *Rex concessit Johanni de Beverly Armigero suo quòd ipse cum quibuscunque canibus suis ad quascunque bestias feras regis in quibuscunque forestis, parcis suis quotiescunque voluerit venari possit, et quoscunque falcones possit permittere volare ad quascunque aves de warrenâ in quibuscunque ripariis, &c.* (8 Rep. 136.) (F.N.B. 164.d.) (5 Rep. 104.b.) [*d*] Hill. 13 E.3. coram Rege in Thesaur. (7 Rep. 15.) [*] 38 E.3. Rot. patent. pars 1. m. 10.

It is resolved [*e*] by the justices and the king's counsell, that *capreoli, id est* roes, *non sunt bestiæ de forestâ, eò quòd fugant alias feras*. Beasts of forrests be properly hart, hinde, bucke, hare, boare, and wolfe, but legally all wild beasts of venery. [*e*] Hill. 13 E.3. coram rege in Thesaur.

A forest and chase are not, but a parke must be inclosed. The forest and chase doe differ in offices and lawes: every forest is a chase, but every chase is not a forest. A subject may have a forest by especiall grant of the king, as the duke of *Lancaster* and abbot of *Whitbie* had. Vide Sect. 1.

Ockam cap. quid regis foresta, saith, *Foresta est tuta ferarum mansio non quarumlibet, sed silvestrium, non quibuslibet in locis, sed certis, et ad hoc idoneis; unde foresta* E. *mutata in* O. *quasi foresta, hoc est, ferarum statio.* Vide Bract. fo. 231 & 316. Britton, fo. 34. Fleta, lib. 2. cap. 34, 35.

Pudzeld or *Woodgeld* is to be free from payment of money for taking of wood in any forest. But let us now returne to our *Littleton*.

In this Section *Littleton* putteth an example of a condition in law, annexed to the office of the keeper of a park, but this example must be understood with a distinction; for if the parker doth not attend on the parke one or two, &c. dayes, this is no forfeiture of the office of parkership; but if in his default any deere be killed, and so a damage to the lord, that is a forfeiture: for (that it may be said once for all) non-user of it selfe without some speciall damage is no forfeiture of private offices, but non-user of publique offices which concern the administration of justice, or the common wealth, is of it selfe a cause of forfeiture. (9 Rep. 50. Sid. 14.) 5 E. 4. 15. b. Lib. 5. E. 4. 26. Pl. Com. 379, 380. 2 H. 7. 11. 30 H. 6. 32, &c. (Cro. Rep. 11 And. Curl case.)

"*To oust him if he will, &c.*" *Littleton* here speaketh of an ouster by force of a condition in law, therefore it is to

be seen in what other cases the grantor may lawfully oust his officer (1).

There is a diversitie between officers that have no other profit but a collaterall certain fee, for there the grantor may discharge him of his service, as to be a bayly, receiver, ☞ surveyor, auditor, or the like, the exercise whereof is but labour and charge to him, but hee must have his fee: for the maine rule of law is, that no man can frustrate or derogate from his owne grant to the prejudice of the grantee. And where albeit the grantee hath no other profit but his fee, yet that fee is to be perceived and taken out of the profits appertaining to the lord within his office, for there the grantor cannot discharge him of his service or attendance, for that may turn to the prejudice of the grantee, if the grantor will not grant the office at all. But in all cases where the officer relinquisheth his office, and refuseth to attend, he loseth his office, fee, profit, and all.

[233. b.]

18 E. 4. 8.
31 H. 8. Grants. Br. 134. 34 H. 8. ibid. 93.
11 Eliz. Dyer, 285. (Plo. 379. b. 381. b. F. N. B. 164. Sid. 74. 81.)
2 Roll. Abr. 155.
9 Rep. 50.
Cro. Car. 55, 56. 59, 60, 61.

There is another diversity where the grantee, besides his certaine fee, hath profits and availes by reason of his office; there the grantor cannot discharge him of his service or attendance, for that should be to the prejudice of the grantee. As if a man doth grant to another the office of the stewardship of his courts of his mannors with a certain fee, the grantor cannot discharge him of his service and attendance, because he hath other profits and fees belonging to his office, which he should lose if he were discharged of his office. And as in the case which *Littleton* here putteth of the office of the keeper of a parke, for that hee hath not onely his fee certaine, but profits and availes also, in respect of his office, as deere skinnes, shoulders, &c. But now let us proceed and see what other particular forfeitures in law bee of this office here spoken of by *Littleton*, and somewhat of conditions in law in generall.

22 H. 6. 10. 3.
6 E. 6. Dier, 71.

(Ant. 54. a.)
15 E. 4. 3. b.
5 E. 4. 26.
28 H. 8. Bendloes enter evesque de Londres & Hieron. lib. 9. fo. 50. 95, 96. 99.

And it is to be understood, that if any keeper kill any deere without warrant, or fell or cut any trees, woods, or underwoods, and convert them to his owne use, it is a forfeiture of his office, for the destruction of vert is, by a meane, destruction of venison. So it is if he pull downe the lodge, or any house within the park for putting of hay into it for feeding of the deere or such like, it is a forfeiture; and the reason wherefore the office in these and in like cases shall be forfeited [*f*] is, *quia in quo quis delinquit in eo de jure est puniendus.*

[*f*] Mich. 33 E. 1. coram rege in Thesaur. l'evesque de Durham's case. Pl. Com. 373. a. Sir Henrie Nevill's case.

As to conditions in law, you shal understand they bee of two natures, that is to say, by the common law, and by statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence: upon skill and confidence, as here the office of parkership, and other offices in the next Section mentioned, and the like.

21 E. 4. 20. 93. (1 Rep. 14. b.)
Lib. 8. fo. 44. Wittingham's case.

Touching conditions in law without skill, &c. some be by the common law and some by the statute. By the common law as to

(1) Since sir Edward Coke's time, several statutes have been passed, particularly 25 Car. 2. cha. 2. 13 W. 3. ch. 6. and 1 An. ch. 22. by which all persons admitted into offices civil or military are to take the oaths of allegiance and supremacy, otherwise they forfeit their offices, and incur other penalties.—But with respect to Roman Catholics, see post. 391. a. note 2.—[Note 146.]

to every estate of tenant by the courtesie, tenant in tayle after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, tenant by *elegit*, gardian, &c. there is a condition in law secretly annexed to their estates, that if they alien in fee (1), &c. that he in the reversion or remainder may enter, *et sic de similibus*, or if they claime a greater estate in court of record, and the like.

Concerning conditions in law founded upon statutes, for some of them an entrie is given, and for some other a recovery by action: where an entrie is given, as upon an alienation in mortmaine, &c. and the like: where an action is given, as for waste against tenant for life and yeares, and the like.

"*And such condition as is intended by the law to be annexed to any thing is as strong, &c.*" Here it is worthy the observation to take a view of the divisions aforesaid in some particular case. As for example. Admit that an office of parkershippe bee granted or descend to an infant or feme covert, if the conditions in law annexed to this office which require skill and confidence be not observed and fulfilled, the office is lost for ever, because, as *Littleton* saith here, it is as strong as an expresse condition. But if a lease for life be made to a fem covert, or an infant, and they by charter of feoffment alien in fee, the breach of this condition in law, that is, without skill, &c. is no absolute forfeiture of their estate. So of a condition in law given by statute, which giveth an entrie onely. As if an infant or feme covert with her husband aliens by charter of feoffment in *mortmaine*, this is no barre to the infant or feme covert. But if a recovery be had against an infant or fem covert in an action of waste, there they are bound and barred for ever.

(Cro. Car. 279.) Lib. 8. fo. 44. Wittingham's case. (Mo. 92. 1 Cro. 7. 9 Rep. 72. Plo. 205. Ant. 100.)

And it is to be observed, that a condition in law by force of a statute which giveth a recovery, is in some cases more strong than a condition in law without a recovery. For if lessee for life make a lease for yeares, and after enter into the land, and make waste, and the lessor recover in an action of waste, he shall avoid the lease made before the waste done. But if the lessee for life make a lease for years, and after enter upon him, and make a feoffment in fee, this forfeiture shall not avoid the lease for yeares. Nor in any of the said cases a precedent rent granted out of the land shal be avoyded. For if lessee for life grant a rent charge, and after doth waste, and the lessor recovereth in an action of wast, he shall hold the land ☞ charged during the life of the tenant for life, but if the rent were granted after the waste done, the lessor shall avoid it.

(Ant. 185. a.)

[234. a.]

And

(1) But this must be understood of an alienation which divests the remainder or reversion, as a feoffment, fine, or common recovery; but a conveyance by lease and release, or bargain and sale, is no forfeiture. Neither is it a forfeiture of the particular estate, if the reversioner, or remainder-man in fee, joins with the tenant for life or years in making the alienation; nor is his grant of an advowson, remainder, or any thing else which lies in grant, a forfeiture. But if a tenant for life or years claims the fee, as by joining the *mise* upon the mere right; or if he affirms the fee to be in a stranger, as by accepting a fine *sur conusance de droit come ceo* from a stranger, it is a forfeiture. See post. 251. b. 252. a.—[Note 147.]

And the reason wherefore the lease for years in the case aforesaid shall be avoyded, is because of necessitie the action of waste must be brought against the lessee for life, which in that case must bind the lessee for yeares, or else by the act of the lessee for life the lessor should be barred to recover *locum vastatum*, which the statute giveth (1).

(Ant. 54.)

(Post. 338. b.)

If a man hath an office for life which requireth skill and confidence, to which office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his office, the rent charge shall not be avoyded during his life, for regularly a man that taketh advantage of a condition in law shal take the land with such charge as he finds it. And therefore *Littleton* is here to be understood, that a condition in law is as strong as a condition in deed, as to avoid the estate or interest it selfe, but not to avoide precedent charges, but in some particular cases, as by that which hath beene said appeareth.

3 H. 7. ca. 12. Auditor, receiver, baylife, keeper of a castle, master of the game, keeper or parker of any forrest, parke, chase, &c. 7 E. 6. ca. 1. Treasurer, receiver, collector, bailife, &c. (Vid. Ant. 3. 6.) (11 Rep. 89.) 5 E. 6. ca. 16. Cro. Car. 557. Cro. Jac. 386. 3 Inst. 154.

There be at this day more conditions in law annexed to offices than were when *Littleton* wrote: for example, for offices in any wise touching the administration or execution of justice, or clerkship in any court of record, or concerning the king's treasure, revenue, account, customes, alnage, auditorship, king's surveyor, or keeping of any of his majestie's castles, forts, &c. For if any of these officers bargaine or sell any of the said offices or any deputation of the same, or take any money or profit, or any promise, covenant, bond, or assurance, to have any money or reward for the same, the person so bargaining or selling, or that shal take any such promise, covenant, bond, or assurance, shall not only forfeit his estate, but also every person so buying, giving or assuring, be adjudged a disabled person to have or enjoy the same office or offices, deputation or deputations, &c. and that all such bargains, sales, promises, covenants, and assurances, as be before specified, shall be voide, except as in the said act is excepted.

Mich. 13 Jacobi Regis.

Sir *Robert Vernon*, knight, being coferer of the king's house of the king's gift, and having the receit of a great summe of money yearely of the king's revenue, did for a certaine summe of money bargain and sell the same to sir *A. I.* and agreed to surrender the said office to the king, to the entent a grant might be made to sir *A.* who surrendred it accordingly: and thereupon sir *A.* was by the king's appointment admitted and sworne coferer. And it was resolved by sir *Thomas Egerton*, lord chancellour, the chiefe justice, and others to whom the king referred the same, that the said office was void by the said statute, and that sir *A.* was disabled to have or to take the said office, and that no *non obstante* could dispense with this act to enable the said sir *A.* for the reason and cause before mentioned, Sect. 180. And hereupon sir *A.* was removed, and sir *Marmaduke Darrell* sworne (by the king's commandment) in his place. And note, that all promises, bonds and assurances, as wel on the part of the bargainor as of the

Lib. 3. fo. 83. Colshil's case.

(1) *For the recovery relates to the time of the waste done, which is paramount to the grant, but it does not relate to the time of making the estate, to avoid charges by force of this condition in law, unless in the case of a lease for years, which is of necessity to have the place wasted.*—Lord Nott. MS.—[Note 148.]

the bargainee, are void by the same act. [*] *Nullâ aliâ re magis Romana respublica interiit, quàm quòd magistratûs officia venalia erant.* [*] Ærod. fo. 353.

[g] *Jugurtha* going from Rome said to the city, *Vale venalis civitas, mox peritura si emptorem invenias.* [g] Salust.

Therefore by the law of *England* it is further provided, that no officer or minister of the king shall be ordained or made for any gift or brocage, favour or affection, nor that any which pursueth by him or any other, privily or openly, to be in any manner of office, shall be put in the same office or in any other, but that all such officers shall be made of the best and most lawfull men and sufficient: a law worthy to be written in letters of gold, but more worthy to be put in due execution. For certainly never shall justice be duely administred but when the officers and ministers of justice be of such quality, and come to their places in such manner as by this law is required. 12 R. 2. ca. 2.

"*Such condition as is intended by the law to be annexed to any thing, is as strong as if the condition were in writing.*" And this accords with that ancient rule, *Utique fortior et potentior est dispositio legis quàm hominis.* Vid. Sect. 419. 429, 430.

Sect. 379.

IN this manner it is of grants of the offices of steward, constable, bedelarie, bayliwick, or other offices, &c. But if such office bee granted to a man, to have and to occupie by himselfe or his deputie, then if the office bee occupied by him or his deputie, as it ought by the law to bee occupied, this sufficeth for him, or otherwise the grantor and his heires may ouste the grantee, as is aforesaid, (ou auterment * le grantor et ses heires poient ouste † le grantee, come est avantdit.)

"*STEWARD.*" Of this I have spoken before. 21 E. 4. 20. Pl. Com. 379. (Ant. 61. a.)

"*Constable.*" Of this likewise something hath beene spoken ☞ before. But a constable is often taken in the law for a warden or keeper, as *Constabularius castri de Dover et 5. portuum*; for the warden of the castle of *Dover* and the Cinque ports, &c. So as in this sense *Constabularius* is taken for *Castellanus*, and this is proved by the statute [*] of *W.* 1. *ca.* 7. *Des prises des Constables ou Castellains faitz des auters, &c.* And *Magna Carta*, [*b*] *c.* 19. *Nullus constabularius vel ejus ballivus capiat blada vel alia catalla alicujus qui non sit de villâ, ubi castrum suum situm est, &c. Stanford, fo.* 152. *Constabularius Turris London*, for *Custos Turris*, 32 *H.* 8. *ca.* 28. Constable of the Forest, for the Keeper of the Forest. [234. b.] 8 E. 4. 6. (5 Rep. 59.) [*] W. 1. ca. 7. [b] Magna Carta, ca. 19. Staunf. fo. 152. 32 H. 8. ca. 28.

"*Bedelarie.*" Bedell is derived of the *French* word *Beadeau*, which signifies a messenger of the court, or under baylife, in *Latine Bedellus.*

And the oath of a bedell of a manor is, that he shall duly and truly

* le grantor—il, *L. and M. and Roh.* † le grantee, *not in L. and M. or Roh.*

truly execute all such attachements and other proces as shall be directed to him from the lord or steward of his court, and that he shall present all pound breaches which shall happen within his office, and all chattels wayved, and estrayes.

"*Bayliwick.*" Of this sufficient hath beene said before.

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ALSO, estates of lands or tenements may bee made upon condition in law, albeit upon the estate made there was not any mention or rehearsall made of this condition. As put the case that a lease be made to the husband and wife, to have and to hold to them during the coverture betweene them; in this case they have an estate for terme of their two lives upon condition in law, scil. *if one of them die, or that there be a divorce between them, then it shall bee lawfull for the lessor and his heires to enter, &c.*

(1 Roll. Abr. 411. Ant.214.b. Post. 242.)

HERE *Littleton* termeth words of limitation to be conditions in law: for his first example is.

"*During the coverture between them,*" *durante cooperturâ inter eos.* This word *(durante)* is properly a word of limitation, as *durante viduitate,* or *durante virginitate,* or *durante vitâ, &c.* And properly a condition in law is, as hath beene said, where the law createth the same without any expresse words.

37 H. 6. 27. 3 E. 3 15. 3 Ass. Pl. (Ant. 214. b. 4 Rep. 3. a.) 14 E. 2. Grant, 92. (10 Rep. 42.) Plo. 242. a. Vaughan, 32. 4 Rep. 33.

Dum also maketh a limitation; as if a lease be made, *dum sola fuerit,* or *dum sola et casta vixerit. Dummodo* is also a word of limitation; as ☞ *dummodo solveret talem redditum. Quamdiu* also is a word of limitation, for if a man grant a rent out of the mannor of *D. quamdiu* the grantor shall bee dwelling upon the mannor, this is good, or *quamdiu se bene gesserit.*

[235. a.]

37 H. 6. 27. (9 Rep. 95.) (Ant. 214. b. 4 Rep. 3. a.) 14 E. 2. Grant, 92. (10 Rep. 42. Plo. 242. a. Vaughan, 32. 4 Rep. 33.) 37 H. 6. 27. (9 Rep. 95.)

10 Ass. 4. 6 E. 3. 8, 9. 21. 3 E. 3. 18. Annuitie, 40. 19 H. 6. 54. Temps E. 1. Annuitie, 150.

And so by these words, *donec, quousque, usque ad, tamdiu, ubicunque.*

"*If one of them die, &c.*" For if any of them die the coverture is dissolved, and consequently the state determined by the limitation.

11 Ass. p. 8. 21 Ass. p. 18. 26 E. 3. 69. 7 E. 4. 16. 9 E. 4. 25, 26. 9 H. 6. 39. 14 H. 8. 13.

"*Or that there be a divorce between them, &c.*" Here is a distinction to be understood: for there bee two kinde of divorces, *viz.* one *à vinculo matrimonii* *, and the other *à mensa et thoro. Divortium dicitur à divertendo,* or *divortendo, quia vir divertitur ab uxore.* Divorces *à vinculo matrimonii* are these: *Causâ præcontractûs, causâ metûs, causâ impotentiæ seu frigiditatis, causâ affinitatis, causâ consanguinitatis, &c.* And I reade in an ancient

* 47 E. 3. 27. 39 E. 3. 32, 33. 11 H. 4. 14. 76. Bracton, fo. 298. 18 E. 4. 28. 24 H. 8. bastards. Br. 44. 39 E. 1. Bastard, 21. 22 E. 4. tit. Consultat. 5. 6 E. 3. 249. 25 E. 3. 39.

record,

record, *coram rege Termino Pasch.* 30 *E.* 1. *William de Chadworthe*'s case, that he was divorced from his wife, for that he did carnally know her daughter before he married the mother; all which are causes of divorce preceding the marriage.

A mensâ et thoro, as *causâ adulterii*, which dissolveth not the marriage *à vinculo matrimonii*, for it is subsequent to the marriage. And the divorce that *Littleton* here speaketh of is intended of such divorces [*] as dissolve the marriage *à vinculo matrimonii*, and maketh the issue bastard, because they were not *justæ nuptiæ*. And therefore in *Littleton*'s case though the husband and wife be divorced *causâ adulterii*, yet the freehold continueth, because the coverture continueth. And it is further to be understood, that many divorces that were of force by the canon law when *Littleton* wrote, are not at this day in force; for by the statute of 32 *H.* 8. ca. 38, it is declared that all persons be lawfull (that is, may lawfully marry) that be not prohibited by God's law to marry, that is to say, that be not prohibited by the Leviticall degrees.

(1 Sid. 64. 1 Roll. Abr. 341. 360. 681.)

[*] Vide Sect. 399. (Sid. 13. 118. 5 Rep. 98. 7 Rep. 42. Cro. Car. 463. 2 Inst. 682. Vaugh. 221. 319. 321.)

32 H. 8. ca. 38.

A man married the daughter of the sister of his first wife, and was drawne in question in the ecclesiasticall court for this marriage, alleging the same to be against the canons; and it was resolved [n] by the court of common pleas, upon consideration had of the said statute, that the marriage could not be impeached, for that the same was declared by the said act of parliament to be good, inasmuch as it was not prohibited by the Levitical degrees, *et sic de similibus* (1).

[n] Tr. 2 Jac. Rot. 1032. Richard Parsons' case. (Cont. 1 Cro. 228. Acc. Mo. 907. Vid. Sid. 434.)

Sect.

(1) This passage exposed sir Edward Coke to much censure.—It was struck out of the third and every following edition to the ninth.—It was restored to its place in that edition, and is to be found in all the subsequent editions.—The following account is given of this circumstance in Burn's Ecclesiastical Law, vol. 3. p. 402. 3d edit.—" There are several degrees, which, although " not expressly named in the Levitical law, are yet prohibited by that, and " by the statute of 32 H. 8. c. 38, by parity of reason. Hence in the case of " Wortley and Watkinson, a consultation was granted, where one had married " the daughter of the sister of his former wife; which (as sir John King laid " the argument) is the same degree of proximity, as the nephew's marrying " his father's brother's wife; and this being expressly prohibited, the other " by parity of reason is so likewise; as it had been declared E. 16 J. in Pen- " nington's case, before the High Commissioners. Which point was again " argued T. 1 An. in the case of Snowling and Nursey, and consultation " granted as before, notwithstanding the case of Richard Parsons, mentioned " by lord Coke, 1 Inst. 235. in which it was first determined not to be within " the Levitical degrees, and prohibition granted; but a consultation being " awarded on debate, two years after, that case is said to have been expunged " out of the First Institute, by order of the King and Council. And this " was the very point in which (presently after the making of the act) lord " Cromwell desired a dispensation for one Massey, who was contracted to his " sister's daughter of his late wife; but the archbishop denied it, as contrary " to the law of God, and gave for reason, that as several persons are prohi- " bited, which are not expressed, but understood by like prohibition in equal " degree; so in this case, it being expressed that the nephew shall not marry " his uncle's wife, it is implied, that the niece shall not be married to the " aunt's husband. Gibs. 412, 413. Much less can it be doubted, whether " the like rule concerning parity of reason, doth not forbid the uncle to " marry his niece, which, though not expressly forbidden, is virtually pro- " hibited

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AND that they have an estate for term of their two lives is proved thus: Every man that hath an estate of freehold in any lands or tenements, either he hath an estate in fee, or in fee taile, or for terme of his own life, or for terme of another man's life, and by such a lease they have a freehold, but they have not by this grant fee, nor fee taile, nor for terme of another's life, ergo, *they have an estate for terme of their owne lives, but this is upon condition in lawe in forme aforesaid; and in this case if they shal do wast, the feoffor shall ☞ have a writ of waste against them, supposing by his writ,* quòd tenet ad terminum vitæ, &c. * *but in this* (A) *count he shall declare how and in what manner the lease was made.* [235. b.]

Pl. Com. 561. b. Vid. Sect. 345. simile.

"*IS proved thus.*" By this argument logically drawne *à divisione*, it appeareth, how necessary it is that our student should (as *Littleton* did) come from one of the universities to the studie of the common law, where he may learne the liberall arts, and especially logick, for that teacheth a man not onely by just argument to conclude the matter in question, but to discerne betweene truth and falsehood, and to use a good method in his studie, and probably to speake to any legall question, and is defined thus, *dialectica est scientia probabiliter de quovis themate disserendi*, whereby it appeareth how necessary it is for our student.

37 H. 6. 27.

"*Supposing by his writ,* quòd tenet ad terminum vitæ, *&c.*" This and the rest of this section is evident and plaine.

Sect.

* *but—and,* in L. and M. and Roh.

(A) *The word* 'this' *seems to be here inserted for* "his." *See Mr. Ritso's Intr. p.* 112.

" hibited in the precept that forbids the nephew to marry the aunt; nor is it " of moment to allege, that the first is a more favourable case, as the natural " superiority is preserved; since the parity of *degree*, which is the proper " rule of judging, is the very same. Gibs. 413. But where in the case of " Harrison and Burwell, T. 20 C. 2. in the spiritual court, one had married " the wife of his great uncle, this was declared not to be within the Levitical " degrees; and accordingly, after the opinion of all the judges taken by the " king's special command, a prohibition was granted. Gibs. 413."—*Note, the case of Richard Parsons, T. 2 Ja. Ro.* 1032. *where a man may marry the daughter of his wife's sister, which is in the editions of* 1628, *and that of* 29, *and is here left out. See Moor,* 1266. *Manne's case,* 33 *Eliz. in the case of the widow of one Rennington, who claimed a widow's estate, but was denied, because she was niece to the former wife of Rennington, who had done penance for the incestuous marriage; but it was resolved she should have her widow's estate, because there was never any divorce had in the life of her husband, though there was cause. Hob.* 181. *in the case of Howard* v. *Bartlett. 2 Inst.* 683. 1 *Cro.* 228. *Vaugh.* 302. *Hill* v. *Good,* 3 *Lev.* 364. *Vide auxy,* 2 *Jones,* 118. 5 *Mo.* 161. *and B. Stillingfleet's Life,* 121.—Lord Nott. MS.—[Note 149.]

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IN the same manner it is, if an abbot make a lease to a man for yeares (B), *to have and to hold to him during the time that the lessor is abbot* (En mesme le manner est, si un abbe fait un lease a un home a aver et tener a luy durant le temps que le lessor est abbe); *in this case the lessee hath an estate for term of his own life: but this is upon condition in law*, scilicet, *That if the abbot resigne, or be deposed, that then it shall be lawfull for his successor to enter, &c.*

"*IF an abbot.*" So it is of a bishop, archdeacon, and other ecclesiasticall or temporall body politique or corporate, or of any officer or graduate, or the like. Vide Bract. lib. 5. 414. (Plowd. 242.)

"*Resigne or be deposed.*" And so it is of a translation and cession.

Sect. 383.

ALSO a man may see in the Book of Assises, an. 38 E. 3. ‡ p. 3, *a plea of Assise in this form following*, scilicet, *An assise of* Novel Disseisin *was sometime brought against* A. *who pleaded to the assise, and it was found by verdict, that the ancestour of the plaintife devised his lands to bee sold by the defendant, who was his executor, and to make distribution of the money for his soule: and it was found, that presently after the death of the testator, one tendred to him a certaine sum of money for the lands, but not to the value, and that the executor afterwards held the lands in his own hands two yeares, to the entent to sell the same dearer to some other; and it was found that he had all the time taken the profits of the lands to his own use, without doing any thing for the soule of the deceased, &c.* Moubray * *justice said, the executor in this case is bound by the law to make the sale as soone as he may after the death of his testator, and it is found that hee refused to make sale, and so there was a default in him, and so by force of the devise he was bound to put all the profits comming of the lands to the use of the dead* (et issint per force del devise il fuist tenus d'aver mis touts le profits † avenants de les tenements al use le mort), *and it is found that he tooke them to his owne use, and so another default in him. Wherefore it was adjudged, that the Pl' should recover.* § *And so it appeareth by the said judgement, that by force of the said devise the executour had no estate nor power in the lands, but upon condition in law.*

"*THE book of Assises,*" is a booke of the Reports of Cases in the raigne of king *Edward* the Third, and it is called the Booke of *Assises*, because the greatest part of the cases therein are

‡ *p.* 3, not in L. and M. or Roh.
* *justice said*, not in L. and M. or Roh.
† avenants — prevenantes, *in L. and M. and Roh.*
§ *&c.* added in L. and M. and Roh.

(B) *It seems, that the text should be read as if the words "for yeares" had been omitted. See Mr. Ritso's Intr. p.* 112. *It is observable that the original French does not warrant the insertion, in the translation, of the words in question.*

are upon writs of *assises* brought, as hath been said, and which hath beene cited before.

"*Devised his lands to be sold by his executor.*" This must ☞ be intended to be of lands devisable by custome, for lands by the common law were not devisable (as hath been said: for in this section is implyed a diversity, *viz.* when a man deviseth that his executor shal sell the land, there the lands descend in the meane time to the heire, and untill the sale bee made the heire may enter and take the profits. But when the land is devised to his executor to be sold, there the devise taketh away the descent, and vesteth the state of the land in the executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth, by our author, that when a man deviseth his tenements to be sold by his executors, it is all one as if he had devised his tenements to his executors to be sold: and the reason is, because he deviseth the tenements whereby hee breakes the descent (1). [236. a.]

(Latch. 9. Ant. 113. a. 181.)

"*Mowbray.*" *John Mowbray* was a reverend judge of the court of common pleas, and descended of a noble family.

"*The executor in this case is bound by the law to make the sale as soone as he may after the death of his testator, &c.*" And the reason hereof is, for that the meane profits taken before the sale shall not bee assets, so as he may be compellable to pay debts with the same, and therefore the law will inforce him to sell the lands as soone as he can, for otherwise hee shall take advantage of his owne laches: but if a man devise that his executor shall sell his land, there he may sell it at any time, for that he hath but a bare power, and no profit. And by this case it appeareth what construction the law maketh for the speedy payment of debts. And here is to be observed, that many ☞ words in a will doe make a condition in law, that make no condition in a deed: As here to devise lands to an executor *ad vendendum*, so if lands be devised to one *ad solvendum* 20*l.* to *I. S.* or paying twentie pounds to *I. N.* this amounts to a condition. And *Crickmer's* case was this: A man seised of certaine [236. b.]

(4 Rep. 81. b.)

(3 Cro. 19. 21. a.)

Mich. 31 & 32 El. in the King's Bench. Crickmer's case, adjudg. Dy. 6 E. 6. fo. 74. 7 E. 6. 70. (1 Leo. 174.) 10 Rep. 41. (Cro. Car. 185.)

lands

(1) 1 *Co.* 25. *b. Porter's case. Breach of condition assigned, because he has not performed within convenient time, viz.* 8 *years.—Ant.* 113. *cont. that where lands are devised to executors to sell, and one refuses, yet it is within* 21 *H.* 8. *though it be an interest, and though the words of the statute are, where lands are willed to be sold by executors, which gives only a power; so there was a difference between them.—*49 *E.* 3. 17. *The case was, a woman seised of lands in London devised them to be sold by her executors, and died without an heir; that devise prevented the escheat which the king pretended to have, and the executors could enter and sell, therefore more than a bare authority passed. Yet in* 1651, *on evidence at the bar, between Wilkinson and White, this case was started; and lord chief justice Rolls doubted of this opinion, because, he said, it was only a descent, according to the words of Littleton; and that it appeared to him, that when lands are devised to be sold by executors, there no interest passes, as in the last clause here.*—See ant. p. 113. a. note 2.—Lord Nott. MSS.—[Note 150.]

lands holden in socage had issue two daughters *A.* and *B.* and devised all his lands to *A.* and her heires, to pay unto *B.* a certaine summe of money at a certaine day and place; the money was not paid, and it was adjudged, That these words, "to pay," &c. did amount in a will to a condition; and the reason was, for that the land was devised to *A.* for that purpose, otherwise *B.* to whom the money was appointed to be paid, should be remediless, *et interest reipublicæ suprema hominum testamenta rata haberi:* and the lessee of *B.* upon an actuall ejectment recovered the moitie of the land against *A.*

"*And so it appeareth by the judgement, &c.*" This conclusion upon a judgment is of great authoritie in law, *quia judicium pro veritate accipitur*, and, as it hath beene said, *judicium* is *quasi juris dictum.*

Sect. 384.

AND many other things there are of estates upon condition in law († Et mults auters choses et cases y sont d'estates sur condition en la ley), *and in such cases he needed not to have shewed any deed, rehearsing the condition, for that the law it selfe purporteth the condition, &c.*

Ex paucis dictis intendere plurima possis.

More shall be said of conditions in the next chapter (Plus serra dit de conditions en le ‡ prochein chapter), *in the chapter of Releases, and in the chapter of Discontinuance.*

HEREBY it appeareth that limitations (which, as hath beene said, *Littleton* termeth conditions in law) may be pleaded without deed: and the reason of our author is observable, because the law in itselfe purporteth the condition, whereof somewhat hath bin said before, and therefore looke backe to the conditions in law, or words of limitation, and withall that a stranger may take advantage of a limitation, as hath beene said. 9 E. 4. 36. (5 Rep. 74. 6 Rep. 38.) (Ante 214. b.)

Littleton having spoken at large of conditions in deed and in law, somewhat seemeth necessary to bee said of defeasances, whereby the state or right of freehold and inheritance may be defeated and avoyded. Vid. Sect. 220.

"*Defeasance*," *Defeisantia*, is fetched from the French word *defaire, i. e.* to defeat or undoe, *infectum reddere quod factum est.* There is a diversitie between inheritances executed, and inheritances executorie; as lands executed by livery, &c. cannot by indenture of defeasance be defeated afterwards. And so if a disseisee release (A) a disseisor, it cannot bee defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, &c. the same may be defeated by indentures Bract. li. 2. fo. 16. 17 Ass. p. 2. 5 E. 3. 42 E. 3. 1. 43 E. 3. 17. 43 Ass. 12. 7 H. 6. 43. 8 H. 6. 23. 32 E. 3. Annu. 30. 5 E. 3. Annuity, 44. 30 Ass. p. 1. 30 Ass. p. 11. 31 Ass. 32. Ant. 207. a. (1 Roll. Abr. 590.)

of

† Et mults auters choses et cases y sont d'estates sur condition en la ley, *not in L. and M. or Roh.*

‡ prochein chapter—chapitre de discentz que tollent entres, *in L. and M. and Roh.*

(A) *The word* to *seems to be here requisite.*

of defeasance, for it is a maxime in law, *Quæ incontinenti fiunt in esse videntur* (1).

20 Ass. pl. 7. 7 E. 4. 29. Browning and Beston's case, Pl. Com. 131. 28 H. 8. Dier, 6. 27 H. 8. 15. 19 R. 2. Donc, 10. Albanie's case, lib. 1. 107.

☞ But rents, annuities, conditions, warranties, and such like, that be inheritances executorie, may be defeated by defeasances made, either at that time, or any time after: and so the law of statutes, recognizances, obligations, and other things executorie. [237. a.]

"*Ex paucis dictis intendere plurima possis.*"

Verses at the first were invented for the helpe of memorie, and it standeth well with the gravitie of our lawyer to cite them. By this verse of our author, inferences and conclusions in like cases are warrantable.

(6 Rep. 32. 3 Rep. Twyne's case.) (*) 27 H. 8. cap. 10. (Cro. Car. 472. Hob. 348. 9 Rep. 107. 1 Rep. 173. 175.)

Lastly, somewhat were necessarie to be spoken concerning clauses of provisoes, containing power of revocation, which since *Littleton* wrote are crept into voluntarie conveyances, which passe by raising of uses, being executed by the (*) statute of 27 *H.* 8. and are become verie frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sonnes, by deed indented, covenanteth in consideration of fatherly love, and for the advancement of the blood, or upon any other good consideration, to stand seised of three acres of land to the use of himselfe for life, and after to the use of *Thomas* his eldest son in taile, and for default of such issue, to the use of his second son in taile, with divers like remainders over; with a proviso that it shall be lawfull for the covenantor at any time during his life to revoke any of the said uses, &c. this proviso being coupled with an use, is allowed to be good, and not repugnant to the former states. But in case of a feoffment, or other conveyance, whereby the feoffee or grantee, &c. is in by the common law, such a proviso were merely repugnant and void.

And first, in the case aforesaid, if the covenantor, who had an estate for life, doe revoke the uses according to his power, he is seised againe in fee simple without entrie or claime.

Secondly, he may revoke part at one time, and part at another.

Lib. 1. fol. 173, 174. Digge's case, lib. 1. fol. 107. Albanie's case, lib. 10. fol. 143. Scrope's case, lib. 7. fol. 12,13. Sir Francis Englefield's case. (2 Roll. Abr. 263. 1 Roll. Abr. 331.)

Thirdly, If he make a feoffment in fee, or levie a fine, &c. of any part, this doth extinguish his power but for that part; whereas in that case the whole condition is extinct. But if it be made of the whole, all the power is extinguished; so as to some purposes it is of the nature of a condition, and to other purposes in nature of a limitation.

Fourthly, If hee that hath such power of revocation hath no present interest in the land, nor by the ceasor of the state shall have nothing, then his feoffment or fine, &c. of the land is no extinguishment of his power, because it is meere collaterall to the land.

Fiftly, By the same conveyance that the old uses be revoked, may

(1) A power of revocation may be defeated by a defeasance made at the same time, or any time after. 1 Rep. 113.—See Carth. 64. But if a thing executory on its commencement be after executed, it cannot be defeated by a subsequent defeasance. 5 Rep. 90. b. In the case of Cottrell *v.* Purchase, lord Talbot said he should always discourage the practice of drawing an absolute deed, and making a defeasance, as it wore the face of fraud. Ca. Temp. Talbot, 61-64.—[Note 151.]

may new be created or limited, where the former cease *ipso facto* by the revocation, without either entrie or claime.

Sixtly, That these revocations are favourably interpreted, because many men's inheritances depend on the same (1). And here I may apply the abovesaid verse:

Ex paucis dictis intendere plurima possis.

(1) Some observations will be made in the notes to the chapter of Releases, on Powers of Revocation, and other Powers deriving their effect from the statute of uses.——A reference was made, in note 1, p. 216. a. to this place, for some observations on the doctrine of *Conditions precedent, and Conditions subsequent.* In 1 Eq. Ca. Ab. 108. it is observed, "That conditions precedent are such as "are annexed to estates, and must, at law, be punctually performed, before the "estate can vest. A condition subsequent is, when the estate is executed; but "the continuance of such estate dependeth on the breach or performance of the "condition. Though this distinction is often mentioned in courts of equity, "yet the prevailing distinction there is to relieve against conditions, where "compensation can be made, whether they be precedent or subsequent." This observation is illustrated and confirmed by the cases collected under the title of Conditions precedent and subsequent, in Mr. Viner's Abridgment;—and see Francis's Maxims of Equity, p. 44. and Kaims's Princ. of Eq. 51. 81. ed. 1760. —One of the most material points of discussion, respecting the doctrine and different operations at law and in equity of Conditions precedent and Conditions subsequent, arises from those cases where *Conditions are annexed to Devises, making them void on the marriage of the devisee without consent.* These cases have frequently been discussed in our courts. All the learning upon them is to be found in the case of Harvey *v.* Aston, Com. Rep. 726. 1 Atk. 361. Reynish *v.* Martin, 3 Atk. 330. and Scott *v.* Tyler, 2 Bro. Ch. Ca. 488.

The doctrine of Conditions precedent and subsequent, also frequently applies to cases arising on the VESTING OF PORTIONS AND LEGACIES MADE PAYABLE AT A FUTURE TIME. There are few points of legal learning upon which the cases in the books are more numerous, or seemingly more discordant. Perhaps the following distinction may serve to enable the reader to reconcile them. I. It was laid down, in the case of Pawlet *v.* Pawlet, 2 Vent. 366, 367. that where a legacy is *charged upon real estate*, if the person entitled to it dies before the day of payment, it sinks into the land for the benefit of the owner of the inheritance. In Hall *v.* Terry, 1 Atk. 502. and Van *v.* Clark, 1 Atk. 510. lord Hardwicke seems to have thought himself bound by this rule, and decreed those cases accordingly.—But in Lowther and Condon, 2 Atk. 130. Sherman *v.* Collins, 3 Atk. 319. Hodgson *v.* Rawson, 1 Ves. 44. his lordship departed from this rule; and perhaps the general rule, as it now stands, is,—That when a legacy is given, charged upon a real estate, and payable at a future time, and there are no express words in the will to make it immediately a vested interest; there, if a stronger implication to the contrary does not arise from the other parts of the will, the court, from its inclination to favour the heir, considers its being *so* charged, and *so* payable, as circumstances amounting to an implication, that the testator's intention was, that it should not *vest* till the time in which it is made *payable*. Most clearly it is in the testator's power to make it immediately vested and transmissible, though charged upon a real estate, and payable at a future time, by using express words to indicate his intention that it should be so;—and if this can be done by express words, there cannot, it should seem, be any reason why it may not be equally done by implication. Therefore, if there are any circumstances or expressions in a will, from which the implication, that it was the testator's intention to make it immediately a vested legacy, is stronger than the implication to the contrary, which arises from its being charged upon a real fund, and payable at a future day, it is to be considered as a vested and transmissible

transmissible interest, notwithstanding those circumstances. One of the circumstances, which the courts have considered as affording very strong ground to imply the testator's intention to be, that the legacy should be immediately vested and transmissible, though the payment is postponed to a future time, is where the payment is postponed for reasons that are not personal to the legatee, but arise or seem to be calculated with a view to the circumstances of the fund. —Upon this ground lord Hardwicke seems in a great measure to have decided in the cases cited above of Lowther *v.* Condon, Sherman *v.* Collins, and Hodgson *v.* Rawson.—See also King *v.* Withers, Ca. Temp. Talbot, 117. Butler *v.* Duncomb, 1 P. W. 457. Pitfield's case, 2 P. W. 513. Hutchins *v.* Foy and Gover, Com. 716. Godwin *v.* Munday, 1 Bro. Cha. Rep. 191.

II. Where the legacy is charged *upon personalty* only; there, if the legatee dies before the day of payment, his personal representatives become entitled to the legacy; unless it is to be collected from the testator's will, that he intended the contrary.—In the construction of bequests of this nature, there is an established distinction between a gift of a legacy to a man, at, or if, or when, he attains 21 (or any other future event of a similar nature), and a legacy *payable* to a man at, or if, or when he attains 21.—In the first case, the attaining 21 is held to be individually applicable as much to the substance as to the payment of the legacy, and therefore the legacy is held to lapse by the death of the legatee before the time. In the second case, the attaining 21 is held to refer, not to the substance, but to the payment only of the legacy, and therefore, here the legacy is held not to lapse by the death of the legatee before the time.—It has been held to be an exception to this distinction, where the testator has disposed of the intermediate interest either to a stranger, or to the legatee. And the distinction does not hold where the legacy is a charge upon real estate.

III. With respect to legacies charged on a *mixed fund*, consisting both of real and personal estate;—if the legatee dies before the time of payment, it seems to be settled, that the legacy should sink in the land, in all cases of this nature where it would be held to sink in the land if the fund consisted of real estate only: but this is only so far as it is necessary to resort to the real estate; for in these cases the legacy is still vested as to the personal estate, in all cases where it would be vested, if the fund consisted of personal estate only. See Sherman *v.* Collins, 3 Atk. 320. Hodgson *v.* Rawson, 1 Ves. 48. Duke of Chandos *v.* Talbot, 2 P. W. 612. and Mr. Cox's excellent note on the last case.

Since the first publication of the thirteenth edition of these annotations, the doctrine of conditions, as applicable to legacies, has been fully and ably explained by Mr. Roper, in his Treatise upon the Law of Legacies, in two volumes octavo.—A succinct statement of it has been attempted, in the 6th edition of Mr. Fearne's Essay on Contingent Remainders, p. 552, note 1.

For the difference between the common-law doctrine of conditions, and that of the civil law and canon law, see the second part of Fulbeck's Parallel, 7th Dialogue.

In the former part of these notes, some observations were made on the leading points of the doctrine of mortgages. The reader will find every thing relating to that comprehensive subject, collected with great industry and ingenuity, in *the Law of Mortgages*, by Mr. Powell.—[Note 152.]

Chap. 6. Discents which toll Entries. Sect. 385.

DISCENTS which toll entries are in two manners, to wit, where the discent is in fee, or in fee taile. Discents in fee which toll entries are (Discents en fee que tollent entries * sont), *as if a man seised of certaine lands or tenements is by another disseised, and the disseisor hath issue, and dieth of such estate seised, now the lands descend to the issue of the disseisor by course of law, as heire unto him. And because the law cast the lands or tenements upon the issue by force of the discent, so as the issue commeth to the lands by course of law, and not by his owne act, the entrie of the disseisee is taken away, and he is put to sue a writ of* entrie sur disseisin *against the heire of the disseisor, to recover the land* †.

"*DISCENTS.*" This word commeth of the Latine word *discendere, id est, ex loco superiore in inferiorem movere*; and in legall understanding it is taken when land, &c. after the death of the ancestor is cast by course of law upon the heire, which the law calleth a discent. And this is the noblest and worthiest meanes whereby lands are derived from one to another, because it is wrought and vested by the act of law, and [237. b.] right of ☞ blood unto the worthiest and next of the blood and kindred of the ancestor, and therefore it hath not in the common law altogether the same signification that it hath in the civill law; for the civilians call him, *hæredem, qui ex testamento succedit in universum jus testatoris.* But by the common law he is only heire which succeedeth by right of blood. And this agreeth well with the etymologie of the word (heire) to whom the lands descend, for *hæres dicitur ab hærendo, quia qui hæres est hæret, hoc est, proximus est sanguine illi cujus est hæres.* So as hee that is *hæres, sanguinis est hæres, & herus hereditatis.*

Mirror, cap. 2. sect. 5. Bracton, lib. 5. fol. 370. and 434. Britton, fol. 115. 215. Vide Sect. 5. (Sid. 193. Ant. 13. b. Ant. 163.)

(Ant. 7. b.)

"*Discents which toll entries are in two manners.*" Here is an exact and perfect division made by our author, and yet withall plaine and perspicuous.

Now, as a discent is the worthiest meanes to come to lands, &c. so hath the heire more privileges than any other that by other order or meanes come to the lands, &c. as shall appeare hereafter.

Nota, In ancient time * if the disseisor had beene in long possession, the disseisee could not have entred upon him. [*a*] Likewise the disseisee could not have entred upon the feoffee of the disseisor, if he had continued a yeare and a day in quiet possession. But the law is changed in both these cases, only the dying seised being an act in law, doth hold at this day, and this seemeth to be verie ancient, for this was the law before the Conquest. [*b*] *Porro autem quam maritus sine lite et controversiâ sedem incoluerit, eam conjux et proles sine controversiâ possidento, si qua in illum lis fuerit illata viventem, eam hæredes ad se (perinde atque is vivus) accipiunto.*

* Bracton, li. 4. fol. 162. & 209. Britton, fol. 115. Fleta, l. 4. c. 2.

[*a*] 50 E. 3. 21. 1 Ass. 13. 20 H. 3. Ass. 432. 9 Ass. 15. 29 Ass. 5. 54. 26 Ass. 12. 21 Ass. 28. 43 Assise, 17.

[*b*] Lamb. explicat. fol. 120. 70

And

* sont—est, *in L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

And one of the reasons of this ancient law may be, that the heire cannot suddenly by entendment of law know the true state of his title. And for that many advantages follow the possession and tenant, the law taketh away the entrie of him that would not enter upon the ancestor, who is presumed to know his title, and driveth him to his action against the heire that may be ignorant thereof.

11 H. 7. 12.
40 E. 3. 24.

"*And dieth of such estate seised.*" To a discent that taketh away an entrie a dying seised is necessarie, as here it appeareth; but a man to other purposes may have lands by discent though his ancestor died not seised, as hath beene said before.

33 E. 3. Gard. 162. 6 H. 4. 4.
39 E. 3. 36.
15 E. 4. 14.
F. N. B. 143. Q.
7 H. 4. 12. 5.
2 Ass. p. 9.
21 E. 3. 2.

"*Of lands or tenements.*" That is, of such tenements as be corporeall, and doe lye in liverie, and not of inheritances which lye in grant, as advowsons, rents, commons in grosse, and such like, which bee inheritances incorporeall, and yet are included within this word (tenements). For discents of them doe not put him that right hath to an action; and the reason of this diversitie is, for that houses serve for the habitation of men, and lands to be manured for their sustenance, and therefore the heire after a discent shall not be molested or disturbed in them by entrie.

"*Is by another disseised.*" The like law is of an abatement or intrusion, and of their feoffees, or donees, &c.

(8 Rep. 101.)
(6 Co. 51. b.)
33 E. 3. tit. 3.
Entrie conge, 51.
45 E. 3. Quare Imp. 139.
27 E. 3. 88.
9 H. 6. 49.
21 H. 6. 17.
3 E. 4. 6.
10 H. 7. 5. b.

Upon the words of *Littleton* a diversitie may be collected, that if a recoverie be had by *A.* ☞ against *B.* and before execution *B.* die seised, this discent shall not take away the entrie of the recoverer. But if after execution *B.* had disseised the recoverer and died seised, this discent shall take away the entrie of the recoveror within the expresse words of *Littleton:* and so it is in case of a fine. [238. a.]

12 E. 4. 19. 3 H. 7. 3. 6 E. 4. 11. 7 H. 7. 15. 5 H. 7. 21.

[n] 5 H. 7. 2.

[n] A recoverie is had against tenant for life, where the remainder is over in fee, tenant for life dieth, he in remainder entreth before execution, and dieth seised, the entrie of the recoveror is lawfull, because he is privy in estate; otherwise it is if the discent had beene after execution.

45 E. 3. Quare Imp. 139.

A. recovereth an advowson against *B.* in a writ of right, and hath judgement final; the incumbent dieth; *B.* by usurpation presents to the church, and his clarke is admitted and instituted; *B.* dieth: *A.* is put out of possession, and the heire of *B.* is not so bound by the judgement either in blood or estate but that he shall present. [o] *B.* levies a fine to *A.* of an advowson to him and his heires; after the church becomes void; *B.* presents by usurpation, and his clarke is admitted and instituted: this shall put *A.* the conusee out of possession. And the reason of these two cases is, for that at the common law every presentation to a church did put the rightfull patron out of possession, and did put him to his writ of right, whether the presentation were by title or without, and therefore albeit the usurpation were in both the said cases before execution, yet it put the rightfull patron out of possession. So note a diversitie betweene a recoverie of land, and of an advowson.

[o] 8 E. 2. Quare Imp. 166.
(6 Co. 48.)

The

"*The entrie of the disseisee is taken away* (1)." Here is one of the privileges which the law giveth to the heire by discent of houses and lands.

[*p*] At the common law if the disseisor, abator, or intrudor had died seised soone after the wrong done, the disseisee and his heires had been barred of his and their entrie without any time limited by law; but now by the statute [*q*] made since *Littleton* wrote, it is enacted, that except such disseisor hath been in the peaceable possession of such mannors, lands, &c. whereof he shall die seised by the space of five yeares next after such disseisin, &c. without entrie or continuall claime, &c. that there such dying seised, &c. shall not take away the entrie of such person or persons, &c. But after the five yeares the disseisee must take such continuall claime as our author hath taught us, the learning whereof is necessarie to be knowne. And it is said that abators and intrudors are out of this statute (2), because the statute is penall, and extends only to a disseisor, and that was the most common mischiefe. *Et ad ea quæ frequentiùs accidunt jura adaptantur.*

[*p*] L'estatute de 32 H. 8. cap. 33. Vide Sect. 422. 426.

[*q*] 37 H. 6. 1.

Pl. Com. 47. in Wimbeshe's case.

The feoffee of a disseisor is out of the said statute, and remaines as at the common law. But to a disseisor, the statute is taken favourably for advancement of the ancient right; for whether the disseisin be without force, or with force, it is within the statute. And albeit the statute speake of him that at the time of such discent had title of entrie, &c. or his heires, yet the successors of bodies politique or corporate, so you hold yourselfe to a disseisin, are within the remedie of this statute, for the statute extendeth cleerely to the predecessor, being disseised; and consequently without naming of his successor extendeth to him, for he is the person that at the time of such discent had title of entrie.

(11 Co. 46. Mo. 151.) Mich. 4 & 5 Eliz. Dier, 219. acc.

(Post. 246. a.)

But if a man make a lease for life, and the lessee for life is disseised, and the disseisor die seised within five yeeres, the lessee for life may enter; but if he die before he doth enter, it is said that the entrie of him in the reversion is not lawfull, because his entrie was not lawfull upon the disseisor at the time of the discent, as the statute speaketh. But if lessee for life had died first, and then the disseisor had died seised, he in the reversion had beene within the remedie of the statute, because he had title of entrie at the time of the discent, as the statute speaketh, and so within the expresse letter of the statute, albeit the disseisin was not immediate to him, and the like is to be said of a remainder, &c.

Vide Pl. Com. 47. ubi supra.

"*Writ*

(1) The outlines of the doctrine contained in this Chapter are thus summarily mentioned by lord chief baron Gilbert, in his Law of Tenures, p. 21;—"When any man is disseised, the disseisor has only the naked possession, "because the disseisee may enter and evict him; but against all other persons "the disseisor has a right, and in this respect only can be said to have the "right of possession, for in respect to the disseisee he has no right at all. "But when a descent is cast, the heir of the disseisor has *jus possessionis*, "because the disseisee cannot enter upon his possession and evict him, but "is put to his real action, because the freehold is cast upon the heir."—[Note 153.]

(2) And so are the donees and feoffees of the disseisor, for they come by title, though it is a defeasible one. *Note to the 11th edition.*—[Note 154.]

F. N. B. 191. "*Writ of entrie sur disseisin.*" Breve de ingressu super disseisinam. Of this writ somewhat shall be said in the next section.

Sect. 386.

DISCENTS in tayle which take away entries are (Discents en taile que tollent entries * sont), *as if a man be disseised, and the disseisor giveth the same land to another in taile, and the tenant in taile hath issue and dieth of such estate seised, and the issue enter; in this case the entrie of the disseisee is taken away, and he is put to sue against the issue of the tenant in taile a writ of* Entrie sur disseisin †.

"*DIETH of such estate seised.*"

If a disseisor make a gift in tayle, and the donee discontinueth in fee, and disseise ☞ the discontinuee, and dieth seised, this discent shall not take away the entrie of the disseisee, for the discent of the fee simple is vanished and gone by the remitter; and albeit the issue be in by force of the estate taile, yet the donee died not seised of that estate, and of necessitie there must be a dying seised, as hath beene said, which is a point worthy of observation, and implyeth many things. [238. b.]

9 H. 7. 24. (Post. 240.) "*In this case the entrie of the disseisee is taken away.*"

If a disseisor make a gift in taile, and the donee hath issue and dieth seised, now is the entrie of the disseisee taken away; but if the issue die without issue, so as the estate taile which discended is spent, the entrie of the disseisee is revived, and he may enter upon him in the reversion or remainder.

13 H. 4. 8, 9. 33 H. 6. 5. b. per Moyle. 34 H. 6. 11. a. per Curiam. Vide Sect. 395. (Ante, 206. b.)

So if there be grandfather, father and son, and the son disseiseth one, and infeoffeth the grandfather who died seised, and the land discendeth to the father, now is the entrie of the disseisee taken away; but if the father dieth seised, and the land descendeth to the sonne, now is the entrie of the disseisee revived, and he may enter upon the son, who shall take no advantage of the discent, because he did the wrong unto the disseisee. But in the case abovesaid some have said, that where after such discent to the father, he made a lease to the son for terme of another man's life, upon whom the disseisee entred, that the son brought an assise and recovered; and the reason that hath beene yeelded is, for that the son had not the fee simple which he gained by disseisin, but is a purchaser of the free-hold only from the father, and the discent remaine not purged. Contrarie it were, as it is there said, if the son were heire to the discent. But the booke cited there in *Fitzherb. tit.* Title, *placit.* 6. doth not warrant that case, and I hold the law to be contrarie, *viz.* that the disseisee in that case shall enter upon the disseisor, as well as if the father had conveyed the whole fee simple to the son, for in that case also the discent to the father is not purged. If a disseisor make a lease to an infant for life, and he is disseised, and a discent cast, the infant enters, the entrie of the disseisee is

13 E. 3. Br. tit. Entrie Cong. 127. (Post. 241. a. sect. 395.)

* sont—est, *L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

is lawfull upon him. More shall be said of the like matter in this chapter hereafter in his proper place, *Sect.* 393. 395. (Sect. 403. F. N. B. 192. D.)

"*Writ of entrie sur disseisin.*" Breve de ingressu super disseisinam. This writ lieth only upon a disseisin made to the demandant or to some of his ancestors, and of this writ there be foure kindes. The first is a writ that lieth for the disseisee against the disseisor upon a disseisin done by himselfe, and this is called a writ of entrie in the nature of an assise. The second is a writ of *entrie sur disseisin en le per*, whereof *Littleton* here speaketh, for the heire by discent is in the *per* by his ancestor: so it is if the disseisor make a feoffment in fee, a gift in taile, or a lease for life, for they are in the *per* by the disseisor. [*] The third is a writ of *entrie sur disseisin en le per & cui*; as where *A.* being the feoffee of *D.* the disseisor maketh a feoffment over to *B.* there the disseisee shall have a writ of entrie *sur disseisin* of lands, &c. in which *B.* had no entrie but by *A.* to whom *D.* demised the same, who unjustly and without judgement disseised the demandant. These are called *gradus*, degrees, which are to be observed, or else the writ is abatable; for *sicut natura non facit saltum, ita nec lex.* 19 H. 6. 56. 9 H. 5. 9. Bracton, lib 5. fol. 219. b. & 318. Brit. fol. 264, 265. Fleta, lib. 5. cap. 35. 5 E. 3. 216. [*] 22 E. 3. 1. b. 7 E. 3. 25. F. N. B. 192.

The fourth is a writ of *entrie sur disseisin in le post*, which lieth when after a disseisin the land is removed from hand to hand beyond the degrees; and it is called *in le post*, because the words of the writ be, *post disseisinam quam D. injustè, &c. fecit, &c.* The formes of these writs you shall read in the *Register* and *F. N. B.* and therefore it were needlesse to recite them here. So then a degree is of two sorts; either by act in law, whereof *Littleton* here putteth an example of a discent, or by act of the partie, by lawfull conveyance, as is aforesaid. But it is to be understood, that at the common law, if the lands were conveyed out of the degrees, the demandant was driven to his writ of right, in respect of such long possession in so many men's hands, which the law doth ever respect and favour. And therefore by the statute [*a*] of *Marlebridge*, the writ of *entrie in le post* is given; *Provisum est etiam quòd si alienationes illæ de quibus breve de ingressu dari consuevit, per tot gradus fiant, per quot breve illud in formâ priùs usitata fieri non possit habeant conquerentes breve ad recuperandam seisinam suam sine mentione* ☞ *graduum, ad cujuscunque manus per hujusmodi alienationes res illa devenerit, per breve originale, & per commune consilium domini regis inde providendum,* &c. (1). 14 H. 4. 40. (6 Co. 9. b.) [*a*] Marlebr. cap. 29. 24 E. 3. 70.

[239. a.]

Now

(1) The different degrees of title which a person dispossessing another of his lands acquires in them in the eye of the law (independently of any anterior right), according to the length of time and other circumstances which intervene from the time such dispossession is made, form different degrees of presumption in favour of the title of the dispossessor; and in proportion as that presumption increases, his title is strengthened; the modes by which the possession may be recovered vary; and more, or rather different proof is required from the person dispossessed, to establish his title to recover.

Thus, if *A.* is disseised by *B.* while the possession continues in *B.* it is a *mere naked possession*, unsupported by any right, and *A.* may restore his possession, and put a total end to the possession of *B.* by an *entry* on the lands, without any previous action.

Bracton, ubi supra. Britton, ubi supra. Fleta, ubi supra. 4 E. 2. Brev. 790. 21 H. 6. 8.

Now it is necessarie to be knowne, what doth make a degree. First, no estate gained by wrong doth make a degree, and therefore neither abatement, intrusion, or disseisin upon disseisin, doth make a degree. Neither doth everie change by lawfull title worke

If *B.* dies, the possession descends on the heir by act of law. In this case, the heir comes to the land by a lawful title, and acquires, in the eye of the law, an apparent *right of possession*; which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by *an action at law*.—The actions used in these cases are called Possessory Actions, and the original writs by which the proceedings upon them are instituted, are called Writs of Entry.

But if *A.* permits the possession to be withheld from him, beyond a certain period of time, without claiming it, or suffers judgment in a possessory action to be given against him by default, or upon the merits; in all these cases, *B.*'s title in the eye of the law is strengthened, and *A.* can no longer recover by a possessory action, and his only remedy then is by an action *on the right*. These last actions are called *Droiturel Actions*, in contra-distinction to *Possessory Actions*. They are the ultimate resource of the person disseised; so that, if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete. The original writs by which *droiturel* actions are instituted are called Writs of Right.

The dilatoriness and niceties in these processes, introduced the *Writ of Assise*. The invention of this proceeding is attributed to Glanville, chief justice to Henry II. (See Mr. *Reeves's History of the English Law, Part. I. ch.* 3.) It was found so convenient a remedy, that persons, to avail themselves of it, frequently supposed or admitted themselves to be disseised, by acts which did not in strictness amount to a disseisin. This disseisin, being such only by the will of the party, is called a *disseisin by election*, in opposition to an *actual disseisin*: it is only a disseisin as between the disseisor and the disseisee, the person, thus propounding himself to be disseised, still continuing the freeholder as to all persons but the disseisor. The old books, particularly the Reports of Assise, when they mention disseisins, generally relate to those cases where the owner admits himself disseised. (See 1 Burr. 111. and see Bract. lib. 4. cap. 3.)

As the processes upon writs of entry were superseded by the assise, so the assise and all other real actions have been since superseded by the modern process of ejectment. This was introduced as a mode of trying titles to lands in the reign of Henry VII. From the ease and expedition, with which the proceedings in it are conducted, it is now become the general remedy in these cases. Booth, who wrote about the end of the last century, mentions real actions as *then* worn out of use. It is rather singular that this should be the case, as many cases must frequently have occurred, in which a writ of ejectment was not a sufficient remedy. Within these few years past, some attempts have been made to revive real actions; the most remarkable of these are the case of Tissen *v.* Clarke, reported in 3 Wils. 419. 541. and that of Carlos and Shuttlewood *v.* Lord Dormer. The writ of summons in this last case is dated the 1st day of December 1775. The summons to the four knights to proceed to the election of the grand assise, is dated the 22d day of May 1780. To this summons the sheriff made his return; and there the matter rested. The last instance in which a real action was used, is the case of Sidney *v.* Perry. In this case, it was adjudged by De Grey, chief justice, and all the other judges, that the defendant, in a writ of right, by proving his actual possession, without any evidence of his title, put the demandant to the necessity of producing and proving his title,—a point, of which, till that decision, some doubts were entertained. That part of sir William Blackstone's Commentary which treats upon real actiens, is not the least valuable part of that excellent work.—[Note 155.]

worke a degree, as if a bishop or an abbot, or the like, disseise one and die, where his successor is in by lawfull title; for though the parson (A) be altered, yet the right remaines where it was, *viz.* in the church, and both of them seised in the same right, *viz.* in the right of the church, and therefore in that verie case *Bracton* [*b*] demands the question, *An faciunt gradum de abbate in abbatem sicut de hærede in hæredem? Et videtur quòd non magis, quàm in computatione descensûs, quia et si alternatur persona, non propter hoc alternatur dignitas, sed semper manet.* And herewith agreeth [*c*] *Fleta*. (2 Inst. 155. Stat. Marl. 30. Post. Sec. 413.) [*b*] Bracton, lib. 4. fol. 321. 5 E. 3. 83. 5 E. 2. Entrie, 66. 11 H. 4. 83. [*c*] Fleta, lib. 5. cap. 34. 3 H. 3. Entrie, 11. 22 E. 3. 7. F. N. B. 191. K. (Post. 318. a.) 5 E. 2. Entrie, 66.

Also an estate made to the king doth make no degree, and therefore if a disseisor by deed inrolled convey the land to the king, and the king by his charter granteth it over, the disseisee cannot have a writ of *entrie in le per & cui*, but in *le post*, for the king's charter is so high a matter of record as it maketh no degree. 7 E. 3. 360.

Also an estate of a tenant by the curtesie, or of the lord by escheat, or of an execution of an use, by the statute of 27 *H.* 8. or by judgement, or recoverie, or of any others that come in in the *Post*, worke no degree. [*d*] But a tenancie in dower by assignement of the heire doth worke a degree, because she is in by her husband; but assignement of dower by a disseisor worketh no degree, but is in the *Post*, as hereafter shall be said in his proper place. [*d*] 36 H. 6. Dower, 30.

When the degrees are past, so as a writ of entrie in the *Post* doth lye, yet by event it may be brought within the degrees againe; as if the disseisor infeoffe *A.* who infeoffes *B.* who infeoffes *C.* or if the disseisor die seised, and the land discend to *A.* and from him to *C.* now are the degrees past; and yet if *C.* infeoffe *A.* or *B.* now it is brought within the degrees againe. 41 E. 3. 4, 5. 39 E. 3. 25. 5 H. 7. 6, 3 H. 6. 38.

If the disseisor make a lease for life, the remainder in fee, tenant for life dieth, he in the remainder is in the *Per*, because he now claimeth immediately from the disseisor, and both these estates make but one degree (2). 50 E. 3. 27.

Note, there bee divers other writs of entrie besides this writ of entrie *sur disseisin*, whereof *Littleton* here speakes; as a writ of entrie *ad terminum qui præteriit, in casu proviso, in consimili casu, ad communem legem, sine assensu capituli, dum fuit infra ætatem, dum non fuit compos mentis, cui in vitâ, sur cui in vitâ, intrusion, cessavit*, and the like; and that which hath beene said of one, may be applyed to all. (F. N. B. 192. a.) (8 Rep. 86.)

Sect. 387.

*AND note, that in such discents which take away entries, it behoveth that a man die seised in his demesne as of fee, or in his demesne as of fee taile. For a dying seised for terme of life, or for terme of another man's life, doth never take away an entry *.*

IF

* *&c.* added in L. and M. and Roh.

(A) parson *seems to be here inserted for* person.

(2) Booth, in his Real Actions, 171. makes the first degree to consist in the original wrong; but sir Henry Finch, 262. and Mr. justice Blackstone, vol. 3. ch. 10. agree with sir Edward Coke. Abatement, disseisin, escheat, recovery, dower, judgment, and a third and every subsequent feoffment, are in the Post. Finch, ibid.—[Note 156.]

Dier, 8 El. 2. 253. 7 H. 4. 46. 8 H. 4. 15. 17 E. 3. 48. 11 H. 4. 42. (1 Rep. 140. b.) [d] Pasch. 16 Eliz. in communi banco. (Ant. 41. b.) 3 E. 3. tit. Entr. Cong. 58.

IF a disseisor make a lease to a man and to his heires during the life of *I. S.* and the lessee dieth, living *I. S.* this shall not take away the entrie of the disseisee, because he that died seised had but a freehold only, and heires in that case were added to prevent the occupant, for the heire in that case shall not have his age, as it was adjudged in [d] Lamb's case (3).

But if hee in the reversion disseise his tenant for life, and dieth seised, this discent shall take away the entrie of the tenant for life (4).

F. N. B. 145. M. 9 H. 7. 25. a.

9 H. 7. 25. (Hob. 323.)

So it is if there be tenant for life, the remainder in taile, the remainder in fee, and tenant in taile disseiseth the tenant for life and dieth seised, this shall take away the entrie of the tenant for life.

(Post. 276. a.) (Plo. 546. a.)

But if the king's tenant for life be disseised, and the disseisor die seised, this discent shall not take away the entrie of the lessee for life, because the disseisor had but a bare estate of freehold during the life of the lessee, and *Littleton* saith, that a discent of an estate for terme of another man's life shall not take away an entrie (5).

Temps E. 1. Reliefe, 12. Dier, 14 Eliz. 308. 40 E. 3. 9. b. [*] 24 E. 3. 47. (8 Rep. 99.)

"*In his demesne as of fee.*" If an infant bee disseised, and the disseisor die ☞ seised, and after the infant commeth to full age, and the heire of the disseisor die before he entreth, albeit he died not seised of an actuall seisin (1), but of a seisin in law, yet that dying seised shall take away the entrie of the disseisee. [*] And yet in pleading the second heire shall (as hath beene said) make himselfe heire to the disseisor, and that land shall not be recovered in value for the warrantie made of other lands by the first heire; but though the first heire had but a seisin in law, yet he is within the words of *Littleton*, for he was seised and died seised in his demesne as of fee.

[239. b.]

Sect.

(3) See Note 4. page 241. a.

(4) *But it will not take away the entry of a stranger; for as to him it is but the estate for life still, a fictitious not true descendible estate.* Lord Nott. MS. —[Note 157.]

(5) This is by reason of the king's prerogative, that he cannot be disseised. See Hob. 322.—[Note 158.]

(1) *See* 1 *Rep.* 140. *temp. Edw. The eldest son before entry died without issue, the youngest will pay two reliefs, for the death of his father and the death of his brother; for they both were tenants to the lord. So note, the death of a person seised of a seisin in law, is a descent to entitle the lord to relief.—By Thorp and Wilby, the grandfather leased for life and died. The father makes a feoffment of Black Acre with warranty, the son shall not render in value the term of which the reversion descends upon him, because the father had only a seisin in law.* 24 *E.* 3. 47. L. Nott. MS.—[Note 159.]

Sect. 388.

ALSO, a discent of a reversion, or of a remainder, doth not take away an entrie. So as in those cases which take away entries by force of discents, it behoveth that hee dieth seised of fee and freehold at the time of his decease, † or of fee taile and freehold at the time of his death, or otherwise such discent doth not take away an entrie.*

AND therefore if a disseisor make a lease for yeares, and die seised of the reversion, this discent shall take away the entrie of the disseisee, because hee died seised of the fee and franktenement. Like law it is if the land be extended upon a statute, judgement, or recognizance, and so it is in case of a remainder.

But if he had made a lease for life, and die seised of the reversion, this discent shall not take away the entrie of the disseisee, for that though he had the fee, yet he had not the franktenement (2).

So it is of a tenant in taile *mutatis mutandis*; and note, the law doth ever give great respect to the estate of freehold, though it be but for terme of life. Vide Sect. 302. 393.

If a disseisor make a lease for terme of his own life, and dieth, this discent shall not take away the entrie of the disseisee; for though the fee and franktenement discend to the heire of the disseisor, yet the disseisor died not seised of the fee and franktenement: and *Littleton* saith, that unlesse he hath the fee and franktenement at the time of his decease, such descent shall not take away the entrie (3).

Sect.

* *&c.* added in L. and M. and Roh.
† *or of fee taile and freehold at the time of his death,* not in L. and M or Roh.

(2) The necessity that there should be a tenant to do the feudal duties, and the notoriety of title, which the disseisor acquired by being permitted to continue during his life in the peaceable possession of the fee, and to die seised of it, are the grounds upon which the law is induced to defend the possession of the heir of the disseisor from the entry of the disseisee, and to leave the disseisee to his remedy by action. But when the disseisor parts with the freehold, there is a vacancy in the possession; and the possession of the disseisor, and consequently the notoriety of it, is lost. Thus the principles which apply to the descent of an estate in possession do not apply to the descent of an estate in remainder or reversion expectant on an estate of freehold. But they apply when the particular estate is only for years; a tenant for years being considered merely as the bailiff of the freeholder, and to hold the possession for him.—[Note 160.]

(3) But suppose the disseisor in this case had conveyed the estate to the use of himself for life, remainder to the use of his first and other sons successively in tail, with the immediate reversion or remainder to himself in fee, and that he died without issue living at the time of his decease; it seems to be a question, whether he is to be considered as seised in fee at the time of his decease, so as to entitle his wife to dower. See Cordall's case, Cro. El. 315.

Sect. 389.

ALSO, as it is said of discents which discend to the issue of them which die seised, &c. the same law is where they have no issue, but the lands discend to the brother, sister, uncle, or other cousin of him which dieth seised‡.

BY this it appeareth, that a discent, in the collateral line doth take away an entrie, as well as in the lineall.

"*Die seised, &c.*" Here *(&c.)* implieth fee simple, or fee taile.

Sect.

‡ *&c.* added in L. and M. and Roh.

Hooker *v.* Hooker, Cas. temp. Hardw. 13. Duncomb *v.* Duncomb, 3 Lev. 437. In the latter case, between the estate of the tenant for life, and the limitation to his first and other sons, there was interposed an estate to trustees during the life of the tenant for life, for preserving the remainder to the sons. It was held that this was a vested estate, and prevented the wife from dower; and lord Hardwicke in Hooker *v.* Hooker admitted this reasoning. The passage in the text and the three cases cited above were mentioned, and great stress laid upon them, in the case between the heir and next of kin of the late lord Thomond. In that case, lord Thomond being tenant for life, with remainder to his first and other sons in tail male, with the immediate reversion expectant thereupon to himself in fee, paid off a sum of 18,000*l.* charged upon the estate under the trusts of a term of years; and afterwards died intestate, and without issue. Now it is a rule in equity, that when a person, having a partial estate in land, is entitled to a sum of money charged upon it, his right to the money does not necessarily merge in the land, but he *may* keep it as a subsisting charge on the estate; and in some cases, if he makes no particular disposition of it in his life-time, it goes upon his decease to his personal representative. See Jones *v.* Morgan, 1 Bro. Cha. Ca. 206. Upon this ground, it was contended that lord Egremont, upon whom the estate descended at lord Thomond's decease as his heir at law, took the estate charged with the 18,000*l.* for the benefit of the intestate's representatives. To this, it was answered, that though lord Thomond was, at the time of his decease, seised of an estate for life, with the immediate reversion in fee; yet as he had no children living at the time of his decease, and his heir at law immediately upon his decease took the lands in fee simple in possession, by descent, he was to be considered as seised of an estate in fee simple in possession, and consequently, that the 18,000*l.* was to be considered as merged in the inheritance. But lord chancellor Bathurst, before whom the cause was heard, was of opinion, that lord Thomond was to be considered as seised only for life, and that of course his lordship's personal representatives were entitled to the 18,000*l.* This case, which, in the annotation to the thirteenth edition of this work, was stated from a full manuscript report of it, has since been reported by Mr. Ambler, — Wyndham and others *v.* Earl of Egremont, 753.—[Note 161.]

[240. a.]

Sect. 390.

ALSO, if there bee lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enter as in his escheat: in this case the disseisee may enter upon the lord, because the lord commeth not to the land by discent, but by way of escheat (1).

"*THE disseisee may enter upon the lord, &c.*" For albeit the alienee of the disseisor die seised, and the lord by escheat commeth to the land by act in law, yet because the land discendeth not to him, the entrie of the disseisee in respect of the escheat shall not be taken away. For a dying seised, and a discent, and not a dying seised and an escheat, doth take away the entrie: for (as hath beene said) the discent is the worthier title. But in that case, if the lord by escheat die seised, and the land discend to his heire, that discent shall take away the entrie of the disseisee. So it is if the disseisor die seised, and the heire of the disseisor dieth without heire, the disseisee cannot enter upon the lord by escheat. So as there is a diversitie as touching the discent, when after a discent cast, the issue in taile dieth without issue, and when after a discent cast, the heire in fee simple dieth without heire: for he in the reversion, or remainder, upon a state taile claimeth in above the state taile, but the lord by escheat claimeth in under the heire in fee simple.

(F. N. B. 144. a.)

37 H. 6. 1.
9 H. 7. 24. b.
(Post. 364. b.)
(Ant. 238. b.)

Sect. 391.

ALSO, if a man be seised of certain land in fee, or in fee taile, upon condition to render certain rent, or upon other condition, albeit such tenant seised in fee, or in fee taile, dieth seised, yet if the condition bee broken in their lives, or after their decease, this shall not take away the entrie of the feoffor or donor, or of their heires, for that the tenancie is charged with the condition, and the state of the tenant is conditionall, in whose hands soever that the tenancie commeth, &c.

UPON these two sections is to bee observed a diversitie betweene a right, for the which the law giveth a remedie by action, and a title, for the which the law giveth no remedie by action, but by entrie only (2). For example, the feoffee upon condition in

33 Ass. 11. 24.
21 H. 6. 17.

(1) When the lord comes to the land by escheat, the law only casts the freehold upon him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and as, by his entry, he fills the possession, the lord's title, which was only good while a tenant was wanting, must necessarily be at an end.—[Note 162.]

(2) Though, by the disseisin a tortious possession is acquired, it is in the present case, such only as between the disseisor and the disseisee, and does not

in this case hath a right to the land, and therefore his entrie may be taken away, because hee may recover his right by action; but the feoffor or donor that hath but a condition, his title of entrie cannot be taken away by any discent, because he hath no remedie by action to recover the land, and therefore if a discent should take away his entrie, it should barre him for ever.

33 Ass. 11. 24. (Ant. 205.) And the law is all one whether the discent were before the condition broken, or after.

Brook, tit. Mortmaine, 6. 47 E. 3. 11. 21 E. 3. 17. ☞ Also hee that hath a title to enter upon a mortmaine shall not be barred by a discent, because then he should bee without all remedie. And so it is in case where a woman hath a title to enter *causâ matrimonii prælocuti*, no descent shall take away her entrie, because she hath but a title, and no remedie by action (1). [240. b.]

40 Ass. 13.

Sect. 392.

ALSO, if such tenant upon condition be disseised, and the disseisor die thereof seised, and the land discend to the heire of the disseisor, now the entrie of the tenant upon condition, who was disseised, is taken away. Yet if the condition be broken, the feoffor or the donor which made the estate upon condition, or their heires, may enter,* causâ quâ suprà.

IF a man be seised of lands in fee, and by his last will in writing deviseth the same to another in fee, and dieth, after whose decease the freehold in law is cast upon the devisee, and the heire, before any entrie made by the devisee, entreth, and dieth seised, this discent shall not take away the entrie of the devisee; for if the discent, which is an act in law, should take away his entrie, the law should barre him of his right, and leave him utterly without remedie (2). And so it is of him that entreth for consent to a ravishment; and so it was resolved in the case of *Martin Trotte* of London

* *&c.* added in L. and M. but not in Roh.

not affect the estate of the feoffor on condition; the condition being so inseparably annexed and inherent to the land, as to bind it, in whose hands soever it comes. See Ow. 141.—[Note 163.]

(1) The assertion, that a woman in this case has no remedy by action, may, perhaps, be disputed, as the writ *causâ matrimonii prælocuti* extends to all the degrees. See the writ in the Register. Booth's Real Actions, 197. and Fitz. Nat. Br. 205.—[Note 164.]

(2) Acc. the case of Matthewson *v.* Trott, Owen, 141. 1 Leo. 209. But the reason given in the Commentary, that the devisee, in this case, has no remedy by action, is not well founded, if what sir Edward Coke observes in page 111. a. be true, that the devisee may either enter or have his writ *ex gravi quærelâ*. Upon this head, the judges Anderson and Walmesley seem to differ on the case above cited. Whatever may be the case with respect to a discent, a fine levied by the heir at law is a bar to a devisee after five years nonclaim. Hulm *v.* Heylock, Cro. Car. 200. It is also a bar to a title of entry for a condition broken, or a right or title of entry upon any other account. Mayor of London *v.* Alford, Cro. Car. 575. 1 Jones, 452. See Mr. Cruise's Essay on Fines, 146, 147.—[Note 165]

London [n] *Pasche* 32 *El. in Com. Banco*; and accordingly was the opinion of the court of common pleas, [o] *Pasche* 1 *Jac. Reg.* To this may be added as a like case, the king's patentee before he enter, &c. Another reason wherefore a discent shall not take away the entrie of him that hath a title to enter by force of a condition, &c. is, for that the condition remaines in the same essence that it was in at the time of the creation of it, and cannot be divested or put out of possession, as lands and tenements may (3).

[n] Pasch. 32 Eliz. in Communi Banco. 7 R. 2. Scir. Fac. 3. 41 E. 3. 14. per Finchden.

[o] Pasch. 1 Jac. Regis in Communi Banco.

Sect. 393.

ALSO, if a disseisor die seised, &c. and his heire enter, &c. who endoweth the wife of the disseisor of the third part of the land, &c. in this case as to this part which is assigned to the wife in dower, presently after the wife entreth, and hath the possession of the same third part, the disseisee may lawfully enter upon the possession of the wife into the same third part. And the reason is, for that when the wife hath her dower, she shall be adjudged in immediately by her husband, and not by the heire (1); *and so as to the freehold of the same third part, the discent is defeated*. And so you may see, that before the endowment the disseisee could not enter into any part, &c. and after the endowment he may enter† upon the wife, &c. but yet he cannot enter upon the other two parts which the heire of the disseisor hath by the discent‡* (2).

"*DIE*

* *&c.* added in L. and M. and Roh.
† *upon the wife*, not in L. and M. or Roh.
‡ *&c.* added in L. and M. and Roh.

(3) Hainsworth *v.* Pretty, Cro. Eliz. 919. Thomas devised to Richard, his eldest son, in fee, upon condition that he should pay to his other children the sums appointed to them according to the intent of his will; and on refusal, that his younger sons and daughters should have it to them and their heirs. Richard refused payment, and died; and Thomas, his son, entered, and the younger sons and daughters entered upon him; it was contended, that the descent upon Thomas took away the entry of the younger sons and daughters: but the court held the contrary. For it was not as a descent to a stranger after a devise, before the entry of the devisee, which, perhaps, might take away their entry, because it was not then an immediate devise; but it was *quasi* a devise upon a limitation, or upon a condition broken, which no descent should take away or prejudice.—[Note 166.]

(1) The dowress holds of the heir; but by the institution of the law, she is in of the estate of her husband; so that after the heir's assignment, she holds by an infeudation from the immediate death of her husband. Hence it is that dower defeats descent, because the lands cannot be said to descend as demesne which are in tenure; and the assignment of dower being in the nature of infeudation, and taking place immediately from the death of the husband, there are only two-thirds which descended as demesne. Gilb. on Dower, 395. —See ant. 31. b.—[Note 167.]

(2) The doctrine contained in this section seems to apply to the cases of a recovery suffered by the heir, before the assignment of dower.—[Note 168.]

"*DIE seised, &c.*" *viz.* in fee simple or in fee tayle.

"*And his heire enter, &c.*" So as he hath an actuall fee simple.

"*Of the 3. part of the land, &c.*" id est, in severaltie.

By this section it appeareth, that an entrie being taken away by the discent, is revived by the endowment, albeit the tenant in dower shall have it but for her life. And the cause is, for that although the heire entred, yet ☞ when the wife is endowed she shall not be in by the heire, [a] but immediately by her husband being the disseisor, who is in for her life by a title paramount the dying seised and discent, and therefore in judgement of law, the discent as to the freehold, and the possession which the heire had is taken away by the endowment; for that the law adjudgeth no meane seisin betweene the husband and the wife. [241. a.]

[a] 8 E. 2. Entrie, 75. 19 E. 2. Dower, 171. 5 E. 2. Entrie, 66. 24 E. 3. 32. 40. 38 Ass. Pl. 26. 43 E. 3. 32. 45 E. 3. 9. b. 11 H. 4. 11. 7 H. 5. 3. 10 E. 3. 27, 28. 36 H. 6. Dower, 30.

31 E. 1. Mesne, 55. (F. N. B. 136.)

If there bee lord, mesne and tenant, the mesne doth grant to the tenant to acquite him against the lord and his heires, the lord dies, his wife hath the seigniorie assigned to her for her dower, and distraines the tenant; albeit the grant was to acquite him against the lord and his heires only, yet because shee continued the estate of her husband, and the reversion remained in the heire, this grant of acquitall did extend to the wife, which is a notable case.

If after the dying seised of the disseisor, the disseisee abate, against whom the wife of the disseisor recover by confession in a writ of dower, in that case, though the discent bee avoided as *Littleton* here saith, yet the disseisee shall not enter upon the tenant in dower, because the recoverie was against himselfe; but if he had assigned dower to her *in pais*, some say he should enter upon her (3).

10 E. 3. 26. (7 Rep. 9. a.)

A man makes a gift in taile reserving twentie shillings rent, and dies, the donee takes wife, and dieth without issue, the heire of the donor entreth and endoweth the wife, shee is so in of the estate of her husband, that albeit the estate taile be spent, and the rent reserved thereupon determined, yet after she be endowed, she shall be attendant to the heire in respect of the said rent. And so it is of lord and tenant, the wife that is endowed shall be attendant for the due services; but if any services be encroached, albeit that encroachment shall binde the heire, yet the wife shall be contributorie but for the services of right due (4).

"*So*

(3) *So note, though the disseisee, being an abater, did an act to which he was compellable, yet it is not as good as if he had been actually compelled. Supra*, 35. Lord Nott. MS.—[Note 169.]

(4) Sir Edward Coke, in this passage, and in a former part of his Commentary, puts several cases on the continuance of the wife's dower after the fee charged with it is determined. Perhaps the following distinctions and observations will assist in clearing up the complex and abstruse points of learning in which this question is involved. I. In those cases where the fee is evicted by title paramount, the dower and courtesy necessarily cease upon the eviction. Such is the case put by Littleton in the section before us. II. When the donor enters

"*So you may see, that before the endowment the disseisee could not enter, and after the endowment he may enter, &c.*" The like hath beene said before in this chapter, *Sect.* 386, where the entrie of the disseisee may be taken away for a time, and by matter *ex post facto* revived againe.

Nota,

enters for breach of condition; as his entry absolutely defeats the estate of the tenant on condition, so it defeats his wife's right of dower, and the husband's right of courtesy, and all other charges brought upon the estate, either by the donee's own act, or by act of law. See note 2. fo. 202. b. III. If a person seised in fee tail, or any other determinable fee, conveys in fee, the wife's right of dower, and the husband's courtesy, can only be commensurate with the estate of the grantee, and must necessarily cease whenever that estate ceases. See 10 Rep. 97. b. 98. a. IV. As to estates in fee simple conditional at the common law, and estates tail under the statute *de donis*;—the wife was entitled to her dower, and the husband to his courtesy, out of them, after the failure of the issues. But it may be observed, that though it is now difficult to avoid considering estates in fee simple conditional in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversioner expectant on the failure of these heirs; yet this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or being such, if they afterwards failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter.—This entry, therefore, was not an entry upon the *natural expiration of a previous estate,* but for a *condition broken*; in which case, as in all others where entry is made for breach of a condition, the right of the wife to her dower, and the husband to his courtesy, if the general rule were adhered to, would be defeated. But for reasons now rather to be guessed than demonstrated, this case was made an exception from the general rule. So with respect to the right of the wife of tenant in tail to her dower, and the husband to his courtesy, after the failure of the issues in tail; the statute *de donis* introduced no new estate, but only preserved estates limited as conditional fees to the issues inheritable under them, by preventing the tenants of such conditional fees from alienating or disposing of them; and as they preserved the estates, so they preserved the incidents belonging to them, and, among others, the right of the wife to her dower, and the husband to his courtesy. V. If a person makes a gift in tail, reserving rent; after failure of the issues in tail, the rent will not be continued, either for the dower of the wife, or the courtesy of the husband. Plo. Com. 155. VI. As to limited fees; —by which, in this place, are to be understood those fees which are qualified, not because the estate of the grantor is limited—(such as those which are classed under the third distinction)—but those which being created by a person seised in fee simple, are by the original grant by which they are created, only to continue till a certain event; as a grant to *A.* and his heirs, lords of the manor of Dale, or to *A.* and his heirs, while there shall be heirs of the body of *B.*:—or those fees which are originally devised or limited in words importing a fee simple or fee tail absolute and unconditional, but which, by subsequent words, are made determinable upon some particular event (see Note 1. 203.): —as to fees of this description, it should seem by the case cited in the Note to F. N. B. 149 G. and the cases of Flavell v. Ventrice, 1 Roll. Abr. 676. and Sammes and Payne's case, 1 Leo. 167. 1 And. 184. 8 Rep. 34. Goulds. 81. that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his courtesy, after the expiration of the period to which the fee charged with the dower or courtesy is to continue;

Vide Sect. 302. 388. 25 E. 3. 48. Pl. Com. 553. (Post. 354. b. Dyer, 31. b.) (1 Roll. Abr. 658. Ant. 55. b.)

Nota, albeit the disseisor after a discent taketh to him but an estate for life, yet when the disseisee doth enter upon him, he shall thereby devest the reversion, for the estate of freehold is that whereupon a *præcipe* doth lye, and therefore the entrie of the disseisee is as available in law, as if he had recovered it in a *præcipe*. And so it is if a disseisor make a lease for life, and grant the reversion to the king, the entrie of the disseisee upon the tenant for life shall devest the reversion out of the king in the same manner as if the disseisee had recovered the lands against the tenant for life in a *præcipe*.

☞ Sect. 394. [241. b.]

ALSO, if a woman be seised of land in fee, whereof I have right and title to enter, if the woman take husband and have issue betweene them, and after the wife die seised, and after the husband die, and the issue enter, &c. in this case I may enter upon the possession of the issue (en cest case

tinue; but that where the fee is originally devised in words importing a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's courtesy cease with the estate to which it is annexed. Such appears to be the distinction established by the foregoing cases. But a different doctrine as to cases of the latter description, seems to have been laid down in the case of Buckworth *v.* Thirkell, determined in Trinity term, 25 Geo. 3, in the court of king's bench. There Joseph Sutton the testator devised his estates to trustees, upon trust to pay the rents and profits of them for the maintenance and education of Mary Barrs, till she arrived at twenty-one, or was married: "And from and after the said Mary "Barrs should have attained her age of twenty-one years, or should be married, "he gave and devised all the said lands and premises to the said Mary Barrs, "her heirs and assigns for ever; but in case the said Mary Barrs should "happen to die before she arrived at the age of twenty-one years, and without "having issue of her body lawfully begotten; then, from and after the decease "of the said Mary Barrs without issue, as aforesaid, he gave and devised all "his said estates unto his grandson Walter for life," with several remainders over. Mary Barrs married Solomon Hansard, and had issue a son, who died in her life; and afterwards Mary Barrs died under twenty-one. In this case, the court were unanimously of opinion, that on the decease of Mary Barrs, her husband became entitled by the courtesy to the estates for his life, and that, subject thereto, the devisees over became entitled to them by way of executory devise.—*Collect. Jurid.* vol. 1. 332. 3 Bos. and Pull. 652. The ground upon which the court appears to have formed their opinion on it, is, an analogy they supposed it to bear to the case of estates in fee simple conditional, and estates tail; in both of which dower and courtesy continue after failure of the issues; and in both of which the wife's being seised of a fee, to which the issue might by possibility inherit, entitles the husband to courtesy.—On the subject discussed in this note much useful learning will be found in Goodhill *v.* Brigham, 1 Bos. and Pull. 192. Doe *ex dem.* Andrew *v.* Hutton, 3 Bos. and Pull. 643. Doe *ex dem.* Willis *v.* Martin, 4 Durn. and East, 39. and Maundrell *v.* Maundrell, 7 Ves. jun. 567. 10 Ves. jun. 246.—[Note 170.]

case jeo * poy enter sur le possession l'issue), *for that the issue comes not to the lands immediately by discent after the death of the mother, &c.* † *but by the death of the father* (1).

Contrarium tenetur P. 9 H. 7. per tout le court, & M. 37 H. 6.

"*IN this case I may enter upon the possession of the issue, &c.*" For here was but a discent of a reversion at the time of the dying seised, for the estate of the tenant by the courtesie had commencement by the having of issue, and is consummate by the death of the wife, so as the fee and franktenement did not after the decease of the wife descend to the heire, and albeit the tenant by the courtesie dieth afterwards, and that the franktenement is cast upon the heire, so as now he hath the fee and franktenement by discent, yet because the heire came not to the fee and franktenement at once, immediately after the decease of the wife, such a mediate discent shall not take away the entrie of the disseisee. On the other side, an immediate discent may take away an entrie for a time, and mediately may be avoided by matter *ex post facto*, as hath beene said. But if a dying seised taketh not away the entrie of him that right hath at the time of the discent, it shall not by any matter *ex post facto* take away his entrie. Vide 9. H. 7. 24. and 37 H. 6. 1. See before the chapter of Homage. (3 Rep. 34. a.)

If a disseisor die without heire (A) his wife privement enseint with an issue, and after the issue is borne, who entreth into the land, he hath the land by discent, and yet thereby the entrie of the disseisee shall not be taken away, because, as *Littleton* here saith, the issue commeth not to the lands immediately by discent, after the decease of the father.

And so it is if a disseisor make a gift in taile, the remainder in fee, and the donee dieth without issue, leaving his wife privement enseint with a sonne, and he in the remainder enters, and after the sonne is borne, who entreth into the land, this discent shall not take away the entrie of the disseisee, *causâ quâ suprâ.*

"*Contrarium tenetur, &c.*" This is an addition, and therefore to be passed over. And at this day, this case of *Littleton* is holden for cleere law.

Sect.

* poy *not in L. and M. or Roh.*
† *but by the death of the father*, and the note that follows, not in L. and M. or Roh.

(A) heire *seems to be here inserted for* issue. *See Mr. Ritso's Intr. p.* 119.

(1) Conformably to this, it was held by lord Holt in the case of Carter *v.* Tash, 1 Salk. 241. that a descent, which tolls entry, ought to be an immediate descent; and therefore if a feme disseisoress take husband, and hath issue and dies, and after the husband dies, the descent to the issue does not take away entry, because the interposition of tenant by the courtesy does impede it; and because coverture, to avoid a descent, ought to be continual from the time of the disseisin to the descent; for, if a feme be sole at the time of the disseisin, or of the descent, or any time intermediate, her entry is not preserved, because she had an opportunity to enter and prevent the descent: as if a feme covert is a disseisee, and after her husband dies she takes a second husband, and then the descent happens, this descent shall take away the entry of the feme: and upon this last point the plaintiff in that case was nonsuited.--[Note 171.]

(Ante, 238. b.)

Sect. 395.

ALSO, if a disseisor enfeoffe his father in fee, and the father die, seised of such estate, by which the land descend to the disseisor, as sonne and heire (si un disseisor enfeoffa son pier en fee, et le pier morust de tiel estate seisie, per que les tenements discendont a le disseisor,* come fits et heire), *&c. in this case the disseisee may well enter upon the disseisor, notwithstanding the ☞ discent, for that as to the disseisin, the disseisor shall be adjudged in but as a disseisor, notwithstanding the discent,* ‖ quia particeps criminis (1). [242. a.]

15 E. 4. 23. a.
11 E. 4. 2.
18 E. 4. 25. a.
33 H. 6. 5. b.
34 H. 6. 11.
12 H. 8. 9.
24 H. 8. 3. 9.
18 H. 8. 5.
5 H. 7.
29 Ass. 54.
39 E. 3. 25, 26.

OF this sufficient hath beene said before in this chapter, Sect. 386. And regularly it is true, that albeit a discent be cast, and the entrie of the disseisee taken away, yet if the disseisor commeth to the land againe, either by discent, or purchase of any estate or (B) freehold, which is implyed in the *(&c.)* the disseisee may enter upon him, or have his assise against him, as if no discent or meane conveyance had beene, *quia particeps criminis.*

(Post. Sect. 409.)

Sect. 396.

ALSO, if a man seised of certaine land in fee have issue two sons, and die seised, and the younger sonne enter by abatement into the land, and hath issue, and dieth seised thereof, and the land descend to his issue, and the issue enters into the land: in this case the eldest sonne, or his heire, may enter by the law upon the issue of the younger son, notwithstanding the discent, because that when the younger son abated into the land after the death of his father, before any entrie made by the eldest sonne (devant ascun entrie per le fits eigne † fait), *the law intend that hee entred claiming as heire to his father. And for that the eldest sonne claimes by the same title, that is to say, as heire to his father, hee and his heires may enter upon the issue of the younger son* (il et ses heires poient enter sur l'issue de puisne ‡ fits), *notwithstanding the discent, &c. because they*

* ent *added in L. and M.*

‖ *&c.* added: quia particeps criminis, *not in L. and M.*

† fait—*not in L. and M.*

‡ fits—frere, *L. and M. and Roh.*

(B) *Should it not be* of, *instead of* " or "? *See Mr. Ritso's Intr. p.* 119.

(1) For when the disseisor enfeoffs the father, it is presumed to be done in order afterwards to come in by descent, and the act of law shall not give sanction to the wrong of the party; nor shall any man by his own wrong, however cunningly contrived, give to himself a right; for when the heir by the descent gains a *jus possessionis*, he is supposed innocent of the wrong of his ancestor, but here he is partner of his guilt. See Gilb. Ten. 27, 28.—[Note 172.]

they claime by the same title. And in the same manner it shall be, if there were more discents from one issue to another issue of the younger sonne (1).

Sect. 397.

BUT in this case, if the father were seised of certaine lands in fee, and hath issue two sons, and die, and the eldest sonne enter (et l'eigne * fits enter), *and is seised, &c. and after the younger brother disseiseth him, by which disseisin he is seised in fee, and hath issue, and of his estate dieth seised, then the elder brother cannot enter, but is put to his writ of* entrie sur disseisin, &c. § *to recover the land. And the cause is, for that the youngest brother commeth to the lands by wrongful disseisin done to his elder brother. and for this wrong the law cannot intend that he claimeth as heire to his father, no more than if a stranger had disseised the elder brother which had no title* (Et la cause est, pur ceo que le puisne frere vient a les tenements per tortious disseisin fait a son eigne frere, et per el tort la ley ne poit entender que il claime come heire a son pier, nient pluis que un estrange person que est disseisie l'eigne frere ‡ que n'avoit ascun title), *&c. And so you may see the diversitie, where the younger brother entreth after the death of the father before any entrie made by the elder brother in this case,* ‖ *and where the elder brother enters after the death of his father, and after is disseised by the younger brother, where the younger after dieth seised* †.

"*IN this case the eldest sonne, &c. may enter upon the issue of the younger son, &c.*" And the reason hereof is, for (Plow. 306. a.) that the law intendeth the youngest sonne entred claiming the land as heire to his father, and because the eldest sonne claimeth also by the same title, *viz.* as heire to his father, therefore hee and his heires may enter upon the second sonne and his heires, in respect of the privitie of the bloud betweene them, and of the same claime by one title, albeit the youngest son gained a fee simple by his entrie: for *Littleton* here calleth it an abatement, which proveth the gaining of a fee simple.

And it is to be observed, that *assisa mortis antecessoris non tenet inter conjunctas personas sicut fratres et sorores, &c.* for these are privie in bloud, but it lyeth against strangers, and then damages are to be recovered against a stranger, but not against his brother. Bract. lib. 4. fol. 261. 282, 283. Britton, fol. 180, 181. Fleta, lib. 5. cap. 1, 2, &c.

20 E. 3. Darr. present. 13. 12 H. 3. Mord. pl. ultim. 13 E. 1. Mord. 47.
29 Ass. 11. F. N. B. 196. B. (8 Rep. 42.) (Post. 271. a.)

Lands

* fits—frere, *L. and M. and Roh.*
§ *&c.* not in L. and M. or Roh.
‡ frere, *not in L. and M. or Roh.*
‖ *&c.* added in L. and M. and Roh.
† *&c.* added in L. and M. and Roh.

(1) When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to preserve the possession in the family, that nobody else abates. Gilb. Ten. 28.—[Note 173.]

Pasch. 3 E. 3. Coram Rege Kanc. in Thesaur.

Lands were given to the husband and wife, and to the heires of their two bodies, they had issue a daughter, the wife died, the husband had issue by another wife foure sons and died, the eldest sonne ☞ abated and died seised, this discent did take away the entrie of the daughters, because they claimed not by one title. And in ancient bookes the eldest sonne is called *hæres propinquus*, and the younger sonne *hæres remotus*. And albeit the eldest sonne hath issue and dieth, and that after his decease the youngest son or his heire entreth, and many discents be cast in his line, yet may the heires of the eldest sonne enter in respect of the privitie of the bloud, and of the same claime by one title; but if the youngest sonne make a feoffment in fee, and the feoffee die seised, that discent shall take away the entrie of the eldest, in respect that the privitie of the bloud faileth. And admit that the youngest sonne be of the halfe bloud to his brother, yet he is of the whole bloud to his father, and therefore if he entreth by abatement, and dieth seised, it shall not barre his elder brother of his entrie. But if the eldest sonne entreth, and gaineth an actuall possession and seisin, then the entrie of the youngest is a disseisin. And then a dying seised shall take away the entrie of the eldest, for *possessio terræ* must be *vacua* when the youngest sonne enters by abatement, as *Littleton* saith, because he hath more colour in that case to claime, as heire to his father, who last was actually seised. Therefore if after the decease of the father, an estranger doth first enter and abate, upon whom the youngest sonne entreth and disseise him, and die seised, this discent shall binde the eldest, for he entred by disseisin, and not by abatement.

[242. b.]

8 E. 2. Ass. 380. 40 E. 3. 24. b. 19 Ass. 24.

Vid. Brooke, tit. Entrie, 27.

(Roll. Abr. 628, 629.)

(4 Rep. 58.)

If a man bee seised of lands of the nature of ☞ burgh English, and hath issue two sonnes and die, and the eldest sonne before any entrie made by the youngest, entreth into the land by abatement, and dieth seised, this shall not take away the entrie of the youngest brother. *Et sic de similibus.* And these and the like cases are all within the reason and rule of our author. And where our author speaketh only of an abatement, so it is not (A) an intrusion; for if the father make a lease for life, and hath issue two sonnes and dieth, and the tenant for life dieth, and the youngest sonne intrude, and die seised, this discent shall not take away the entrie of the eldest. But if the father had made a lease for yeares it had beene otherwise, for that the possession of the lessee for yeares maketh an actuall freehold in the eldest sonne. And it is to be observed, that the reason of *Littleton* in this case (for that both the brethren hold by one title) holdeth also in many other cases.

[243. a.]

(1 Roll. Abr. 629. Ant. 15. a.)

22 E. 4. 4. (F. N. B. 34. Ant. 186. b.)

If two coparceners make partition to present by turne, and one of them usurpe in the turne of the other, this usurpation shall not put the other out of possession, because they claime by one title.

Doctor & Stud. cap. 30. fol. 117.

If two coparceners be, and they severally present to the ordinarie, yet the church is not litigious, because they claime all by one title (1).

If

(A) *The text should be read, it seems, as if lord Coke had used the word* of *instead of* "not." *See Mr. Ritso's Intr. p.* 119.

(1) Acc. Dig. p. 1. c. 3.—See 7th Ann. c. 18.

If upon a writ of *diem clausit extremum*, the youngest sonne be found heire, the eldest son hath no remedy by the common law, because they claimed by one title; but otherwise it is if they claime by severall titles, as it appeareth in our bookes (2). But this is now holpen by a statute * made since *Littleton* wrote. 12 E. 4. 18. * 2 E. 6. cap. 8. 2 H. 7. 12. a. See the Section next following.

If two parsons be in debate for tithes, which amount to above the fourth part, and one man is patron of both churches, no *indicavit* doth lye, for that both incumbents claime by one and the same patron. *Et sic de similibus.*

And where *Littleton* saith, seised of lands in fee, the same law it is if a man bee seised of lands in taile, and hath issue two sonnes *mutatis mutandis*.

"*And is seised, &c.*" That is to say, actually seised, either by entrie, as *Littleton* here putteth it, or by possession of the lessee for yeares, or the like. (Post. 245. a.)

"*Had no title, &c.*" That is to say, any pretence or semblance of title, as the younger brother here hath; and in many other cases there is a great diversitie holden in our bookes [o] where one hath a colour or pretence of right, and when he hath none at all, whereof you may read plentifully in our bookes. [o] 2 E. 2. Bastardie, 19. 21 E. 3. 34. 22 Ass. 85.

39 E. 3. 26. 17 E. 3. 59. 11 E. 3. Ass. 88. 21 H. 6. 14. 11 E. 3. Age, 3. Vide Sect. 400. & cap. Garran. (A).

(A) *See the observation under* (B) *at the end of the commentary on Sect.* 400.

Sect. 398.

IN the same manner it is, if a man seised of certaine land in fee, hath issue two daughters and dieth, the eldest daughter entreth into the land claiming all to her, and thereof onely taketh the profits, and hath issue and dieth seised, by which her issue enter, which issue hath issue and dieth seised, and the second issue enter †, & sic ultra, *yet the younger daughter, or her issue as to the moitie, may enter upon any issue whatsoever* [243. b.] *of the elder* ☞ *daughter notwithstanding such discent, for that they claime by one same title, &c. But in such case where both sisters have entred after the death of their father, and were thereof seised, and after the eldest sister had disseised the younger of her part, and was thereof seised in fee, and hath issue, and of such estate dieth seised, whereby the lands descend to the issue of the elder sister, then the younger sister nor her heirs cannot enter, &c.* causâ quâ suprà, &c.

"*CLAIMING*

† *&c.* added in L. and M. and Roh.

(2) At the common law, if the youngest son were found heir, the eldest might have an office; the doubt was, whether the point, which was heir, should be tried by immediate interpleader, or at the full age of him that was first found heir: but the 2d and 3d Ed. 6. ch. 8. hath remedied it, and given an interpleader immediately, on traversing the first office, which cannot be, unless the party who traversed had an office found for himself. 7 Co. 44. a. b. Kenn's case.—[Note 174.]

(Hob. 120. Post. 373. b. Ant. 198.) 21 Ass. 19. 21 E. 3. 7. 27. 32. 26 Ass. 2. 27 Ass. 68. 36 Ass. p. 1. 43 E. 3. 19. 4 H. 7. 10. 16 H. 7. 4. (Mo. 60.) See more of this in the chapter of Warrantie, Sect. 710. 28 Ass. 30. Vide Sect. 710. (4 Leo. 52. Ant. 174. a.)

"*CLAIMING all to her.*" Here it appeareth, that when the one coparcener doth specially enter, claiming the whole land, and taking the whole profits, that she gaines the one moitie, *viz.* of her sister by abatement, and yet her dying seised shall not take away the entrie of her sister; whereas when one coparcener enters generally, and taketh the profits, this shall be accounted in law the entrie of them both, and no divesting of the moitie of her sister (1).

If one coparcener enter claiming the whole, and make a feoffment in fee, and take backe an estate to her and her heires, and hath issue and die seised, this discent shall take away the entrie of the other sister, because by the feoffment the privitie of the coparcenarie was destroyed.

"*Claime by one same title, &c.*" Of this sufficient hath beene said in the next precedent Section.

"*Cannot enter, &c.*" Of this there hath beene also spoken in the same Section.

Sect. 399.

ALSO, if a man be seised of certain lands in fee, and hath issue two sonnes, and the elder is a bastard, and the younger mulier, *and the father die, and the bastard entreth claiming as heire to his father, and occupieth the land all his life, without any entrie made upon him by the* mulier, *and the bastard hath issue, and dieth seised of such estate in fee, and the land descend to his issue, and his issue entreth, &c. in this case the* mulier *is without remedie, for he may not enter, nor have any action to recover the land, because there is an ancient law in this case used, &c.**

Pl. Com. 57. 39 E. 3. Le darreine case.

"*SEISED in fee.*" For this holds not in case of an estate taile.

Lib. 8. fol. 101, 102. Sir Rich. Lechford's case. (2 Roll. Abr. 584. 586. Doctor & Stud. 68, 69.) Glanvil. lib. 7. cap. 2. Bract. lib. 5. cap. 19. Brit. cap. 70. Vide Sect. 188.

"*Mulier,*" *seu filius mulieratus. Mulier* hath three significations, First, *Sub nomine mulieris continetur quælibet fœmina.* Secondly, *Propriè sub nomine mulieris, continetur virgo.* Thirdly, *Appellatione mulieris, in legibus Angliæ, continetur uxor. Et sic filius natus vel filia nata ex justâ uxore, appellatur in legibus Angliæ filius mulieratus, seu filia mulierata,* a sonne *mulier,* or a daughter *mulier. Sicut bastardus* (2) *dicitur à Græco verbo Bassaris,*

* *&c.* not in L. and M. or Roh.

(1) *Hob.* 120. *Smale* v. *Dales. The contrary is held, that one coparcener cannot be disseised without actual ouster, and claim shall not alter the possession.* Lord Nott. MS.—[Note 175.]

(2) *Sir Henry Spelman, verbo Bastard, rejects this derivation, and holds it to be a pure Saxon word Bastart,* viz. impurè natus, ut apud nos, Upstart dicitur homo novus. *Lord Nott. MS.*—In Germany, and with us, (who derive many of our customs and political opinions from the Germans), bastardy was always a circumstance of ignominy. But in Spain, Italy, and France, bastards were in

[244. a.] *Bassaris, i. e. meretrix, seu concubina, quia procreatur ex meretrice seu & concubinâ.* In English hee is called base borne, and thereupon some say, that a bastard is as much to say, as one that is a base naturall, for *aerd* signifieth nature. I read in *Fleta* [p] that there bee three kindes of bastards, *viz. manser, nothus, & spurius*, which are described in two old verses :

[p] Flet. lib. 1. cap. 5. Vide Sect. 380. (1 Roll. Abr. 356, 357, 358, 359. Cro. Jac. 541. Godb. 281. Palm. 9. 4 Inst. 36.)

Manseribus scortum, notho mœchus dedit ortum.
Ut seges è spicâ, sic spurius est ab amicâ (1).

But we terme them all by the name of bastards that be borne out of lawfull marriage. By the common law [r] if the husband be within the foure seas, that is, within the jurisdiction of the king of England, if the wife hath issue, no proofe is to be admitted to prove the childe a bastard, (for in that case *filiatio non potest probari*) unlesse the husband hath an apparent impossibilitie of procreation; as if the husband be but eight yeares old, or under the age of procreation, such issue is bastard, albeit he be borne within marriage (2). [s] But if the issue be borne within a moneth

[r] Bract lib. 4. fol. 278, 279. 7 H. 4. 9. 43 E. 3. 19. 41 E. 3. 7. 44 E. 3. 10. 29 Ass. 54. 98 Ass. 14. 1 H. 6. 7. 19 H. 6. 17. 39 E. 3. 13. [s] 18 E. 4. 28. (1 Salk. 120.)

in many respects on an equal footing with legitimate children. During the first and second races of the kings of France, no difference appears to have been made between their legitimate and illegitimate offspring. The same seems to have been the case of the offspring of all the sovereign princes and higher ranks of nobility in France. Their acknowledging a natural child to be their child was considered as tantamount to any formal act of legitimation. But the natural children of all other persons were considered as villeins. After the accession of the Capetian line, the condition of bastards was altered for the worse in many respects. Those of royal parentage were excluded from the throne, and were no longer held to be of blood royal. They were only permitted to bear the arms of France, with a bar. A similar change took place with regard to the bastards of the princes and nobility. By an ordinance of the year 1600, it was declared, that the children of nobility should not be considered even as gentlemen, unless they obtained letters of nobility. On the other hand, the bastards whose parents were of a lower order, instead of being considered villeins, as before, began about the commencement of the 16th century to be considered as free men, and except as to the right of receiving and transmitting succession, they are now, in France, on an equal footing with their fellow subjects. See *Oeuvres de Chancelier D'Agueſseau*, t. 7. p. 881. *Dissertation dans laquelle on discute les principes du droit Romain et du droit François par raport aux Bâtards.*—[Note 176.]

(1) *Filius naturalis à vulgo barbarorum opponitur legitimo. Sed revera opponitur filio adoptivo, in quo sensu Tiberius vocat Drusum filium suum naturalem. Cal. Lex. verb. nat. filius. Spurii Latini et Græci sine patre.* Ib.—Lord Nott. MS. *Jure pontificio nothi dicuntur qui ex adulterino concubitu, manseres qui ex scorto, spurii exitus qui sacris initiati sunt, aut religionem professi sunt.*—Ib.—[Note 177.]

(2) It is now held, that the husband's being within the four seas is not conclusive evidence of the legitimacy of the child, and it is left to a jury to consider whether the husband had access to his wife. See 3d P. W. 275, 276. Pendrell v. Pendrell, 2 Stra. 925. So evidence may be given, that the husband's habit of body was such, as to make his having children an impossibility. Lomax v. Holmden, 2 Stra. 940. See also 1 Roll. Abr. 358. 1 Salk. 123.

moneth or a day after mariage, betweene parties of full lawfull age, the childe is legitimate (3).

" *Descend to his issue.*" For if the bastard dieth seised without issue, and the lord by escheat entreth, this dying seised shall not barre the *mulier*, because there is no discent. If the bastard enter, and the *mulier* dieth, his wife privement ensient with a sonne, the bastard hath issue and dieth seised, the sonne is borne, his right is bound for ever. But if the bastard dieth seised, his wife enseint with a sonne, the *mulier* enter, the sonne is borne, the issue of the bastard is barred; for *Littleton* putteth his case, that there must not only be a dying seised, but also a discent to his issue.

(Post. 260. 273. 1 Roll. Abr. 624. 8 Rep. 101. b. Ant. 15. a. 7 Rep. 42.)

" *And his issue entreth, &c.*" And so it is to be understood, albeit the *mulier*, after the decease of the bastard, doth enter before the heire of the bastard; for the discent bindeth, and not the entrie of the heire.

Lib. 8. 101, 102. Sir Rich. Lechford's case.

" *The mulier is without remedie.*" Hereby it appeareth that this discent differeth from other discents, for this discent barreth the right of the *mulier*, whereas other discents doe take away the entrie only of him that right hath, and leaveth him to his action, but here by the dying seised of the bastard, his issue is become lawfull heire. [*a*] It is holden that if the *mulier* bee within age at the time of the dying seised, that neverthelesse hee shall bee barred, because the issue of the bastard is in judgement of law become lawfull heire, and the law doth preferre legitimation, before the privilege of infancie.

[*a*] 5 E. 2. Discent, Br. 49. 31 Ass. 18. 22. 33 E. 3. Verdict, 48. 36 Ass. 2. Pl. Com. Stowel's case. 10 E. 3. 2.

And the reason of this case is, for that *Justum non est aliquem post mortem facere bastardum, qui toto tempore vitæ suæ pro legitimo habebatur.* And so it seemeth to be, that if a man hath issue a sonne being bastard eigne, and a daughter, and the daughter is married, the father dieth, the sonne entreth and dieth seised, this shall barre the feme covert. And the discent in this case of services, rents, reversions, expectant upon estates taile, or for life, whereupon rents are reserved, &c. shall binde the right of the *mulier*, but a discent of these shall not drive them, that right have, to an action.

13 E. 1. tit. Bastardie, 28. (Post. 246. a. 5 Rep. 98.)

14 E. 2. Bastardie, 26.

So if the bastard dieth seised, and his issue endoweth the wife of the bastard, yet is not the entrie of the *mulier* lawfull upon the tenant in dower, for his right was barred by the discent.

Sir Rich. Lechford's case, ubi supra. (Ant. 241.)

If the bastard eigne entreth into the land, and hath issue, and entreth into religion, this discent shall barre the right of the *mulier*.

20 H. 3. Bastardie, 29. (Post. 248.)

" *Hath issue two sonnes.*" If a man hath issue such a bastard

Hill. 18 E. 3. cor. Reg. Rot. 144. Ebor. 17 E. 3. 59 F. tit. Bastard. 32. Sir Rich. Lechford's case, ubi supra.

See afterwards in the Chapter of Warranties. (Post. 368. a.)

as

But the rule laid down by lord Coke, was once generally received. In Jenk. c. 10. pl. 18. it is said, " that if the husband be in Ireland for a year, and " the wife in England during that time has issue, it is a bastard; but it seems " otherwise now for Scotland, both being under one king, and make but one " continent of land."—See ant. note 2, to p. 126.—[Note 178.]

(3) See note 1, to page 245. a.

as is aforesaid, and dieth, and the bastard entreth and dieth seised, and the land descendeth to his issue, the collaterall heire of the father is bound, as well as where there be two sonnes.

And where our author speaketh of sonnes, so it is if a man hath issue two daughters, the eldest being a bastard, and they enter and occupie peaceably as heires; now the law in favour of legitimation shall not adjudge the whole possession in the *mulier*, (who then had the only right) but in both, so as if the bastard hath issue and dieth, her issue shall inherit.

[244. b.] ☞ [*b*] And in the same case, if both daughters enter and make partition, this partition shall binde the *mulier* for ever.

[*b*] 2 E. 3. tit. Bastardie, 15. 21 E. 3. 34. b. 30 Ass. p. 7. Sir Rich. Lechford's case, ubi supra.

[*c*] And an assise of *mort d'ancester* lieth not betweene the bastard and the *mulier* in respect of the proximitie of bloud.

And the bastard being impleaded or vouched shall have his age.

[*c*] Brit. cap. 73. 20 E. 3. Vouch. 129. 11 E. 3. Age, 3. 5 H. 7. 2. Sir Rich. Lechford's case, ubi supra. (Ant. 170. b.)

"*And the bastard entreth as heire to his father.*" If a man hath issue bastard eigne and *mulier puisne*, and the bastard in the life of the father hath issue and dieth, and then the father dieth seised, and the sonne of the bastard entreth, as heire to his grandfather, and dieth seised, this discent shall binde the *mulier*.

"*Because there is an ancient law in this case used, &c.*" As hereafter in our Commentarie upon the two next Sections shall appeare, by our antient bookes, and the antient statutes of the realme. And here is implyed how necessarie it is, after the example of our author, to looke into the antiquities, than which nothing is more venerable, profitable, and pleasant (1).

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BUT it hath beene the opinion of some, that this shall be intended where the father hath a sonne bastard by a woman, and after marrieth the same woman, and after the espousels he hath issue by the same woman a son or a daughter, and after the father dieth, &c. if such bastard entreth, &c. and hath issue and die seised, &c. then shall the issue of such bastard have the land cleerely to him, as it is said before, &c. and not any other bastard of the mother which was never married to his father. And this seemeth to be a good and reasonable opinion: for such a bastard borne before marriage celebrated betweene his father and his mother, by the law of holy church is mulier, *albeit by the law of the land he is a bastard, and so he hath a colour to enter as heire to his father, for that he is by one law* mulier, scilicet, *by law of holy church. But otherwise it is of a bastard which hath no manner of colour to enter as heire* (Mes auterment est de bastard que n'ad ascun * maner colour d'entre come heire),

* maner *not in L. and M. but in Roh.*

(1) In the case of Pride v. the earls of Bath and Montague, it was held, that the rule that a person shall not be bastardized after his death, is only good in the case of bastard eigne and mulier puisne. 1 Salk. 120.—[Note 179.]

heire), *in so much as hee can by no law bee said to be* mulier, *for such a bastard is said in the law to be* quasi nullius filius, &c. (2).

☞ "*BUT it hath beene the opinion of some, &c.*" And our author here saith, that this opinion is good and reasonable, for that such a bastard, by the law of holy church * is a *mulier*. [245. a.]

* Vid. Britton, fol. 128. b. 166. 203. And the stat. of Merton, 20 H.3. cap. 19. confirmeth this opinion. Hill. 18 E. 3. coram rege in Thesaur. Eborum. Bracton, lib. 2. fol. 63.

Matrimonium subsequens legitimos facit quoad sacerdotium non quoad successionem, propter consuetudinem regni quòd se habet in contrarium. Yet the canon law holdeth them legitimate *quoad successionem.*

(2) Nota, 2 Inst. 96, 97. *On the statute of Merton, Pope Alexander III. (ann.* 1160, 6 *H.* 2.) *ordained, that children born before matrimony, where matrimony follows, should be as legitimate as those born after marriage,* quia ecclesia tales habet pro legitimis.—Constitutio pontifica, *or the canon law,* est intelligenda solummodo de filiis natis ex coitu, qui poterunt esse conjugales; qui verò ex damnato coitu, nascuntur, scilicet ex coitu incestuoso vel adulterino, cujusmodi coitus non poterat esse uxorius, tamen nunquam legitimari possunt per subsequens matrimonium. Ratio est quia matrimonium subsequens ex fictitione legis retrahitur ad tempus susceptionis liberorum, ut legitimati habeantur legitimè suscepti (i. e.) post contractum matrimonium. Fictio autem juris nunquam admittur contra naturam et bonos mores. Quapropter lex non potest fingere matrimonium fuisse cum eis, cum quibus nuptiæ non potuerunt esse per leges; quia in fictitionibus translationis requiritur habilitas extremorum à quo et ad quem. Ideòque leges civiles et decretales olim matrimonium inter adulteros prohibebant, contractumque dirimebant. Jam verò ista prohibitio locum non habet, nisi in mortem prioris conjugis alteruter fuerit machinatus, vel prematurè, dum adhuc viveret, de contrahendo post mortem ejus connubio pacta fuerit fides. Secundò notandum est quòd subsequens matrimonium legitimos facit quoad spiritualia, non quoad temporalia, quia Papa non potest legitimare, quoad temporalia, extra sui ipsius dominica, scilicet extra terras quæ sunt de patrimonio sancti Petri, quod Papa Innocentius III. confitebatur (ergo Anglia non est ex patrimonio sancti Petri quicquid fecerit Rex Johannes). Et Sanchez quem Clemens III. valdè laudavit, apertè dicit, si proles habita sit ex concubitu omnino fornicano, eam non posse pontificem, quoad temporalia et secularia, legitimare. *All this was said and proved out of ancient authors by a learned advocate, whose discourse is printed at large in the modern arrets collected by Mons. de Maison. Arrest* 20. *And there the principal case was, the uncle, in the life of his wife, had a child by his niece and god-daughter, on promise of marriage when time should serve: the wife dies, and then the uncle had other children, and ten years after, by dispensation from the pope, containing a clause of legitimation of the children born before, marries her. Res. The pope's dispensation was void as to any legitimation, which, whether it were because the marriage were within the Levitical degrees, or because of spiritual kindred, or because against the council of Trent, a general council being held by the Sorbonne to be above the pope, appears not; but may be for all these reasons, or for none of them, but only because the pope cannot legitimate in temporals. 2dly, That the children of this marriage should have pensions to live on, which may seem to approve the dispensation as to the marriage. 3dly, That no such be granted for the future. Ibid.* 360. Romani filios naturales tantùm non alio jure habuerunt quàm peregrinos. Theodosii & Arcadii principatu temperata fuit legum severitas, ac deinde Zenonis lege obtinuit, ut naturales liberi consequentibus cum matre nuptiis justi ac legitimi haberentur. Bodinus de

successionem. At a parliament holden [q] *anno* 20 *H.* 3, for that to certifie upon the king's writ, that the sonne borne before marriage as a bastard, was *contra communem formam ecclesia, rogaverunt omnes episcopi magnates ut consentirent, quòd nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium quantùm ad successionem hæreditariam, quia ecclesiæ tales habet pro legitimis: et omnes comites & barones unâ voce responderunt, quòd nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt & approbatæ.*

[q] Statut. de Merton. 20 H. 3. cap. 9. Vid. Bract. l. 5. f. 416, 417. 10 Ass. Pl. 20.

"*So he hath a colour to enter, &c.*" Here it is to be observed, that the law more respecteth him that hath a colourable title, though it be not perfect in law, than him that hath no title at all, as hath beene said [r] before (1).

[r] Vide Sect. 397. & cap. Gar. Sect. (B)

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(B) *See post.* 376. *b. where it is said, that the bastard eigne may be vouched alone, because he is in appearance heir, &c. See also* 368. *a. & b.* 369. *a. & b. and Sect.* 698, *& the* 12 *following sections there.*

de Repub. lib. 1. cap. 4. p. 29. Sed nota, quòd ante Zenonis tempora, viz. per legem Divi Constantini, nati ante matrimonium, fiebant legitimi per matrimonium subsequens; quod tamen explicatur in eodem codice, viz. per matrimonium legitimantur liberi naturales modò procreati sint muliere liberâ, & cujus matrimonium non est legibus interdictum. Vid. Mons. de Maisons, Arrest 20, page 359.—*Lord Nott. MS.*—[Note 180.]

(1) Both by the civil and canon law, children born before marriage are made legitimate by the subsequent marriage of their parents. This was established in the civil law by the emperor Constantine, and confirmed by the emperor Justinian. It was established in the canon law by a constitution of pope Alexander the Third, in 1160. This legitimation is a privilege or incident inseparably annexed to the marriage; so that though both the parents and the children should wave or refuse it, the children nevertheless would be legitimate. But it holds in these cases only, where, at the time of the birth of the children, it was lawful for both parents to intermarry; for, if the father were married to another woman at the time of the birth of the children, and afterwards his wife died, and he married the mother of the child, the child would not be legitimated by this subsequent marriage. Children thus legitimated are on an equal footing with the legitimate children; and, if they die before the marriage of their parents, still they are considered as legitimate, and transmit their legitimacy to their issue: but, whether they are considered legitimate only from the time of the marriage of their parents, or whether their legitimacy by their parents marriage has a relation back to the time of their birth, is a point warmly disputed by the civilians and canonists. The prevailing opinion seems to be, that they are to be considered as legitimate from the time of their birth to all purposes but those in which, to consider them as such, would operate to the detriment of a third person. Thus, if there be a natural-born child, and the father afterward marries and has sons; his wife dies, and he marries the woman by whom he had the natural child: it seems to be the better opinion, that the child legitimated by the subsequent marriage does not acquire the right of progeniture over the sons of the first marriage.

The doctrine of legitimacy by a subsequent marriage was never admitted into the English law; and the refusal of the noblemen of our nation to admit it, on the occasion mentioned in sir Edward Coke's Commentaries, is spoken of by sir William Blackstone and other writers, as a memorable instance of their jealousy of the civil law, and their firmness in opposing foreign innovations.

The doctrine of legitimation prevails, with different modifications, in France, Germany,

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BUT in the case aforesaid, where the bastard enter after the death of the father, and the mulier oust him, and after the bastard disseise the mulier, and hath issue and dieth seised, and the issue enter, then the mulier may have a writ of entrie sur disseisin *against the issue of the bastard, and shall recover the land, &c. And so you may see a diversity where*

Germany, and Holland. By an arret d'audience of the 21st June 1668, it was adjudged, that, if a person marries in England, a woman, by whom he had children previous to the marriage, the children born in France are legitimated by it, and acquire all the rights of legitimacy under the French law. See c. 10. C. de Natur. lib. Nov. 89. c. 8.—Vinn. in Inst. l. 1. t. 10. s. 13.—Hein. Elem. Jur. de Legitimatione.—Traité des Successions par le Brun, ed. 1776, lib. 1. c. 2. s. 1. d. 1. l. 2. c. 2. s. 1. n. 13. and sir John Fortescue, c. 39. Till the statute of Merton, the question whether born before or after marriage, was examined before the ecclesiastical judge, and his judgment was certified to the king or his justices, and the king's court either abided by it or rejected it at pleasure. But, after the solemn protest made by the barons at Merton against the introduction of the doctrine of the civil and canon law in this respect, *special bastardy* has been always triable at common law; and *general bastardy* alone has been left to the judgment of the ecclesiastical judge, who in this case agrees with the temporal. 2 Inst. 98. Reeves's Hist. of the English law, 85. 201. and see ant. note 2, to page 126. a. If the reader wishes to become acquainted with the doctrine of the Roman law on marriage, and the legitimacy and illegitimacy of children, he will find it succinctly and perspicuously stated in *Pothier Traité de Contrat de Marriage, partie* 1. c. 2. In the 3d chapter of the same work, he discusses the celebrated question, " de " l'autorité de la Puissance Séculiere sur le Marriage." He concludes that chapter with the following sentence, " Par tout ce qui vient d'etre dit, il ne " peut rester aucun doute que la puissance séculiere a le droit de faire des " loix sur les marriages, dont l'inobservation les rende absolument et entire- " ment nuls, non seulement quant aux effets civile, mais meme quant au " lien, et qui les empechent en conséquence de pouvoir servir de matiere au " sacrement de marriage." The same doctrine is laid down by *Sanchez* in his famous Treatise *de Matrimonio*, lib. 7. disp. 3. n. 3. where he says, " Absque " dubio dicendum est posse principem secularem ex genere et naturâ suæ " potestatis, matrimonii impedimenta dirimentia, fidelibus sibi subditis ex " justâ causâ indicere. . . Nec obstat principis secularis potestati, matri- " monium esse sacramentum, quia ejus materia contractus civilis; qua ratione " perinde potest ex justâ causâ illud irritare, ac si sacramentum non esset, " reddendo personas inhabiles ad contrahendum, & sic invalidum contractum." Doctor Launoi, in his treatise *Regia in Matrimonium Potestas*, cites numberless passages to the same effect, from divines of all countries and all schools. The article *Empechemens de Marriage*, in the *Enclyclopédie Methodique*, lately published at Paris, establishes the same doctrine in these words: " Le mar- " riage forme actuellement un tout composé de deux parties soumises a deux " puissances qui influent sur son existence, avec cette difference cependant, " qui l'eglise est obligée de se soumettre aux empechemens etablis par le " prince, et que ceux etablis par l'eglise ne peuvent avoir lieu qu'autant " qu'ils sont admis par le prince."—[Note 181.]

where such bastard continues the possession all his life without interruption, and where the mulier entreth and interrupts the possession of such bastard, &c.

"AND *the mulier oust him.*" An estranger in the name of the *mulier* without his commandement cannot enter upon the bastard, for that the bastard may gaine the estate and barre the *mulier*. And therefore regularly none shall enter but the *mulier*, or some other by his commandement. And therefore *Littleton* saith (and the *mulier* put him out) no more than in the case [*a*] of the lord *Awdley:* for there an estranger of his owne head could not enter in the name of him that right had to enter within the five yeares to avoid the fine. But in both those cases, first, if the *mulier* agree thereunto before the discent of the bastard; or secondly, if he that right hath before the five yeares be past do assent thereunto, the claime is good, and shall avoid the estate both of the bastard and of the conusee, as it was holden in the lord *Awdley*'s case, *quia omnis ratihabitio retrotrahitur, & mandato æquiparatur*, and it standeth well with the words of the statute, so that they pursue their title, &c. by way of action or entry; and so is the booke in [*b*] 31 *H.* 8. to be intended.

[*a*] Mich. 38 & 39 Eliz. in the King's Bench, upon evidence by the whole court. Vide 31 H. 8. Entr. conge, Br. 123. 4 H. 7. cap.

Vide Sect. 334.

[*b*] 31 H. 8. Entr. cong. Br. 123.

But in the case of the *bastard eigne* which is *Littleton*'s case, gardein in socage, or gardein in chivalrie, may enter, for they are no strangers, as in another place is plainly shewed. If an infant make a feoffment in fee, an estranger of his owne head cannot enter [*c*] to the use of the infant, for the estate is voidable. But where an infant or a man of full age is disseised, an entrie by a stranger of his owne head is good, and vesteth presently the estate in the infant, or other disseisee. So it is if tenant for life make a feoffment in fee, an estranger may enter for a forfeiture in the name of him in the reversion, and thereby the estate shall be vested in him, *et sic de similibus*.

[*c*] Pasc. 39 Eliz. in Communi Banco per curiam. 10 H. 7. 16. 7 E. 3. 69. 26 E. 3. 62. per Thorp. 45 E. 3. Release, 28. 11 Ass. 11.

[245. b.] ☞ "*Where such bastard continues the possession without interruption.*" If the *mulier* entreth upon the bastard, and the bastard recovereth the land in an assise against the *mulier*, now is the interruption avoided; and if the bastard dieth seised, this shall barre the *mulier*.

If the bastard eigne after the decease of the father entreth, and the king seiseth the land for some contempt supposed to be committed by the bastard, for which no freehold or inheritance is lost, but only the profits of the land by way of seisure, and the bastard die, and his issue is upon his petition restored to the possession, for that the seisure was without cause, the *mulier* is barred for ever; for the possession of the king when he hath no cause of seisure shall be adjudged the possession of him for whose cause he seised. But if after the death of the father the *mulier* be found heire and within age, and the king seiseth, in that case the possession of the king is in right of the *mulier*, and vesteth the actual possession in the *mulier*, and consequently the bastard eigne is fore-closed of any right for ever.

2 Ass. 9.

And so it is when the king seiseth for a contempt, or other offence of the father, or of any other ancestor; in that case if the issue of the bastard eigne upon a petition be restored, for that the seisure was without cause, the *mulier* is not barred, for the bastard could never enter, and consequently could gain no estate in the land, but the possession of the king in that case shall

shall be adjudged in the right of the *mulier*. And it is to be observed, that the bastard must enter *in vacuam possessionem*, and continue during his life, without interruption made by the *mulier*.

Pl. Com. Parson de Honylane's case, 91. 35 H. 6. 24. 21 H. 6. 9. 1 E. 4. 3. 21 E. 4. 5. 5 E. 4. 60.

"*Interrupts the possession of such bastard, &c.*" If the bastard invite the *mulier* to see his house, and to see pictures, &c. or to dine with him, or to hawk, hunt, or sport with him, or such like upon the land descended, and the *mulier* commeth upon the land accordingly, this is no interruption, because he came in by the consent of the bastard, and therefore the coming upon the land can be no trespasse; but if the *mulier* commeth upon the ground of his own head, and cutteth downe a tree, or diggeth the soile, or take any profit, these shall be interruptions; for rather than the bastard shall punish him in an action of trespasse, the act shall amount in law to an entry, because he hath a right of entry. So it is if the *mulier* put any of his beasts into the ground, or command a stranger to put on his beasts, these doe amount to an entry; for albeit in these cases the *mulier* doth not use any express words of entry, yet these, and such like acts, doe without any words amount in law to an entrie; for acts without words may make an entry, but words without an act (*viz.* entry into the land, &c.) cannot make an entry (all which interruptions are implied in the said *&c.*) More shall be said hereafter of interruptions in the chapter of Continuall Claime.

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ALSO, if an infant within age hath such cause to enter into any lands or tenements upon another, which is seised in fee, or in fee taile of the same lands or tenements, if such man who is so seised dieth of such estate seised, and the lands descend to his issue during the time that the infant is within age, such discent shall not take away the entry (2) *of the infant, but that hee may enter upon the issue which is in by discent, for that no laches shall be adjudged in an infant within age in such a case.*

Brooke, tit. Discent, 40.

"*IF an infant within age hath such cause to enter.*" If a man seised of lands in fee die, his wife *privement enseint* with a son, and a stranger abate and die seised, and after the sonne is borne, hee shall bee bound by the discent (1), because hee at the time of the discent had no right to enter, and this is to be gathered upon these words of *Littleton, hath cause to enter*, which at the time of the discent he hath not.

20 H. 6. 28. b. 2 E. 4. 25, 26. 15 E. 4. Discent, 30.

"*Is in by discent, &c.*" Here is implyed any other heire, collaterall or lineall.

As

(2) He need not enter hastily after his full age, but may do it two or three years or more after his full age, but caveat that he do not permit a descent after his full age before his entry, for then it will toll his entry. 1 Rep. 140. —[Note 183.]

(1) A contrary doctrine seems to be asserted in Dyer, 94. b.—[Note 182.]

[246. a.] An infant is accounted in law (as hath beene often said,) [d] untill he passeth the ☞ age of 21 yeares, and certaine privileges hee hath in respect of his infancy.

[d] Vide Sect. 259. 403.

"No laches shall be adjudged in an infant within age in such a case."

And *Littleton* well added *(in such a case)* that is, in case of discent, for in some other cases laches shall prejudice an infant. As laches shall be adjudged in an infant if he present not to a church within six moneths, for the law respecteth more the privilege of the church (that the cure bee served) than the privilege of infancy. And so the publike repose of the realme concerning men's freeholds and inheritances, shall be preferred before the privilege of infancy, in case of a fine, where the time begins in the time of the ancestor. So non-claime of a villaine of an infant by a yeare and a day, who hath fled into ancient demesne (A), shall take away the seisure of the infant. And if an infant bring not an appeale of the death of his ancestor within a yeare and a day, he is barred of his appeale for ever, for the law respects more liberty and life than the privilege of infancy. And here it is to be observed, that *Littleton* putteth his case, that an infant shall enter upon a discent, when a stranger dieth seised, but hee put it not so before, in the case of the bastard eigne. *B.* tenant in taile infeoffeth *A.* in fee, *A.* hath issue within age and dieth, *B.* abateth and dieth seised; the issue of *A.* being still within age, this discent shall binde [e] the infant, for the issue in taile is remitted; and the law doth more respect an ancient right in this case, than the privilege of an infant that had but a defeasible estate. And it is said [f] if the king die seised of lands, and the land descend to his successor, that this shall bind an infant, for that the privilege of an infant in this case holds not against the king (1).

33 E. 3. Quar. Imp. 46. (Ant. 171. a. Post. 337. b. 350. b. 380.)

Pl. Com. 372. (F. N. B. 33. B. 6 Rep. 48. b. 3 Rep. 84.)

(Post. 348. a. 357. a.)

[e] 11 E. 4. 1, 2. F. N. B. 35. M.

[f] 35 H. 6. 60.

Sect.

(A) *See post.* 254. *b. where lord Coke states that,* if a villein remained in ancient demesne a year and a day, he is privileged.

(1) This and many other passages in this work, respecting the operation and force of the acts of infants, were fully considered in the cases of Zouch *v.* Parsons, 3 Burr. 1794; and May *v.* Hook, heard before lord chancellor Bathurst, in 1773.—There being no printed account of the last case, it may not, perhaps, be unacceptable to the reader to find an account of it here.—Ann May and her two sisters were, under their father's will, seised of a considerable freehold estate; and possessed of a considerable leasehold estate, as joint-tenants. Previous to the marriage of Ann May with John Hook the defendant, she being then an infant, by articles of agreement dated the 28th of October 1761, and made between her of the first part, John Hook of the second part, and trustees of the third part, it was covenanted and agreed, that the leasehold estates should be assigned to John Hook for his own use and benefit; and that the freehold estates should be settled on him for life; and then on her for life; remainder to their first and other sons successively in tail male; remainder to their daughters, as tenants in common in tail; remainder to John Hook in fee. And he covenanted to pay 100 *l.* to the trustees upon trust to pay Ann Hook, if she survived him, the interest of it for her life, and after her decease to divide it among the children.—Afterwards Ann May died under age. The question was, Whether these articles were in equity a severance of the joint-tenancy? Lord Chancellor Bathurst,

Sect. 403.

ALSO, if husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee tayle, and such tenant dieth seised, &c. in such case the entry of the husband is taken away upon the heire which is in by discent. But if the husband die, then the wife may well enter upon the issue which is in by discent, for that no laches of the husband shall turn the wife or her heires to any prejudice nor losse in such case, but that the wife and her heires may well enter, where such discent is eschued during the coverture.

"*IF husband and wife, as in right of the wife, have title and right to enter, &c. and such tenant dieth seised, &c.*"

9 H. 7. 24. a.
2 E. 4. 25.
7 E. 3. 47. b.
20 H. 6. 28. b.
42. E. 3. 12.
15 E. 4. Discent, 30.

These words are generall, but are particularly to bee understood, *viz.* when the wrong was done to the wife during the coverture; for if a feme sole be seised of lands in fee, and is disseised, and then taketh husband; in this case the husband and wife, as in the right of the wife, have right to enter, and yet the dying seised of the disseisor in that case shall take away the entry of the wife after the death of her husband; and the reason is aswell for that shee herselfe when shee was sole might have entred and recontinued the possession, as also it shall be accounted her folly that shee would take such a husband which would not enter before the discent.

But

Bathurst, when he made his decree in this cause, observed, that the first point attempted to be established by the counsel was, that, had Ann May been of full age when she entered into the articles, they would have amounted to a severance; but that no determination to that effect had ever been made:—That the co-joint-tenants were not, in this case, to be considered as volunteers, as they claimed by title paramount; and that their situation approached nearer to that of issue in tail, who claimed *per formam doni*, than to that of an heir at law, who claims only under his ancestor;—That the utmost which the infant could do would be an avoidable act; and that, of course, it would be in the discretion of the court either to give or refuse their assistance to it; and, by a parity of reason, it must always be in their power to model his contracts at their pleasure:—That the contract, in the present case, was not such as the court would uphold. Had the infant lived to come of age, and a bill been filed against her for a performance of the articles, the court would have them set aside, and referred it to a master to draw new proposals for a proper settlement:—That as the contract was not such as would have bound the infant herself, *à fortiori* it should not bind the co-joint-tenants:—That it would be a strange doctrine, that any act of an infant, which is by its nature avoidable, should sever the joint-tenancy, as, if that were allowed, it would always be in the power of the infant to say whether the joint-tenancy should be severed or not; then, if any of the co-joint-tenants should die under age, the infant might avoid his own act, by pleading *infra ætatem*, and resort to his title of survivorship, which would be a great injustice and hardship on the co-joint-tenants.——On these grounds his lordship was of opinion, that the articles did not amount in equity to a severance of the joint-tenancy.—[Note 184.]

[246. b.] ☞ But there if the woman were within age at the time of her taking of husband, then the dying seised shall not after the decease of her husband take away her entry; because no folly can bee accounted in her, for that shee was within age when shee tooke husband, and after coverture she cannot enter without her husband; all which is implyed in the said *(&c)*. 9 H. 7. 24.

"*No laches of the husband shall turn the wife, &c. to any prejudice, &c.*" *Laches* signifieth in the common law, retchlesnesse, or negligence, *et negligentia semper habet infortunium comitem.* Here is a diversity to be observed, that albeit regularly no laches shall be accounted in infants, or feme coverts, as is aforesaid, for not entry or clayme to avoid discents, yet laches shall be accounted in them for no performance of a condition annexed to the state of the land. For if a feme be infeoffed either before or after marriage, reserving a rent, and for default of payment a re-entrie; in that case, the laches of the baron shall disherit the wife for ever. And so it is [*n*] of an infant; his laches, for not performing of a condition annexed to a state, either made to his ancestor or to himselfe, shall barre him of the right of the land for ever. Vid. Sect. 492. Hob. 96. Ant. 233. b. 1 Lev. 266. 8 Rep. 100. 1 Roll. 4. Plo. 23. 20 H. 6. 28. b. [*n*] 31 Ass. p. 17. 42 E. 3. 1. Pl. Com. 55. 10 H. 7. 13 H. 7. 35 H. 6. 41. Pl. Com. 136. b. Fleta, lib. 2. cap. 50.

If a man make a feoffment in fee to another reserving a rent, and if he pay not the rent within a moneth, that he shall double the rent, and the feoffee dieth, his heire within age, the infant payeth not the rent, he shall not by this laches forfeit any thing. But otherwise it is of a feme covert; and the reason and cause of this diversity is, for that the infant is provided for by the statute, [*o*] *non current usuræ contra aliquem infra ætatem existen', &c.* But that statute doth not extend to a feme covert, neither doth that statute extend to a condition of a re-entry; which an infant ought to performe, for the forfeiture thereof cannot bee called *usura*. [*o*] Le statute de Merton, ca. 5.

* Sect. 404.

BUT the court holdeth, where such title is given to a fem sole, who after taketh husband which doth not enter, but suffer a discent, &c. there otherwise it is, for it shall be said the folly of the wife to take such a husband which entered not in time, &c.

THIS is added, and therefore as formerly I have done, I meddle not withall; howbeit the opinion is holden for law, as it appeareth in the section next precedent. 9 H. 7. 24.

Sect. 405.

ALSO, if a man which is of non sane memory, that is to say in Latine, qui non est compos mentis, *hath cause to enter into any such tenements, if such discent,* ut supra, *bee had in his life during the time that he was*

* This Section is not in L. and M. or Roh.

was not of sound memorie, and after dieth, his heire may well enter upon him which is in by discent. And in this case you may see a case, where the heire may enter, and yet his ancestor which had the same title could not enter. For hee which was out of his memorie at the time of such discent, if he will enter after such a discent, if an action upon this be sued against him, he hath nothing to plead for himselfe, or to helpe him, but to say, that hee was not of sane memorie at the time of such discent, &c. And he shall not bee received to say this, for that no man of full age shall bee received in any plea by the law to disable his owne person (pur ceo que nul home de pleine age serra resceive en ascun plee per la ley a *disabler le person demesne), *but the heire may well disable the person of his ancestor for his owne advantage in such case* (pur son advantage † demesne en tiel cas), *for that no laches may bee adjudged by the law in him which hath no discretion in such case.*

Pl. Com. fo. 368. b. per Sanders. lib. 4. fo. 127. 182. Beverley's case.

HERE *Littleton* explaineth a man of no sound memorie to be *non compos mentis*. Many times (as here it appeareth) the Latin word explaineth the true sense, and calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus*, or the like, for *non compos mentis* is most sure and legall (1).

Mirror, cap. 1. sect. 9. ca. 5. sect. 1. Bract. fo. 166 and 420. Britton, fo. 167. b. 217. 66. Fleta, li. 6. ca. 39. Fitz. N. B. 222. B. Staunf. Prer. 33, 34. (Hob. 96. Sid. 112.)

Non

* destultifer et, *added in L. and M. and Roh.* † demesne—del heire, *L. and M. and Roh.*

(1) *Scotch Pleading, anno* 61. *case* 5. *pages* 69 *and* 70, *and Sir Thomas Stewart's case.* Fatui sive idiotæ sunt illi tantùm, qui omni ratiocinatione et judicio carent, tardi, bardi, moriones, macærones, qui inopiâ caloris et spiritum laborant. Furor est dementia cum ferociâ, et horrendâ actionum vehementiâ. Fromanus de jure furiosorum, p. 6. Furor dividitur in continuum; ubi animus continuâ mentis agitatione semper accenditur; et interpolatum seu intervallatum; qui dilucida habent intervalla; quorum furor habet inducias, et quos morbus non sine laxamento aggreditur; qui testamentum facere possunt; & quos furor stimulis suis variatis vicibus accendit. *In these fury and madness is but an ague or a disease; in the others, it is temperament and complexion. Again, among those who have lucid intervals, it may be fit to distinguish between those who have only* remissionem seu adumbratam quietem, *and those who have* intermissionem seu resipiscentiam integram. *Two witnesses deposing* sanæ menti, *are preferred and believed before an hundred touching fury and madness. Melancholy and hypochondriac vapours are like storms at sea, which, though they disturb for a while, yet they do not hinder the returning to the former calm;* semel furibundus, semper furibundus præsumitur; *and therefore where the question is of a fact done* lucido intervallo, *which may be either by remission or intermission, it is not enough to show the act was* actus sapienti conveniens, *for that may happen many ways; but it must be proved to be* actus sapientis, *and to proceed from judgment and deliberation, else the presumption continues.* Lord Nott. MS.—On the general law, respecting lunacy, and the acts of lunatics, much useful information may be obtained from Mr. Ridgway's report of the great cause of Hume *v.* Burton, usually called Lord Ely's case, adjudged in the House of Lords in Ireland, on the 24th March 1784; (Ridgway's Cases in Parliament, vol. 1. p. 16. and the six Appendixes), and from lord Thurlow's argument, in pronouncing his decree, in the case of the Attorney-General *v.* Parnther, 3 Bro. Cha. Ca. 441.—[Note 185.]

[247. a.] *Non compos mentis* is of foure sorts; 1. *Idcota*, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*. 2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding. 3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he hath not understanding. Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken. But that kinde of *non compos mentis* shall give no privilege or benefit to him or to his heires. And a discent shall (1) take away the entrie of an ideot, albeit the want of understanding was perpetuall; for *Littleton* speaketh generally of a man of non sane memorie. So likewise if a man that becomes *non compos mentis* by accident, as is aforesaid, be disseised and suffer a discent, albeit he recover his memorie and understanding againe, yet hee shall never avoid the discent; and so it is *à fortiori* of one that hath *lucida intervalla*. As for a drunkard who is *voluntarius dæmon*, he hath (as hath beene said) no privilege thereby, but what hurt or ill soever he doth, his drunkenesse doth aggravate it: *Omne crimen ebrietas & incendit, & detegit.*

(2 Inst. 14.)

Lib. 4. 124, 125. Beverleye's case.

(8 Rep. 170.)

(Plo. Com. 19.)

If an ideot make a feoffment in fee, he shall in pleading never avoid it by saying that hee was an ideot at the time of his feoffment, and so had beene from his nativitie. But upon an office found for the king, the king shall avoid the feoffment, for the benefit of the ideot, whose custodie the law giveth to the king.

(4 Rep. 123. b. F. N. B. 232.) 39 H. 6. 42. b. Abb. Ass. 89. b. F. N. B. 202. 5 E. 3. 70.

So it is of a *non compos mentis* by accident, and of him *qui gaudet lucidis intervallis*, if an estate be made during his lunacie: for albeit the parties themselves cannot bee received to disable themselves, yet twelve men upon their oathes may finde the truth of the matter. But if any of them alien by fine or recoverie, this shall not onely binde himselfe, but his heires also (2). As

Britton, cap. 28. fol. 65. 25 Ass. pl. 4. 35 Ass. pl. 10.

32 E. 3. tit. Scire fac. 160. Staundf. Pr. 34.

F. N. B. 202. A. Beverleye's case, lib. 4. 126, 127, 128.

amongst

(1) In all the editions except the first, the word *not* is here erroneously inserted.

(2) Lord Hobart observes in the case of Needler *v.* Bishop of Winchester, that in these cases "the law finds these persons not so disabled, nor admits the "averment of such disablement, because it is certified by invincible and indisputable credit of the judge, that they were perfect and able persons. And so "here is a law of policy that doth not cancel the law of nature, but doth only "bound it in point of form and circumstance; it being better to admit a mischief "in particular, even against the law of nature, than an inconvenience in general: "and it is not the law of nature to admit any improbable surmise against authentic record or evidence." Hob. 224.—Sir Ed. Coke observes, post. 380. b. that the only mode by which an infant can reverse a fine levied by him, is by appearance in court during his infancy, and being inspected by the judges; *non testium testimonio, aut juratorum veredicto, sed judicis inspectione solummodo:* the judges may, however, inform themselves in cases of this kind by means of witnesses, church books, or any other kind of evidence. It appears a great hardship that infants should not be permitted to reverse their fines after they attain their full age; and it seems unaccountable that the law, which will not permit them to do it after they attain their full age, should permit them to do it before that age. The objection, that no averment can be made against any fact which is upon record, applies as much to them before their attaining their full

amongst other things requisite to be knowen, these cases you shall finde at large in my Commentaries, whereunto, for brevitie, I referre the reader: upon all which bookes there have beene foure severall opinions concerning the alienation, or other act of a ☞ man that is *non compos mentis, &c.* For, first, some are of opinion, that hee may avoid his owne act by entrie, or plea. Secondly, others are of opinion, that hee may avoid it by writ, and not by plea. Thirdly, others, that he may avoid it either by plea, or by writ; and of this opinion is *Fitzherbert* in his *Natura Brevium, ubi supra.* And *Littleton* here is of opinion, that neither by plea nor by writ nor otherwise, he himselfe shall avoid it, but his heire (in respect his ancestor was *non compos mentis*) shall avoid it by entrie, plea, or writ. And herewith the greatest authorities of our bookes agree; and so was it resolved with *Littleton* in *Beverley*'s case; [r] where it is said, that it is a maxim of the common law, that the partie shall not disable himselfe. But this holdeth only in civil causes; for in criminall causes, as felonie, &c. the act and wrong of a madman shall not bee imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens (id est) sine mente*, without his minde or discretion; and *furiosus solo furore punitur*, a madman is only punished by his madnesse. And so it is of an infant, untill he be of the age of fourteene, which in law is accounted the age of discretion.

Vide Br. tit. Dum fuit infra ætatem, 5.

[247. b.]

[r] Lib. 4. fol. 126, 127. (Plo. 19. a. F. N. B. 232.)

26 Ass. 27. 21 H. 7. 31. Staundf. 16. b. 8 E. 2. Coron. 412. 414. 351. 22 E. 3. ibid. 224. Beverley's case, ubi supra. F. N. B. 202. D. 3 H. 7. 2. Vide 3 E. 3. tit. Entrie Cong. Statham.

"*And in this case you may see a case, &c.*" And though *Littleton* saith (one case), yet other cases may be found to the same end. For if there be grandfather, father, and son, and the father disseise the grandfather, and make a feoffment in fee, without warrantie, the grandfather dieth, albeit the right descend to the father, he cannot by this right descended enter against his owne feoffment; but if he die the sonne shall enter, and avoid the estate of the feoffee.

12 E. 4. 8. 39 H. 6. 4. Abbr. Ass. 89. 39 H. 6. 43. (Post. 265.)

15 E. 4. tit. Discent, 30.

So if the grandfather be tenant in taile, and the father disseise him, *ut supra, mutatis mutandis.*

If lands be given to two and to the heires of one of them, he that hath the fee simple shall not have an action of waste upon the

age as after. But the contrary has been too often established to be now called in question. See Ann Hungate's case, 12 Rep. 122. Warcombe and Carrel's case, ib. 124. Herbert Perrot's case, 2 Vent. 30. Hutchison's case, 3 Lev. 36. Requishe and Requishe, Bulstr. p. 2. 320. Sarah Griffith's case, 12 Mod. 444. With respect to the fines levied by idiots and lunatics, see 12 Rep. 124. Hugh Lewing's case, 10 Rep. 42. b. But infant trustees within the stat. 7 Ann. c. 19. may both levy fines and suffer common recoveries. See 3 Atk. 479. 559. Com. Rep. 615. Barnes's Cases of Pract. 217. See also Fitz. Nat. Bre. 202. where much argument is used to show, that a *non compos* may plead his disability to avoid his own acts as well as an infant; and 2 Black. Com. ed. 5. p. 291. But in Stroud *v.* Marshal, Cro. Eliz. 398. debt upon obligation, the defendant pleaded, that at the time of the obligation made, he was *de non sane memory:* and it was thereupon demurred, and adjudged to be no plea; for he cannot save himself by such a plea; and the opinion of Fitzherbert was held not to be law.—[Note 186.]

the statute of *Gloucester*, against the joyntenant for life, but his here shall maintaine an action of waste against him, upon the statute of *Gloucester*; so the heire shall maintaine that action which the ancestor could not. (Ant. 53. b. 200. b.)

Sect. 406.

AND if such a man of non sane memorie make a feoffment, &c. he himselfe cannot enter (il * mesme ne poit enter), *nor have a writ called* Dum non fuit compos mentis, &c. causâ quâ suprà: *but after his death his heire may well enter* (mes apres † la mort son heire bien poit enter), *or have the said writ of* Dum non fuit compos mentis *at his choice.*‡ *The same law is where an infant within age maketh a feoffment, and dieth, his heire may enter, or have a writ of* Dum fuit infra ætatem, &c.

"*MAKE a feoffment, &c.*" Or any other like conveyance *in pais*; but fines and other assurances of record are not implyed in this *(&c.)*.

"*The same law is where an infant.*" This is true, as to the bringing of a *Dum fuit infra ætatem, &c.* but without question the infant in that case might have entered, as it appeareth in the next Section (1).

"*Writ of* Dum non fuit compos mentis." This writ (as it appeareth by our author) lieth for the heire of him that was *non compos mentis*, and not for himselfe; but a *Dum fuit infra ætatem* lieth as well for the ancestor himself after his full age, as for his heire.

[248. a.]

☞ Sect. 407.

ALSO, if I be § *disseised by an infant within age, who alieneth to another in fee, and the alienee dieth seised, and the lands descend to his heire,* ‖ *being an infant within age, my entrie is taken away, &c.* ¶ (1)†

Sect.

* mesme *not in L. and M. or Roh.*
† la—sa, *L. and M. and Roh.*
‡ *&c.* added in L. and M. and Roh. —The rest of this Section not in L. and M. or Roh.
§ *disseised* not in Roh. but in L. and M.
‖ *and* added in L. and M. and Roh.
¶ *&c.* not in L. and M. or Roh.

(1) See the observation of Mr. Dunning on this passage in his argument in the case of Zouch ex demiss. Abbot and Hallett *v.* Parsons, 3 Burr. 1794.

(1)† The original text of section 407, is "*Item, si jeo sue disseisi per un enfeant deins age, lequel aliena a un auter en fee, et l'alienee devie seisi, et les tenements descendent a son heir, esteant l'enfant deins age, mon entry est tolle, &c.*" It is apprehended, that, on comparing the text with the version, it will be found, that lord Coke has given a wrong translation of Littleton. In this and the next section,

Sect. 408.

BUT if the infant within age enter upon the heire which is in by discent, (que est § eins per discent), *as he well may, for that the same discent was during his nonage* (pur ceo que ‖ mesme le discent fuit durant son nonage), *then I may well enter upon the disseisor, because by his entrie hee hath defeated and taken away the discent.*

Vide the next Sect. following.

HERE it appeareth, that the entrie of the infant is lawfull, and giveth advantage to the disseisee to enter also, because the discent, which was the impediment, is avoided. And it is to be observed, that if the discent be cast, the infant being within age, he may enter at any time, either within age, or after his full age.

43 E. 3. tit. Entr. Cong. Vet. N. B. 126. b. F. N. B. 192. 45 E. 3. 21.

And so it is if an infant make a feoffment, &c. he may enter either within age, or at any time after his full age, and so in both cases may his heire.

Sect. 409.

IN the same manner it is, where I am disseised, and the disseisor make a feoffment in fee upon condition, and the feoffee die of such estate seised, ¶ *I may not enter upon the heire of the feoffee* (jeo ne purroy ** my enter sur †† l'heire le feoffee): *but if the condition be broken, so as for this cause the feoffor enter upon the heire, now I may well enter, for that when the feoffor or his heires enter for the condition broken, the discent is utterly defeated, &c.* ‡‡

Vide the Sect. next precedent. Dyer, 13 El. fol. 298, 299. (Ant. 5. 395.)

THE reason hereof is apparent, for *cessante causâ, cessat causatum.* Tenant *in capite* maketh a feoffment in fee to the use of the feoffee and his heires, untill the feoffor pay an hundred pounds to him or his heires, the feoffee dieth his heire within age, now

§ eins—heire *L. and M. and Roh.*

‖ mesme *not in L. and M. but in Roh.*

¶ *&c.* added in L. and M. and Roh.

** *my* not in L. and M. or Roh.

†† l'heire—la terre *L. and M. and Roh.*

‡‡ *&c.* not in L. and M. or Roh.

section, Littleton puts the case of a person disseised by an infant, who aliens the land in fee, and the alienee dies, the *infant disseisor* being still under age. A descent is thereby cast, which takes away the entry of the disseisee; but the alienation being made by an infant, is voidable by his entry, and if the descent happens during his infancy, it does not affect his right of entry. He may therefore enter notwithstanding the descent; and, if he does enter, the right of entry of the disseisee is revived. It is obvious, that the point of this case is, not that the heir of the alienee is an infant within age, as lord Coke translates it, but that, at the time of the descent, the infant disseisor still continues an infant. The words, *esteant l'enfant deins age*, should therefore be translated, "the infant being under age."—[Note 187.]

now hath the king the wardship of the bodie, and is intituled to the gard of the land. But if the feoffor pay the hundred pounds according to the limitation, the wardship is devested, both for the body and the land, and so it is in case of a condition: for, as *Littleton* here saith, the discent, which is the cause of wardship, is utterly defeated. And by these two last cases which *Littleton* hath here put, it appeareth, that there is no difference, where the discent is disaffirmed by a right paramount, as where the state was never ☞ lawfull (as in the case of an infant,) and where the discent is affirmed for a time, the estate being lawfull, and being after defeated by matter *ex post facto*, by a title of re-entry. (Ant. 76. b.)

[248. b.]

Sect. 410.

ALSO, if I be disseised, and the disseisor hath issue and entreth into religion, by force whereof the lands descend to his issue, in this case I may well enter upon the issue, and yet there was a discent. But for that such discent commeth to the issue by the act of the father, scilicet, *for that he entred into religion, &c. and the discent came not unto him by the act of God,* (scilicet) *by death, &c. my entry is congeable. For if I arraigne an assise of* novel disseisin *against my disseisor, albeit he after enter into religion, this shall not abate my writ, but my writ (notwithstanding this) shall stand in his force, and* my recovery against him shall bee good. † And by the same reason the discent which commeth to his issue by his own act, shall not take from me my entry, &c.*

"*ENTRETH into religion, &c.*" Here is implied profession. This discent shall not barre the entry of the disseisee, for that the discent commeth by the deed of the father, because he entred into religion, wherein there is an excellent point worthy of observation: for albeit the entry into religion make not the discent, but the profession, whereof you have read before, *Sect.* 200, yet here you may learne by *Littleton* that the law respects the originall act, and that is, his entry into religion, which is his owne act, whereupon the profession followed; whereby the discent happened; for *Cujusque rei potissima pars, principium est.* And againe, *Origo rei inspici debet*, whereof you shall make great use in reading of our bookes. [*] Here *Littleton* attributeth the cause of the discent to his entry into religion, which was his owne act, whereas a discent doth not take away an entry unlesse it commeth by death, which as *Littleton* saith, is the act of God, and no glorious pretext of an act (no, though it bee of religion) shall work a wrong to a stranger, that hath right, to barre him of his entrie. But it is said, that in the case of the bastard eigne, and *mulier puisne*, such a discent shall bind the *mulier*, as before hath beene said, and such an heire that commeth in by such a discent shall have his age. Vide Sect. 200. (Ant. 132.) (Ant. 126. b. 238. b. 3 Rep. 61.) [*] Vid. Pl. Com. Dame Hale's case. 6 E. 3. 41, &c. 10 E. 3. 55. (Ant. 244.)

"*For*

* *my recovery* not in L. and M. or Roh. † *And* not in L. and M. or Roh.

3 H. 6. 41.
10 H. 6. 10. b.
18 E. 4. 19.
9 E. 4. 25. 52.
7 E. 4. 15.
18 E. 3. 24.
25 E. 3. 39.
46 E. 3. 25.
30 E. 1.
Briefe, 885.
Bracton, lib. 4. fo. 189 & lib. 5. fo. 414.
22 R. 2.
Briefe, 936.

"*For if I arraigne an assise, &c.*" *Nota*, if a man be tenant or defendant in a reall or personall action, and hanging the suit the tenant or defendant entreth into religion, by this the writ is not abated, because it is by his owne act. And so it is of a resignation; but otherwise it is of a deposition, or deprivation, because he is expelled by judgment, and yet his offence, &c. was the cause thereof, *sed in præsumptione legis, judicium redditur in invitum.*

"*From me my entry, &c.*" Here is implyed, or any of my heires.

15 Ass. pl. 8.

☞ Sect. 411. [249. a.]

ALSO, if I let unto a man certaine lands for the terme of twenty yeares, and another disseiseth me, and oust the termor, and die seised, and the lands descend to his heire, I may not enter; and yet the lessee for yeares may well enter, because that by his entry hee doth not ouste the heire who is in by discent of the freehold which is descended unto him, but only * *claymeth to have the lands for terme of yeares, which is no expulsion from the freehold of the heire who is in by discent* (lequel n'est † pas expulsement de le franktenement del heire que est eins per discent). *But otherwise it is where my tenant for terme of life is disseised* (ou mon tenant a terme de vie est ‡ disseisie), causa patet, &c. ‖ (1)

"*FOR the terme of twenty yeares.*" It is cleere that a discent shall not take away the entrie of a lessee for yeares, as our author here saith, nor of a tenant by *elegit*, or tenant by statute merchant, or such like, as have but a chattle and no freehold; and the reason is, for that by their entry upon the heire by discent, they take no freehold (which, as often hath bin observed, is so much respected in law) from him; but otherwise it is of an estate for life, or any higher estate. And as a discent of a freehold and inheritance shall take away the entrie of him that right hath to a freehold, or inheritance, so a discent of a freehold and inheritance cannot take away the entry of him that hath but a chattle, for that no discent or dying seised can be of the same.

A man

* *claymeth* not in L. and M. or Roh.

† pas *not in L. and M. or Roh.*

‡ disseisie—seisie, &c. *L. and M. and Roh.*

‖ &c. not in L. and M. or Roh.

(1) A lease is considered as a covenant real, that binds the possession of lands into whose hands soever it comes, if the lands be not evicted by a superior title; yet the termor has not the freehold in him, but holds the possession as bailiff of the freeholder, *nomine alieno*, by virtue of the obligation of the covenant. Now then, if the termor enters before the descent, he revests the freehold in the disseisee, who has the right of possession; but if he enters after the descent, then he can only hold in the name of the freeholder, who has the present right of possession, which is the heir of the disseisor. Gilb. Ten. 35.—[Note 188.]

(2) A man seised of an advowson in fee grants three avoydances one after another, and after the church becommeth void, and the grantor presents, and his clarke is admitted and instituted, and after the church becomes void againe, the grantee may present to the second avoydance, for that he was not put out of the possession thereof; for as the lessor having the freehold and inheritance cannot disseise his lessee for years, having but a chattle, that any discent may be cast to take away his entry (as *Littleton* here saith); so in the said case the grantor hath the franktenement and fee of the advowson rightfully, so as he cannot make any usurpation, to gaine any estate, or to put the grantee so out of possession as that he should not present, no more than the lessee for yeares in this case, to enter. Also in respect of the privitie that is betweene them, the usurpation of the grantor shall not put the grantee out of possession for the two latter avoydances. And this was resolved [*a*] by all the judges of the court of common pleas, which I myselfe heard and observed.

(See 2 Roll. Abr. 371. Hob. 322, 323. 5 Rep. 57. 102.)

[*a*] Hil. 18 Eliz. in communi banco.

Sect. 412.

ALSO, it is said, that if a man be seised of lands in fee by occupation in time of warre, and thereof dieth seised in the time of warre, and the tenements discend to his heire, such discent shall not oust any man of his entry; and of this a man may see in a plea upon a writ of aiel, 7 E. 2.

"*BY occupation in time of warre.*" First, it is necessarie to be knowne, what shall bee said time of peace, *tempus pacis*; and what shall be said *tempus belli, sive guerræ*, time of warre. *Tempus pacis est* ☞ *quando cancellaria, & aliæ curiæ regis sunt apertæ, quibus lex fiebat cuicunque prout fieri consuevit.* And so it was adjudged in the case of *Roger Mortimer*, and of *Thomas* earle of *Lancaster*. *Utrùm terra sit guerrina necne, naturaliter debet judicari per recorda regis, & eorum, qui curias regis per legem terræ custodiunt, & gubernant, sed non alio modo.*

[249. b.]

(4 Inst. 125.)

Inter brevia de anno 1 E. 3. parte 1. & Pasch. 28 E. 3. inter adjudicata coram rege, lib. 2. fol. 37. in Thesaur. Pasch. (Cro. Car. 71.)

39 E. 3. inter adjudicata coram rege in Thesaur. lib. 2. fol. 92.
14 E. 3. tit. Scire facias, 122. but more fully in the record at large.

And therefore when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellions, or such

(2) *Hob.* 322, 323. *sir William Elvis's case. This very case was the principal point; and there, by Hobart, Warburton, and Winch, it was adjudged* contra, *that usurpation by the grantor puts the grantee out of possession, and gets all that was granted out, Hutton* dissentiente. *But it appears that this case is good law, and that Hutton erravit. Hil.* 12 *Car. C. B. Legge* v. *Archer. A man leased an advowson for years, and then presented; this was ruled to be no usurpation, but plenarty* pro hâc vice: *this case is cited l.* 8, *usurpation* 5. idque ratione *privity*, ut inter *coparceners, and because it is against his own act.* 8 *Rep. Damport's case.* Lord Nott. MS.—[Note 189.]

such like, the peaceable courts of justice is disturbed and stopped, so as the courts of justice be as it were shut up, *et silent leges inter arma*, then it is said to be time of warre. And the triall hereof is by the records, and judges of the court of justice; for by them it will appeare whether justice had her equall course of proceeding at that time or no, and this shall not be tried by jury.

If a man be disseised in time of peace, and the discent is cast in time of warre, this shall not take away the entry of the disseisee.

Bracton, lib. 4. fol. 240. *Item tempore pacis, quod dicitur ad differentiam eorum quæ fuerunt tempore belli, quod idem est, quod tempore guerrino, quod nihil differt à tempore juris, & injuriæ; est enim tempus injuriæ, cum fuerunt oppressiones violentæ, quibus resisti non potest & disseisinæ injustæ.*

So as hereby it also appeareth, that time of peace is the time of law and right, and time of warre is the time of violent oppression, which cannot be resisted by the equall course of law. And therefore in all reall actions, the expleas, or taking of the profits, are layed *tempore pacis*, for if they were taken *tempore belli*, they are not accounted of in law (1).

" *By*

(1) *If tenant by elegit is interrupted in taking the profits of the land, by reason of war, he shall not hold over, but it shall be in disadvantage of the tenant by elegit.* 19 *E.* 1. *Execution*, 246. 4 *Rep.* 82. *b. In Lib. Rubb. Scacc. fol.* 241. tempus guerræ duravit à quarto die Apl. 48 H. 3. usque ad 17 Sep. an. 49, apud Winter post bellum de Evesham pax proclamata fuit. Nota H. 3. 19 die Oct. anno ejusdem 16. fuit apud Wall. An. 40, fuit apud Oxon. 48. apud Dudl. 14 Maij. an. 49. fuit apud Evesham. Et tamen sunt placita de Rich. 16 H. 3. de banco. Tr. 16 H. 3. Et assisa magna 40 H. 3. 48 H. 3. M. 40 H. 3. P. 48 H. 3. P. 49 H. 3. Et placita coram rege à 32, usque 40 H. 3. Tr. 4 H. 3. 26 et 27 E. 1. Ent. R. T. Rot. 5. *Goods were seized for debt to the king: the sheriff returned, that the Scots entered* hostiliter, *by reason of which they could not be taken: Rule,* Fiat inde inquisitio, & interim pacem habeatde demandâ. *Noy, MS.* 384.——3 *Inst.* 52. *See the case of the earl of Lancaster put at large. Nota, that in* 14 *E.* 3. F. scire facias, 122. *there is no intimation at all of the matter; but on the record of this case, as is to be seen in the manuscript Rep.* of Coke* 428, *the case was thus; Henry Lancaster granted to the Abbot of Rumsey and his successors,* quòd si ex tunc aliquo tempore vel aliquâ occasione guerræ in regno Angliæ feriam suam amitterent, ita quòd nihil inde percipere possunt, quieti essent ejusdem anno et tempore de formâ suâ prædictâ 50*l. And upon* scire facias *for the arrears of that rent, which was in court for three years, viz.* 11, 12, *and* 13 *E.* 3. *the abbot pleaded these charters, and said, that* guerra fuit tàm super mare quàm super terram inter dominum regem et illos de Franciâ, ita quòd mercatores ad dictas nundinas nec venerunt ut solebant, nec ipse abbas aliquod proficuum de iisdem nundinis per idem tempus percepit nec percipere possit, quod paratus fuit verificare juxta tenorem chartæ prædictæ; *and it was resolved,* quòd utrùm terra sit guerrina, &c. prout hic notatur. *Then it follows in the said manuscript:* Nota, quòd guerra dicitur in hoc regno esse, quando exercitium justitiæ in curiis et placeis regis impeditur. *And Coke adds a short note:* Ceo tryal de guerre in cest realm; et ex hoc semble que ne fuit guerre inter E. 4. et H. 6. car exercitium

* The Editor has not been able to discover what the manuscript is to which lord Nottingham alludes in this place.

"*By occupation.*" *Occupation* is a word of art, and signifieth a putting out of a man's freehold in time of warre; and it is all one with a disseisin in time of peace, saving that it is not so dangerous as it appeareth here by *Littleton*; and therefore the law gave a writ in that case of *occupavit*, so called, by reason of that word in the writ, in stead of *disseisivit*, in the *assise* of *novel disseisin*, if the disseisin had beene done in time of peace; whereby it appeareth, how aptly both in this, and in all other places, *Littleton* thorow his whole booke speaketh. But albeit *occupatio*, whereof *Littleton* here speaketh, is used only in the said writ (2) and in none other, (that I can finde or remember) yet hath it beene used commonly in conveyances and leases, to limit, or make certaine precedent words *ad tunc in tenurâ & occupatione.* But *occupatio* is applyed to the possession, be it lawfull or unlawfull; it hath also crept into some acts of parliament, as 4 *H.* 7. *cap.* 19. 39 *Eliz. cap.* 1. and others; and *occupare* is sometimes taken to conquer.

Ingham, cap. de Novel disseisin.

Lib. 4. fol. 49, 50. Ognel's case.

"*And of this a man may see in a plea upon a writ of aiel*, 7 *E.* 2." Hereby it appeares, that ancient termes or yeares, after the example of *Littleton*, are to bee cited and vouched for confirmation of the law, albeit they were never printed; and that of those yeares, those especially of *E.* 1. *H.* 3. *&c.* are worthy of the reading and observation; a great number of which I have seene and observed, which in mine opinion doe give a great light, not onely to the understanding and reason of the common law, (which *Fitzherbert* either saw not, or were by him omitted) but also to the true exposition of the ancient statutes made in those times. Yet mine advice is, that they be read in their time. For after our student is enabled and armed to set on our yeare bookes, or reports of the law, let him reade first the latter reports, for two causes. First, for that for the most part the latter judgements and resolutions are the surest, and therefore it is the best to season him with them in the beginning, both for the settling of his judgment, and for the retaining of them in memorie. Secondly, for that the latter are more facile and easier to be understood than the more ancient: but after the reading of them, then to reade these others before mentioned, and all the ancient authors that have written of our law; (for I would wish our student to be a compleat lawyer) But now to returne. As it is in case of discent, so it is in case of presentation, for no usurpation in time of warre putteth the right patron out of possession, albeit the incumbent come in by institution and induction: and time of warre doth not onely give privilege to them that be in warre, but to all others within the kingdome; and although the admission and institution be in time of peace, yet if the presentment were in time of warre, it putteth not the right patron out of possession.

6 E. 3. 41. 7 E. 3. Darr. pres. 2. 18 E. 2. Quar. imp. 175. F. N. B. 31.

Sect.

exercitium justitiæ non impeditum fuit, come appiert per les reports de 10 E. 3. et 49 H. 6. nec temps H. 3. hic supra, nec temps Car. 1. *Lord Nott. MS.* —[Note 190.]

(2) This perhaps is not quite accurate, as the words of the writ of mandamus are these: *Quis terras et tenementa (del tenant del roy) a tempore mortis ejusdem tenentis occupavit et exitus et proficuas inde percepit.* F. N. B. 253. B. Nov. lib. intrat. fol. 402. c. and vid. Stat. de Bigamis, cap. 4.—[Note 191.]

☞ Sect. 413. [250. a.]

ALSO that no dying seised (where the tenements come to another by succession) shall take away the entrie of any person, &c. As of prelates, abbots, priors, deanes, or of the parson of a church, or of other bodies politike (Item, * que nul morant seisie (ou les tenements viendront a un auter per succession) † tollera l'entre a'ascun person, &c. ‡ Come de prelates, abbots, priors, deans, ou parson d'esglise, ‖ ou d'auters corps politicke), *&c. albeit there were xx. dyings seised, and xx. successors, this shall not put any man from his entrie* §.

More shall be said of discents in the next ¶ *chapter.*

Vid. Sect. 1.

"*BY succession.*" This in the common law is applied only to bodies politike, or corporate, which have succession perpetuall, and not to naturall men: as to a bishop and his successors, or to an abbot, deane, archdeacon, prebend, parson, &c. and their successors, and not to *I. S.* or any other naturall body and his successors, but to him and his heires. And the successor of any of these is in the *post*, and the heire of the naturall man is in the *per*; and *succedere* is derived of *sub* and *cedere*.

7 E. 3. 25. a.
5 E. 3. 13. & 31.

"*Bodies politike, &c.*" This is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called here by *Littleton* a body politike; and it is also called a corporation, or a body incorporate, because the persons are made into a body, and are of capacity to take and grant, &c. And this body politike, or incorporate, may commence, and be established three manner of ways, *viz.* by prescription, by letters patents, or by act of parliament. Every body politike, or corporate, is either ecclesiasticall or lay: ecclesiastical, either regular, as abbots, priors, &c. or secular, as bishops, deanes, archdeacons, parsons, vicars, &c. lay, as maior and communaltie, baylifes and burgesses, &c. Also every body politike, or corporate, is either elective, presentative, collative, or donative. And againe it is either sole, or aggregate of many; as you may reade in the Third Part of my Commentaries. And this body politike, or corporate, aggregate of many, is by the civilians called *collegium* or *universitas*.

Lib. 3. fo. 73. in the case of the Deane & Chapter of Norwich (1 Sid. 162.) (11 Rep. 77. a.)

CHAP.

* que *not in L. and M. or Roh.*
† ne *added in L. and M. and Roh.*
‡ Come—quor. *L. and M. and Roh.*
‖ ou d'auters corps politicke, *not in L. and M. or Roh.*
§ *&c.* added in L. and M. and Roh.
¶ *next chapter—chapter of Continuall Claime*, L. and M. and Roh.

Chap. 7. Continuall Claime. (1) Sect. 414.

CONTINUAL claim is where a man hath right and title to enter into any lands or tenements whereof another is seised in fee (continual claime est † la lou home ad droit et title d'entrer en ascuns terres ou tenements dont ** auter est seisie en fee), *or in fee tail, if hee which hath title to enter makes continuall claime to the lands or tenements before the dying seised of him which holdeth the tenements, then albeit that such tenant dieth thereof seised, and the lands or tenements descend to his heire, yet may he who hath made such continual claime, or his heire, enter into the lands or tenements so descended, by reason of the continuall claime made, notwithstanding the discent. As in case that a man bee disseised, and the disseisee makes continuall claime to the tenements in the life of the disseisor, although that the disseisor dieth seised in fee, and the land descend to his heire, yet may the disseisee enter upon the possession of the heire, notwithstanding the discent* §.

HERE our Author first describeth what a continuall claime is. It is called *continuum clameum*, because at the common law it must have beene made within every yeare and day, as *Littleton* here teacheth. And yet if hee that right hath, maketh claime, and the ter-tenant dieth within the yeare and the day, this claime though it bee but ☞ once [*] made (as hath beene said) shall preserve the entry of him that maketh the claime (1) ||.

[250. b.]

Mirror, cap. 1. § 15 & § 18. Bracton, li. 5. fo. 435, 436. Britton, 107. b. 126. 4. Fleta, lib. 6. cap. 52. 53. Vid. Sect. 424. Vid. Sect. 385.

32 H. 8. c. 33. [*] Vid. Sect. 424.

" *Hath*

† per *added in L. and M.*
** un *added in L. and M.*
§ &c. added in L. and M. and Roh.

(1) By the statute of limitations, 21 Jac. 1. c. 16, it is enacted, that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue.——By the 4th and 5th (A) Ann. c. 16, it is enacted, that no entry shall be of force to satisfy the statute of limitations, or to avoid a fine levied of lands, unless an action be thereupon commenced within one year after, and prosecuted with effect.—[Note 192.]

(1) || It has been observed in the notes to the chapter of Discents, that the reasons, for which the law protected the possession of the heir of the disseisor from the entry of the disseisee, were, the notoriety and presumptive right of possession which the disseisor acquired by his being permitted to hold during his life the peaceable possession of the lands; the necessity that there should be a tenant to do the feudal duties; and by way of a punishment on the tenant for his neglect in not asserting his right. But none of these reasons could exist, where the tenant entered upon the lands, and made his claim for them; as, by doing it, he prevented the presumption in favour of the title of the disseisor; made a tender to the lord of his feudal services; and did all that was in his power to restore his possession. But, to entitle the disseisee to enter on the heir of the disseisor, notwithstanding the descent upon him, this claim must have been made within a year and a day next preceding the descent. Lord chief baron Gilbert, in his commentary upon this chapter, observes, that the

A) *The act is styled 4th Ann. c. 16, in Ruffhead's edition o the Statutes at large.*

"*Hath right and title to enter.*" And yet in some cases a continuall claime may be made by him that hath right, and cannot enter.

If tenant for years, tenant by statute staple, merchant, or *elegit*, be ousted, and he in the reversion disseised, the lessor, or he in reversion, may enter to the intent to make his claime, and yet his entry as to take any profits, is not lawfull during the terme. And in the same manner, the lessor or he in the reversion in that case may enter to avoid a collaterall warranty, or the lessor in that case may recover in any assise. And so (as some have holden) may the lessor enter in case of a lease for life, to this intent, to avoid a discent, or a warranty.

Dyer, 19 El. Pl. Com. 374. 15 H. 7. 3. 4. Jacobin's case. 28 H. 6. 28. Vid. Sect. 442. 45 E. 3. 21.

If the disseisee make continuall claime, and the disseisor die seised within the yeare, his heire within age, and by office the king is intitled to the wardship, albeit the entry of the disseisee bee not lawfull, yet may he make continuall claime to avoid a discent, and so in the like.

7 H. 6. 40. Contin. Claime, 1 Downcler's case. 5 E. 4. 4. (Plo. 191. a.) (9 Rep. 106.) (1 Rep. 67. a.) (1 Roll. Abr. 630.)

"*Yet may he who hath made such continual claime, or his heire, enter.*" This is to be understood in this manner: that if the father make claime, and the disseisor dieth, and then the father dieth, that his heire may enter, because the discent was cast in the father's time, and the right of entry which the father gained by his claime shall descend to his heire. But if the father make continuall claime, and dieth, and the sonne make no continuall claime, and within the yeare and day after the claime made by the father, the disseisor dieth, this shall take away the entrie of the sonne, for that the discent was cast in his time, and the claime made by the father shall not availe him that might have claimed himselfe. And of this opinion was *Littleton* himselfe in our bookes, where he holdeth that no continuall claime can avoid a discent, unlesse it be made by him that hath title to enter, and in whose life the dying seised was. See more of this matter hereafter, in this chapter, Sect. 416.

Bracton, lib. 5. fo. 436. Fleta, lib. 5. cap. 52, 53. 22 H. 6. 37. 9 H. 4. 5. a. 15 E. 4. 22. a.

And as here *Littleton* putteth his case of the ancestor and heire, so it holdeth in all respects of the predecessor and successor.

23 H. 6. 37.

Sect.

the notion of laches, in not claiming for a year and a day, is taken from the feudal law; this being the period of time within which the feudal services must be required. It is a space of time which is prescribed for the performance of different acts in our law, and in all laws derived from the feudal institutions. It seems only to import the space of a complete year. Thus in the fourth law of Charlemagne it is said, *Cujuscunque hominis proprietas ob crimen quod idem habet commissum in bonnum fuerit misca, & ille re cognitâ ne justitiam faciat venire distulerit, annumque et diem in eo banno esse permiseret, ulterius eam non acquirat, sed ipsa fisco nostro societur.*—In the laws of king Pepin it is said, *De rebus forfactis, quæ per diversos comitatos sunt, volumus ut ad palatium pertineant, transacto anno et die.* In the *Vieux Coutumier de Normandie* it frequently occurs. Something similar is to be found in the Roman law, in which a person who was bound to pay a sum of money in two months, was considered to acquit himself from the obligation, if he paid the money on the 61st day. See Pasquier, les Recherches de la France, lib. 4. cap. 32. *De l'an et jour que l'on desira és matieres de retraicts lignagers et de la complainte.*—In Plo. Com. 359. a. lord chief justice Dyer is said to have defined claim to be a challenge of the ownership, or propriety, that he hath not in possession, but is detained from him by wrong.—[Note 193.]

[251. a.]

☞ Sect. 415.

(1 Rep. 14. a.)

IN the same manner it is, if tenant for life alien in fee, he in the reversion or he in the remainder may enter upon the alienee. And if such alienee dieth seised of such estate without continuall claime made to the tenements, before the dying seised of the alienee, and the lands by reason of the dying seised of the alienee descend to his heir, then cannot he in the reversion nor hee in the remainder enter. But† if hee in the reversion or in the remainder, who hath cause to enter upon the alienee, make continuall claime to the land before the dying seised of the alienee, then such a man may enter after the death of the alienee, as well as he might in his life-time* (donques tiel home poit enter apres la mort l'alienee, auxy bien come il ‡ puissoit en sa vie) §.

BY this it appeareth, that a continuall claime may be made as well where the lands are in the hands of a feoffee, &c. by title, as in the hands of a disseisor, abator, or intrudor, by wrong, as before hath beene noted (1).

Sect. 416.

ALSO, if land be let to a man for terme of his life, the remainder to another for terme of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continuall claime to the land before the dying seised of the alienee, and after the alienee dieth seised, ‖ and after he in the remainder for life die before any entrie made by him, in this case he in the remainder in fee may enter

* *to his heir — to the heir of the alienee*, L. and M. and Roh.

† *if* not in L. and M. or Roh.

‡ puissoit en—poet a, *L. and M. and Roh.*

§ *&c.* in L. and M.

‖ *&c.* added in L. and M. and Roh.

(1) Except for the special purposes mentioned by Littleton and sir Edward Coke, and in a few other instances, the lessor, if the lessee for life were disseised, could not enter. But he might maintain an assise. In that case however, though he recovered the freehold, which was devested out of him, he recovered no damages, because those were supposed to be a compensation for the loss of possession, which loss was sustained not by him, but by the tenant for life. 15 H. 7. 4.—The lessor might enter upon the lessee to examine whether he had committed waste, or to view repairs. Bro. Trespas. 16. 97. 208. And if the lessee impeded his entry, the lessor might bring an action on the case. Cro. Jac. 478.—Express covenants, that it shall be lawful for the lessor to enter and view the lands demised, are now usually inserted in leases.—For the entry of reversioners, or remainder-men to avoid a fine, see Margaret Podger's case, 9 Rep. 106.—[Note 194.]

enter † *upon the heire of the alienee, by reason of the continuall claime made by him which had the remainder for life, because that such right as hee had of entrie, shall goe and remaine to him in the remainder after him, insomuch as hee in the remainder in fee could not enter upon the alienee in fee during the life of him in the remainder for life, and for that hee could not then make continuall claim* (pur ceo que tiel droit que il averoit d'entre, ‡ alera et remaindra a celuy en le remainder apres luy, entant que celuy en le remainder en fee § ne puissoit pas enter sur l'alienee en fee durant la vie celuy en le remainder pur terme de ‖ sa vie, et pur ceo * que il ne puissoit adonques faire continuall claim). †† *(For none can make continuall claime but when he hath title to enter, &c.)*

(1 Roll. Abr. 630.)

"*ALIEN to another in fee.*" It is to be observed, that a forfeiture may be made by the alienation of a particular tenant, two manner of wayes; either *in pais*, or by matter of record.

In pais, of lands and tenements which lie in livery (whereof *Littleton* intendeth his case) where a greater estate passeth by livery than the particular tenant may lawfully make, whereby the reversion or remainder is devested, as here in the example that *Littleton* putteth when tenant for life alieneth ☞ in fee, which must bee understood of a feoffment, fine, or recoverie by consent.

Vide Sect. 581. 609, 610, 611.

(1 Rep. 14.)

[251. b.]

If tenant for life, and hee in the remainder for life in *Littleton*'s case, hath joyned in a feoffment in fee, this had beene a forfeiture of both their estates, because hee in the remainder is *particeps injuriæ*. And so it is if hee in the remainder for life had entred, and disseised tenant for life, and made a feoffment in fee, this had beene a forfeiture of the right of his remainder (1).

17 El. Dy. 339. 16 El. Dy. 324.

A particular estate of any thing that lies in grant cannot be forfeited by any grant in fee by deed. As if tenant for life or yeares of an advowson, rent, common, or of a reversion or remainder of land, by deed grant the same in fee, this is no forfeiture of their estates, for that nothing passes thereby, but that which lawfully may passe; and of that opinion is *Littleton* in our bookes.

33 E. 3. Devise, 21. 15 E. 4. 9. Vide Sect. 608, 609, 610. (1 Roll. Abr. 854.)

But if tenant for life or yeares of land, the reversion or remainder being in the king, make a feoffment in fee, this is a forfeiture, and yet no reversion or remainder is divested out of the king; and the reason is, in respect of the solemnitie of the feoffment by liverie, tending to the king's disherison (2).

(1 Rep. 76. b.) 35 H. 6. 62. Tr. 32 El. in Informat. de intrusion vers Robinson pur le Manor de Drayton Basset, so resolved by the court of exchequer.

By matter of record, and that by three manner of wayes. First, by alienation. Secondly, by claiming a greater estate than he ought. Thirdly, by affirming the reversion or remainder to be in a stranger.

First,

† *&c.* added in L. and M. and Roh.
‡ ne *in L. and M. and Roh.*
§ que *added in L. and M. and Roh.*
‖ sa *not in L. and M. or Roh.*
* que *not in L. and M. or Roh.*
†† *(For none can make continuall claime)* not in L. and M. or Roh.

(1) See the observations on feoffments introduced in the notes to the next chapter.

(2) See ant. 233. b. note.

First, by alienation; and that of two sorts, *viz.* by alienation divesting, or not divesting, the reversion or remainder. Divesting, as by levying of a fine, or suffering a common recoverie of lands, whereby the reversion or remainder is divested: not divesting, as by levying of a fine in fee, of an advowson, rent, common, or any other thing that lieth in grant: and of this opinion is *Littleton* in our bookes [*]. And so note two diversities: first, between a grant by fine (which is of record) and a grant by deed *in pais*; and yet in this they both agree that the reversion or remainder in neither case is divested: secondly, betweene a matter of record, as a fine, &c. and a deed recorded, as a deed inrolled, for that worketh no forfeiture, because the deed is the originall.

(Post. 332. b. 1 Leo. 40. 1 Roll. Abr. 855.)

[*] 15 E. 4. 9. 31 E. 3. Gr. 62. 14 E. 3. 3 Avow. 117.

Secondly, by claime; and that may be in two sorts, either expresse or implyed. Expresse, as if tenant for life will in court of record claime fee, or if lessee for yeares be ousted, and he will bring an assise *ut de libero tenemento*. Implyed, as if in a writ of right brought against him he will take upon him to joyne the mise upon the meere right, which none but tenant in fee simple ought to doe. So if lessee for yeares doe lose in a *præcipe*, and will bring a writ of error, for error in processe, this is a forfeiture (3).

15 E. 2. Judg. 237. 6 E. 3. 49. 9 E. 3. 4. 18 E. 2. Fines, 120. 15 E. 4. 29. 36 H. 6. 29. 2 H. 6. 9. 4 Fl. Dy. 9 H. 5. 14.

22 Ass. 31. 18 E. 3. 28. 16 Ass. 16. (Mo. 77. 212. 1 Rep. 16.)

[252. a.] ☞ Thirdly, by affirming the reversion or remainder to be in a stranger, and that either actively or passively. Actively, by five manner of wayes. As first, if tenant for life pray in aid of a stranger, whereby he affirmes the reversion to be in him. Secondly, if he atturne to the grant of a stranger; and there note also a diversitie betweene an atturnement of record to a stranger, and an atturnement *in pais*, for an atturnement *in pais* worketh no forfeiture. Thirdly, if a stranger bring a writ of entrie *in casu proviso*, and suppose the reversion to be in him, if the tenant for life confesse the action, this is a forfeiture. Fourthly, if tenant for life plead covinously, to the disherison of him in the reversion, this is a forfeiture. Fifthly, if a stranger bring an action of waste against lessee for life, and he plead *nul wast fait*, this is a forfeiture; or the like.

21 E. 3. 14. a. 5 E. 4. 2. 24 H. 8. Forf. Br. 87. li. 2. fol. 55, 56. Buckler's case. 27 E. 3. 77. 17 E. 3. 7. a. 39 E. 3. 16. 29 E. 3. 24. 5 Ass. 5. 5 E. 3. Entr. cong. 42. 14 E. 3. Receit, 135. 3 E. 3. 32. 24 E. 3. 68.

1 H. 7. (1 Roll. Abr. 852. 3 Rep. 4. b. 1 Leo. 264. 9 Rep. 106.)

Passively, as if tenant for life accept a fine of a stranger, *sur conusans de droit come ceo, &c.* for hereby he affirmes of record the reversion to be in a stranger (1).

3 Mar. Dy. 148.

Littleton here speaketh of the forfeiture of an estate; and here it is to be knowen, that the right of a particular estate may be forfeited also, and that he that hath but a right of a remainder or reversion

Lib. 2. fol. 55. Buckler's case.

(3) So in the case of a lease for life, the tenant may plead it in bar; but, in the case of a lease for years, or an estate of tenant by statute or *elegit*, the defendant shall not plead in bar, as to say, *assisa non*, &c. but justify by force of the lease: and conclude, *issint sans tort*; and if the tenant of the freehold be not named, he shall plead, *nul tenant de franctenement nosmé en le bref:* and in the case of a feoffment with a warranty, he must rely on the warranty. See ant. 228. b. 229. a.—[Note 195.]

(1) But, though this acceptance amounts to a forfeiture, it does not devest the estate of him in remainder or reversion. 9 Rep. fol. 106. b.—[Note 196.]

reversion shall take benefit of the forfeiture. As if tenant for life be disseised, and hee levie a fine to the disseisor, he in the reversion or remainder shall presently enter upon the disseisor for the forfeiture. And so it is if the lessee after the disseisin had levied a fine to a stranger, though to some respects *partes finis nihil habuerunt*, yet it is a forfeiture of his right.

13 E. 4. 4. *Littleton* here speaketh of an alienation in fee absolutely, but so it is if the lessee for life make a lease for any other man's life, or a gift in taile. If *A.* be tenant for life, and make a lease to *B.* for his life, and *B.* dieth, and the lessee re-entreth, yet the forfeiture remaineth.

(Ant. 202. b.) 39 Ass. 15. 43 E. 3. Ent. cong. 30. 2 H. 5. 7. 39 E. 3. 16. 45 E. 3. 25. (Ant. 28. a. 42. a.) If tenant for life make a lease for life, or a gift in taile, or a feoffment in fee, upon condition, and entreth for the condition broken, yet the forfeiture remaineth. *Littleton* speaketh of an estate for life; so it is of tenant in taile *apres possibilitie*, tenant by the courtesie, tenant in dower, or of him that hath an estate to him and his heires, during the life of *I. S.* &c. and so of tenant for yeares, tenant by statute merchant, statute staple, or *elegit*.

Littleton saith, that where the alienation in fee is made to another, which must be intended a stranger, for if it be made to him in reversion or remainder, it amounts to a surrender of his estate, as at large hath beene spoken in the chapter of tenant for life.

By *Littleton* it appeareth, that tenant for life in remainder may enter for the forfeiture of the first tenant for life, and that if the tenant for life in remainder make continuall claime, and the alienee die seised, then may he in the remainder for life enter; and if he die before he do enter, then he in the remainder in fee shall enter, because he in the remainder in fee could not make any claime(2); and therefore the right of entrie, which tenant for life in remainder gained by his entrie (3), shall goe to him in the remainder in fee, in respect of the privitie of estate: and so it is of him in the reversion in fee in like case, for he is also privie in estate.

(1 Roll. Abr. 630.)

If two joyntenants be disseised, and the one of them make continuall claime, and dieth, the survivor shall take benefit of his continuall claime in respect of the privitie of their estate.

But if tenant for life make continuall claime, this shall not give any benefit to him in the remainder, unlesse the disseisor died in the life of tenant for life, for the cause abovesaid, *Sectione* 414.

If tenant in taile, the remainder in fee with garrantie, have judgement to recover in value, and dieth before execution without issue, he in the remainder shall sue execution, for he hath right thereunto, and is privie in estate.

In the same manner, if a seigniorie be granted by fine to one for life, the remainder in fee, the grantee for life dieth, he in the remainder shall have a *per quæ servitia*, for he hath right to the remainder, and is privie in estate. Here also it appeareth, that none can make continuall claime, but he that hath right to enter.

Sect.

(2) *i. e.* during the life of him in the remainder for life.

(3) The word *entry* appears to be printed in this case by mistake, instead of the word *claim*, which the context seems to require.

Sect. 417.

*BUT it is to be seene of thee (my son) how and in what manner such continuall claime shall be made; and to learne this wel, three things are to be understood. The first thing is, if a man hath cause to enter into any lands or tenements in divers townes in one same countie, if he enter into one parcell of the lands or tenements which are in one towne, in the name of all the lands or tenements into the which he hath right to enter within all the townes of the same countie; * by such entrie he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entrie* (de † touts terres ou tenements dont il ad title d'entrie), *as if hee had entred ‡ in deed into every parcell: and this seemeth great reason.*

"*IF a man hath cause to enter into any lands or tenements, &c.*" It is not sufficient to tell one generally what he should doe, but to direct him how, and in what manner he shall doe it, as *Littleton* doth in this place. And here, the generall rules of our author are to bee ☞ understood, that the entrie of a man, to recontinue his inheritance or freehold, must ensue his action for recoverie of the same. As if three men disseise me severally of three severall acres of land, being all in one countie, and I enter in one acre, in the name of all the three acres, this is good for no more but for that acre which I entred into, because each disseisor is a severall tenant of the freehold, and as I must have severall actions against them for the recoverie of the land, so mine entrie must be severall.

(Plo. 355. b. 359. a. 2 Inst. 518. 3 Rep. 91. 1.) (Post. 263. b.)

[252. b.]

This hath beene adjudged, Mich. 14 & 15 Eliz. Rot. 1458, in the Earl of Arundell's case.

And so it is if one man disseise mee of three acres of ground, and letteth the same severally to three persons for their lives, *&c.* there the entrie upon one lessee, in the name of the whole, is good for no more than that acre that he hath in his possession. But if the disseisor had letten severally the said three acres to three persons for yeares, there the entrie upon one of the lessees, in the name of all the three acres, shall recontinue and revest all the three acres in the disseisee, for that the disseisee might have had one assise against the disseisor, because he remained tenant of the freehold for all the three acres, and therefore one entrie shall serve for the whole.

(4 Leo. 8.) (1 Leo. 36.) (1 Roll. Abr. 738.) (1 Leo. 51.)

If one disseise me of one acre at one time, and after disseise me of another acre in the same countie at another time, in this case mine entrie into one of them in the name of both is good: for that one assise might be brought against him for both disseisins.

7 Ass. 18. 12 E. 4. 10. 36 H. 6. 27. 32 Ass. pl. 1.

But if I infeoffe one of one acre of ground upon condition, and at another time I infeoffe the same man of another acre in the same countie upon condition also, and both the conditions are broken, an entrie into one acre in the name of both is not sufficient, for that I have no right to the land, nor action to recover the same, but a bare title, and therefore severall entries must

11 H. 7. 25. Dyer. 16 El. 337.

* *and* added in L. and M. and Roh.

† touts—tiels, *L. and M. and Roh.*

‡ *in deed*, not in L. and M. or Roh.

must be made into the same, in respect of the severall conditions. But an entrie in one part of the land, in the name of all the land subject to one condition, is good, although the parcels be severall, and in severall townes. And so note a diversitie betweene severall rights of entrie, and severall titles of entrie, by force of a condition (1).

"*In one same countie.*" For if the lands lye in severall counties there must be severall actions, and consequently severall entries, as hath beene said.

5 H. 7. 7. 4 E. 4. 19. 12 E. 4. 11. a. (Ant.52.180.b.) (10 Rep. Lampet's case.) (Plo. Com. 91.)

"*In the name of all, &c.*" If one disseise me of two severall acres in one countie, and I enter into one of them generally, without saying, In the name of both; this shall revest only that acre wherein entrie is made, as hath beene said; and that is proved by our bookes, which say, that if I bring an assise of two acres, if I enter into one hanging the writ, albeit it shall revest that only acre, yet the writ shall abate.

"*Whereof he hath title of entrie.*" Here in a large sense, title of entrie is taken for a right of entrie.

(9 Rep. 136. b.) (Ant. 48, 49, 50. Post. 259. a.) (2 Rep. 31.)

☞ Sect. 418. [253. a.]

FOR if a man will enfeoffe another without deed of certaine lands or tenements which he hath in many townes in one countie, and he will deliver seisin to the feoffee of parcell of the tenements within one towne in the name of all the lands or tenements which he hath in the same towne, and

(1) The entry for a condition broken has been discussed in the preceding chapter, and the commentary and notes upon it.—With respect to entries for avoiding fines, there were four modes of avoiding a fine at the common law; two by matter of record, and two by acts *in pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied, and an entry of a claim on the record at the foot of the fine itself, in this manner, *talis venit et apponit clameum suum*. Those by acts *in pais* were a lawful entry upon the land by the person who had a right; and if that could not be done, a continual claim. But by the statute of 4 H. 7. all those who are affected by a fine must pursue their title by way of action, or lawful entry; so that a claim entered on the record of a fine would now be ineffectual. The actual entry must be made by the person who has a right to the lands, or some one appointed by him, either by preceding command or subsequent assent, within five years. See Plowd. 355. 359. 2 Inst. 518. 3 Rep. 91. 2 Bla. Rep. 994.—By the statute of 4 Ann. c. 16. sect. 16. it is enacted, "That no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be of any force or effect to avoid any fine levied, or to be levied, with proclamations, according to the form of the statute in that case made and provided, in the court of common pleas; or in the courts of sessions in any of the counties palatine, or in the courts of grand sessions in Wales, shall be a sufficient entry or claim within the statute of limitations, unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."—[Note 197.]

and in other townes, &c. all the said tenements, &c. passe by force of the said livery of seisin to him to whom such feoffment in such manner is made, and yet hee to whom such livery of seisin was made hath no right in all the lands or tenements in all the townes (et uncore celuy a que tiel livery de seisin fuit fait, n'avoit droit * en touts les terres ou tenements en touts les villes), *but by reason of the livery of seisin made of parcell of the lands or tenements in one towne:* à multò fortiori, *it seemeth good reason that when a man hath title to enter into the lands or tenements in divers townes in one same county, before entry by him made, that by the entry made by him into parcell of the lands in one towne, in the name of all the lands and tenements to which he hath title to enter within the same county, this shall vest a seisin of all in him* (ceo † vest un seisin de touts en luy), *and by such entry hee hath possession and seisin in deed, as if he had entred into every parcell.*

THIS is evident, but here is a diversity betweene a feoffment and an entry; for a man may make a feoffment of lands in another county, and make livery of seisin within the view, albeit he might peaceably enter and make actuall livery; and so may he shew the recognitors in an assise the view of lands in another county; but a man cannot make an entry into lands within the view where he may enter without any feare (for it is [*] one thing to invest, and another to devest), as hereafter shall be said in the Section next following.

38 E. 3. 11. 38 Ass. 23.

[*] Vide Sect. next following.

"*A multò fortiori.*" Or *à minore ad majus,* is an argument frequent in our author, and in our bookes, the force of argument in this place standing thus: if it be so in a feoffment passing a new right, much more it is for the restitution of an antient right, as the worthier and more respected in law, which holdeth affirmatively, as our author here teacheth us.

Vide Sect. 438.

The three *(&c.)* in this Section need no explication.

[253. b.] ☞ Sect. 419.

THE second thing to be understood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the same lands or tenements, nor into any parcell thereof for doubt of beating, or for doubt of mayming, or for doubt of death, if he goeth and approach as neere to the tenements as hee dare for such doubt, and by word claime the lands to bee his, presently by such claime he hath a possession and seisin in the lands, as well as ‖ *if hee had entred in deed, although hee never had possession or seisin of the same* ‡ *lands or tenements before the said claime.*

HERE

* en—a, *L. and M. and Roh.*
† vest—est, *L. and M. and Roh.*
‖ *if* not in L. and M. or Roh.
‡ *lands or* not in L. and M. or Roh.

Vide the Sect. preceding. (2 Roll. Abr. 124. 2 Inst. 483.) 7 E. 4. 21. 39 H. 6. 5.

HERE is to be observed, that every doubt or feare is not sufficient, for it must concerne the safety of the person of a man, and not his houses or goods; for if hee feare the burning of his houses, or the taking away or spoiling of his goods, this is not sufficient, because hee may recover the same, or dammages to the value without any corporall hurt.

Again, if the feare do concern the person, yet it must not bee a vaine feare, but such as may befall a constant man; as if the adverse partie lie in wait in the way with weapons, or by words menace to beat, mayhem, or kill him that would enter; and so in pleading must hee shew some just cause of feare, for feare of it selfe is internall and secret. But in a speciall verdict, if the jurors doe finde that the disseisee did not enter for feare of corporall hurt, this is sufficient, and shall be intended that they had evidence to prove the same. *Talis enim debet esse metus qui cadere potest in virum constantem, et qui in se continet mortis periculum, et corporis cruciatum. Et nemo tenetur se infortuniis et periculis exponere.*

(9 Rep. 13.) 39 E. 3. 28. 11 R. 2. tit. Dures, 2. 12 H. 4. 19, 20. Bract. lib. 2. fol. 16. b. Britton, fol. 19. 66. Fleta, lib. 3. cap. 7. and lib. 2. cap. 54. 49 E. 3. 14. 14 H. 4. 13. 39 Ass. 11. 11 H. 6. 51. 38 H. 6. 27. 39 H. 6. 36. 5. 20 H. 6. 28. 4 E. 4. 17. 12 E. 4. 7. 28 H. 6. 8. 41 E. 3. 9. 11 H. 4. 6. 8 Ass. 25. Vide Sect. 434. W. 2. cap. 49. 13 H. 4. Dures, 20.

And it seemeth that feare of imprisonment is also sufficient, for such a feare sufficeth to avoid a bond or a deed; for the law hath a speciall regard to the safety and liberty of a man. And imprisonment is a corporall dammage, a restraint of liberty, and a kind of captivity. But see in the Second Part of the Institutes, *W.* 2. *cap.* 49. a notable diversity betweene a claime or an entry into land, and the avoidance of an act or deed for feare of battery.

"*By such claime, he hath a possession and seisin, &c.*" Here is to be observed, that there be two manner of entries, *viz.* an entry in deed, and an entry in law. An entry in deed is sufficiently knowne. An entry in law is when such a claime is made as is here expressed, which entry in law is as strong and as forcible in law as an entry in deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon such an entry in law an assise doth lie, as well as upon an entry in deed, and such an entry in law shall avoid a warranty, &c.

Vide Sect. 378.

11 H. 6. 51. (Post. 256. b.)

But here is a diversity to be observed betweene an entry in law and an entry in deed, for that a continuall claime of the disseisee being an entry in law shall vest the possession and seisin in him for his advantage, but not for his disadvantage. And therefore if the disseisee bring an assise, and hanging the assise he make continuall claime, this shall not abate the assise, but he shall recover dammages from the beginning; but otherwise it is of an entry in deed. See more of this matter after in this chapter, Sect. 422.

Vid. Sect. 442. Pl. Com. 93. in Ass. de fresh-force. The parson of Hony-lane's case.

[254. a.]

☞ Sect. 420.

AND that the law is so, it is well proved by a plea of an assise in the booke of assises, an. 38 E. 3. p.* 32, *the tenor whereof followeth in this manner. In the county of* Dorset, *before the justices, it was found by verdict of assise, that the plaintiff which had right by discent of inheritance to have the tenements put in plaint, at the decease of his ancestor was abiding in the towne where the tenements were,† and by paroll claimed the tenements amongst his neighbours, but for feare of death hee durst not approach the tenements, but bringeth his assise, and upon this matter found, it was awarded that he should recover, &c.*

HERE it appeareth that our booke cases are the best proofes what the law is, *Argumentum ab authoritate est fortissimum in lege.* And for proofe of the law in this particular case, *Littleton* here citeth a case in 38 E. 3, but it is misprinted, for the originall, according to the truth, is in the Booke of *Assises*, 38 E. 3. p. 23, and not *placito* 32, for there be not so many pleas in that yeare. And after the example of *Littleton*, booke cases are principally to be cited for deciding of cases in question, and not any private opinion, *teste meipso.* More shall be said of the matter implyed in this Section in the next following. 38 Ass. p. 23.

Sect. 421.

THE third thing is to know within what time‡ and by what time the claim which is said continuall claime shall serve and aid him that maketh the claime, and his heires. And as to this it is to be understood, that he which hath title to enter, when he will make his claime, if he dare approach the land, then he ought to go to the land, or to parcell of it, and make his claime (donques il covient aler a la terre, ou a parcel de ceo, § et faire son claime); *and if he dare not approach the land for doubt or feare of beating, or maiming, or death, then ought he to go and approach as neere as he dare towards the land, or parcell of it, to make his claime* (donques covient a luy d'aler et approcher auxy pres come il osast vers la terre, ou parcel de ceo, ‖ a faire son claime).

"*OUGHT he to go and approch as neere, &c.*" By this it should seeme, that by the authority of our author, if the disseisee commeth as neere to the land as he dare, &c. and maketh his claime, this should be sufficient, albeit he be not within the view.

And the great authoritie of the booke [*] in 9 H. 4, (being by the [*] 9 H. 4. 5.

* p. 32, not in L. and M. or Roh.
† &c. added in L. and M. and Roh.
‡ *and by what time*, not in L. and M. or Roh.
§ a *added in L. and M. and Roh.*
‖ a—et *L. and M. and Roh.*

the whole court) is not against this; for that case is put where there is no such feare, as here our author mentioneth, in him that makes the continuall claime, ☞ and then he that makes the continuall claime ought to bee within the view of the land; and therefore the authoritie of this booke, as it is commonly conceived, is not against the opinion of our author in the point aforesaid. But then it is further objected, that the said booke is against another opinion of our author in this Section, *viz.* that where there is no feare, &c. hee that maketh a continuall claime * ought to go to the land or to parcell thereof to make his claime, and therefore in that case he cannot make a claime within view of the land. To this it is answered, that where a continuall claime shall divest any estate in any other person in any lands or tenements, there, as it hath beene said, he that maketh the claime ought to enter into the land, or some part thereof, according to the opinion of our author: but where the claime is not to devest any estate, but to bring him that maketh it into actual possession, there a claime within the view sufficeth: as upon a discent, the heire having the freehold in law may claime land within the view to bring himselfe into actual possession, and in that sense is the opinion of *Hull* and the court to be intended. *Et sic de similibus.* But yet the entry into some parcell in the name of the residue is the surest way (1).

[254. b.]

* 11 H. 6. 31, agreeth with our author in this point. (3 Rep. 25. Ant. 15. Ant. 245.)

Vid. Sect. 177.

Sect. 422.

AND if his adversary who occupieth the land, dieth seised in fee, or in fee taile, within the yeare and a day after such claime, whereby the lands descend to his sonne as heire to him, yet may hee which makes the claime enter upon the possession of the heire, ‡ *&c.*

"*WITHIN the yeare and a day.*" It is to bee observed, that the law in many cases hath limited a yeare and a day to be a legall and convenient time for many purposes. As at the common law, upon a fine or finall judgement given in a writ of right, the party grieved had a yeare and a day to make his

Vid. Sect. 385. 426. 9 H. 4. 5. 14 H. 4. 36. 7 E. 3. 37. Pl. Com. 356, 357. 367. Mirror, cap. 2. § 18. Britton, fol. 45. b. & 126.

‡ *&c.* not in L. and M. or Roh.

(1) Even where a declaration in ejectment is delivered, though the defendant appears to it, and confesses lease, entry and ouster, yet, to avoid a fine, there must be an actual entry. This was very solemnly determined in the king's bench, in the case of Berrington *v.* Packhurst: and by the lords on appeal in 1758. See 2 Stra. 1086. 4 Bro. Par. Cas. 353. This doctrine has since been twice expressly recognized;—first, in the case of Oates ex dimiss. Wigfall *v.* Brydon, 3 Burr. 1895; and afterwards in the case of Goodright *v.* Cator, Doug. 460. In that case, lord Mansfield states the distinction to be, that where entry is necessary to *complete the landlord's title*, there, the confession of lease, entry, and ouster, is sufficient; but that, where it is requisite in order to *rebut the defendant's title*, actual entry must be made. The latter is the case where a fine is to be avoided.—[Note 198.]

his claime. So the wife or heire hath a yeare and a day to bring an appeale of death. If a villeine remained in antient demesne a yeare and a day, he is privileged. If a man be wounded or poysoned, &c. and dieth thereof within the yeare and the day, it is felony. By the antient law if the feoffee of a disseisor had continued a yeare and a day, the entry of the disseisee for his negligence had beene taken away. After judgement given in a reall action, the plaintife within the yeare and the day may have a *habere facias seisinam*, and in an action of debt, &c. a *capias*, *fieri facias*, or a *levari facias*. A protection shall be allowed but for a yeare and a day, and no longer, and in many other cases. (Post. 262. a.) (Ant. 130. b.)

But this time of a yeare and a day in case of continuall claime is, since our author wrote, altered by the said statute of 32 *H.* 8. *ca.* 33, as before it appeareth. Vid. Sect. 385.

[255. a.]

☞ Sect. 423.

BUT in this case after the yeare and the day that such claime was made, if the father then died seised the morrow next after the yeare and the day, or any other day after (Mes en cest cas apres l'an et le jour que tiel claime fuit fait, * si le pere donques morust seisi ademaine procheine apres l'an et le jour, ou † un auter jour apres), *&c. then cannot hee which made the claime enter: and therefore if hee which made the claime will be sure at all times that his entrie shall not be taken away by such discent, &c. it behoveth him that within the yeare and the day after the first claime ‡ made, to make another claime in forme aforesaid, and within the yeare and the day after the second claime ‖ made, to make the third claime in the same manner, and within the yeare and the day after the third claime to make another claime, and so over, that is to say, to make a claime within everie yeare and day next after everie claime made during the life of his adversarie, and then at what time soever his adversarie dieth seised, his entrie shall not be taken away by any discent. And such claime in such manner made* (Et tiel claime en tiel maner § fait), *is most commonly taken and named Continuall Claime of him which maketh the claime, &c.*

IT is to be observed, that the yeare and the day shall bee accounted, as the day whereon the claime was made shall be accounted one: as for example, if the claime were made 2. *die Martii*, that day shall be accounted for one; for *Littleton* saith in the Section next before (after the claime made) and then the yeare must end the first day of *March*, and the day after is the second day of *March*. Vid. Sect. 385. (Ant. 46. b.)

See for the computation of the yeare, *de anno bisextili*, and of the

* si nul auter clayme fuist fait *added in L. and M. and Roh.*

† a *added in L. and M. and Roh.*

‡ *made* not in L. and M. or Roh.

‖ *made* not in L. and M. or Roh.

§ d'estre *added in L. and M. and Roh.*

the day naturall and artificiall, and other parts of the yeare,
[a] Bract. fol. 264. 344. 359. [a] *Bracton*, [b] *Britton*, and [c] *Fleta*, excellent matter.
(2 Roll. Abr. 1521.) [b] Britton, fol. 209. [c] Fleta, lib. 6. cap. 11. Statute de anno Bisextili. 21 H. 3. Dier, 17 Eliz. 345.

Sect. 424.

*BUT yet in the case aforesaid, where his adversarie dieth within the yeare and the day next after the * claime, this is in law a continuall claime, insomuch as his adversarie ☞ within the yeare and the next day after the same claime dieth. For he which made his claime needeth not to make any other claime, but at what time he will within the same yeare and day,* (car il ne besoigne a celuy que fist son claime de faire ascun auter claime, mes a quel temps que il † voit deins mesme l'an et jour), *&c.* [255. b.]

Vid. Sect. 414. This is evident.

(Vid. Stat. 32 H. 8. c. 33.)

Sect. 425.

ALSO, if the adversarie be disseised within the yeare and the day after such claime, and the disseisor thereof dieth seised within the yeare and the day, &c. such dying seised shall not grieve him which made the claime, but that he may enter, &c. For whosoever hee be that dieth seised within the yeare and the day after such claim made, this shall not hurt him that made the claime, but that he may enter, &c. albeit there were many dyings seised, and many discents within the same yeare and day, &c.

HERE it appeareth, that the continuall claime doth not only extend to the first disseisor, in whose possession it was made, but to any other disseisor that dieth seised within the yeare and day after the continuall claime made. And whereas our author speaketh of a second disseisor, &c. herein is likewise implyed not only abators and intrudors, but the feoffees or donees of the disseisors, abators, or intrudors, and any other feoffee or donee immediate or mediate, dying seised within the yeare and day, of such continuall claime made.

Sect.

* *first* added in L. and M. and Roh. † voit *not in L. and M. or Roh.*

Sect. 426.

ALSO, if a man be disseised, and the disseisor dieth seised within the yeare and day next after the disseisin made, whereby the [256. a.] *tenements descend to his heire, in this ☞ case the entrie of the disseisee is taken away, for the yeare and day which should aid the disseisee in such case*, shall not bee taken from the time of title of entrie accrued unto him, but only from the time of the claime made by him in manner aforesaid. And for this cause it shall be good for such disseisee to make his claime † in as short time as he can after the disseisin, &c.*

THIS in case of a disseisor is now holpen by the statute made since *Littleton* wrote, as hath beene said; for if the disseisor die seised within five yeares after the disseisin, though there be no continuall claime made, it shall not take away the entry of the disseisee, but after the five yeares there must be such continuall claime as was at the common law: but that statute extendeth not to any feoffee or donee of the disseisor immediate or mediate, but they remaine still at the common law, as hath beene said.

32 H.8. cap. 33. Vide Sect. 385-422. (Ant. 238. a.)

Sect. 427.

ALSO, if such disseisor occupieth the lands fortie yeares, or more yeares (Item si tiel disseisor occupia la terre per xl. ans, ou per ‡plusors ans), *without any claime made by the disseisee, &c. § and the disseisee a little before the death of the disseisor makes a claime in the forme aforesaid, if so it fortuneth that within the yeare and the day after such claime the disseisor die, &c. the entrie of the disseisee is congeable, &c. And therefore it shall bee good for such a man which hath not made claime, and which hath good title of entrie ‖, when he heareth that his adversarie lieth languishing, to make his claime, &c.*

THIS is evident enough, and in respect of that which hath beene said, needeth not to be explained.

Sect. 428.

ALSO, as it is said in the cases put, where a man hath title of entrie by cause of a disseisin, &c. the same law is where a man hath right to enter by cause of another title, &c.

HERE

* *&c.* added in L. and M.
† *&c.* added in L. and M.
‡ plus *added in L. and M.*
§ *and* not in L. and M.
‖ *&c.* added in L. and M.

HERE title is taken in his large sense to include a right.

"*Another title, &c.*" Here is implyed abators or intruders, and not only their disseisors, but the feoffees or donees of disseisors, abators, or intruders, or any other so long as the entrie is congeable. [256. b.]

Sect. 429.

ALSO, of the said foresaying (de les dits * presidents) *thou mayst know* (*my sonne*) *two things. One is, where a man hath title to enter upon a tenant in taile, if he maketh such a claime to the land, then is the estate taile defeated, for this claime is as an entrie made by him, and is of the same effect in law as if he had bin upon the same tenements, and had entred into the same, as before is said.* † *And then when the tenant in taile immediately after such claime continue his occupation in the lands, this is a disseisin made of the same tenements to him which made such claime, and so by consequent, the tenant then hath a fee simple.*

"*Presidents.*" This should be *precedents*, and so is the originall, and this agreeth with the right sense of *Littleton*.

(Ant. 233.) And here it appeareth, that a continuall claime, which is an entrie in law, is as strong as an entrie in deed.

Vide Sect. 650, and 659, &c. "*Title to enter.*" Here *title to enter* is taken in the large sense for right of entrie.

Sect. 430.

THE second thing is, that as often as he which hath right of entrie maketh such claime, ‡ *and this notwithstanding his adversary continue his occupation,* § *so often the adversary doth wrong and disseisin to him which made the claime.* ☞ *And for this cause so often may he which makes the same claime* (que fist ‖ mesme le claime) *for every such wrong and disseisin done unto him, have a writ of trespasse,* ⸸ Quare clausum fregit, &c. *and recover his dammages, &c.* [257. a.]

HEREBY also it appeareth, that an entrie in law is equivalent to an entry in deed.

"*Have a writ of trespasse,* quare clausum fregit, *and recover his*

* dites precedents *L. and M.*

† *And* not in L. and M. or Roh.

‡ *and this,—&c.* L. and M. and Roh.

§ *&c.* added in L. and M. and Roh.

‖ mesme *not in L. and M. or Roh.*

⸸ Quare clausum fregit, *&c. and recover his dammages, &c. or he may have a writ*, (the beginning of the next Section) not in L. and M. or Roh. nor in MSS. before mentioned. It may be here observed, that the older copies of Littleton are not divided into Sections, which seem to have been first injudiciously marked by West in the edition 1583, though his divisions have been since retained for the convenience of citation.

his dammages." The disseisee shall have an action of trespasse against the disseisor, and recover his dammages for the first entry without any regresse, but after regresse he may have an action of trespasse with a *continuando*, and recover as well for all the meane occupation as for the first entry. And here note, that *Littleton* doth here include costs within dammages.

(2 Roll. Abr. 550. 1 Rep. 98. 1 Leo. 302. 20 H. 6. 15. 38 H. 6. 27.)

Sect. 431.

OR he may have a writ upon the statute of R. 2. *made in the fifth yeare of his reigne, supposing by his writ that his adversarie had entred into the lands or* ‡ *tenements of him that made the claime, where his entry was not given by the law, &c. and by this action he shall recover his dammages, &c. And if the case were such, that the adversarie occupied the tenements with force and armes, or with a multitude of people at the time of such claime, &c.* ‖ *immediately after the same claime may hee which made the claim for every such act have a writ of forcible entry, and shall recover his treble dammages, &c.* (1).

THIS

‡ *or—and*, L. and M. and Roh.

‖ *immediately after the same claime—then*, L. and M. and Roh.

(1) Perhaps this passage is not quite accurate. Till the reign of Richard II. the party disseised, if his attempt were made soon after the disseisin, might recover his possession by *force*; but, by a statute passed in the fifth year of that reign, it was enacted, that none, from thenceforth, should make any entry into lands and tenements, but in cases where entry was given by the law; and in that case, not with a strong hand, or with a multitude of people, but only in a peaceable and easy manner; and that persons convicted of doing the contrary should be punished by imprisonment, to be ransomed at the king's pleasure. By a statute passed in the fifteenth year of the same reign, it was enacted, that, upon complaint of any such forcible entries, to the justices of peace, they should take sufficient power of the county, and go to the place where such force was made; and, if they found any that held such place forcibly, after such entry made, they should be taken and put into the next gaol, there to abide convict by the record of the same justices, until they had made fine and ransom to the king. By this it appears, that Littleton is equally wrong in his account of the punishment inflicted by that statute, and the offence it intended to correct. These statutes of the reign of Richard II. have been confirmed, explained, and in some respects extended by the stat. 4 H. 4. ch. 8. 8 H. 6. ch. 9. 23 H. 8. ch. 14. 31 Eliz. ch. 11. and 21 Jac. 1. ch. 15. See Burn's Just. vol. ii. 181. It should be observed, that, in case an action is brought on these statutes, if the defendant make himself a title, which is found for him, he shall be dismissed without any inquiry concerning the force; for howsoever he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the laws and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. See 1 Haw. 141. 3 Burr. 1698. 1731.—[Note 199.]

(Doct.Pla. 381.) THIS is the statute of 5 *R.* 2. *cap.* 7.
37 H. 6. 35.
34 H. 6. 30. 13 H. 7. 15. 10 H. 6. 14. 2 E. 4. 18. 21 E. 4. 5. 74. 13 E. 2. 3.
27 Ass. 64. 38 Ass. 9. 44 E. 3. 20. 10 H. 7. 27. Keylwey, 1. b. 5 R. 2. cap. 7.
(F. N. B. 248, 249.)

"*By this action he shall recover his dammages.*"
This is to be understood, that he shall recover dammages for the first torcious entry, but not for the meane profits in this action, though he made a regresse. And here note, that also he shall recover his costs of suit, *expensæ litis*, which *Littleton* doth include within these words (dammages, &c.)

2 E. 4. 24. b.
9 E. 4. 4. b.
16 H. 7. 6. a.

(2 Inst. 289. Post. 355. b. 10 Rep. 115, 116. 11 Rep. 56.)

"*Dammages.*" *Damna* in the common law hath a speciall signification for the recompence that is given by the jury to the plaintife or defendant (A), for the wrong the defendant hath done unto him (2).

(3 Inst. 176. Hale's Pl. C. 137). (See stat. 1 Geo. 1. c. 4.)

"*Multitude.*" One or more may commit a force, three or more may commit an unlawfull assembly, a riot or a rout. A multitude here spoken of (as some have said) must be ten or more. *Multitudinem decem faciunt.* And so (say they) it is said *de grege hominum.* But I could never read it restrained by the common law to any certaine number, but left to the discretion of the judges (3).

8 H. 6. cap. 9. 3 E. 4. 19. 24. F. N. B. 248. 11 E. 4. 11. b. 6 H. 7. 12. b. 22 H. 6. 37. 19 H. 6. Register, 97. 22 H. 6. 57. F. N. B. 249. a.

"*A writ of forcible entry, and shall recover his treble dammages.*" This writ ☞ is grounded upon the statute of 8 *H.* 6. and lieth either where one entreth with force, or where he entreth peaceably and detaineth it with force, or where he entreth by force and detaineth it by force. And in this action without any regresse the plaintife shall recover treble dammages, as well for the meane occupation as for the first entry by force of the statute. And albeit he shall recover

[257. b.]

(2 Cro. 17. 19. 31. 148. 151. 199. 214. 633. 639. 1 Roll. Rep. 406. Sid. 97. 149. Noy, 136. 1 Cro. 561. 2 Inst. 289. 4 Inst. 176. c. 15. 1 Leo. 327.) (15 R. 2. c. 2. 8 H. 6. c. 9. 23 H. 8. c. 15. 31 El. c. 11. 21 Jac. c. 15.)

treble

(A) defendant *seems to be printed in this place by mistake, instead of* demandant. *See Mr. Ritso's Intr. p.* 119.

(2) Some observations on the progress of our law, with respect to damages, costs, and mesne profits, are to be found in note 1. fol. 355. b.

(3) By the common law there must be *three* persons at least to constitute a riot. By the 1 Geo. 1. c. 5. *twelve* persons at least must be unlawfully assembled, to be within that act. By the 13 Car. 2. st. 1. c. 5. not more than *twenty* names are to be signed to a petition to the king, or either house of parliament, for any alteration of matters established by law in church or state; and no petition is to be delivered by a company of more than *ten* persons. By the bill of rights, or declaration delivered by the lords and commons to the prince and princess of Orange, Feb. 13, 1688, and afterwards enacted in parliament, when they became king and queen, the fifth article is, "That it is "the right of the subjects to petition the king, and that all commitments and "prosecutions for such petitioning are illegal." Sir William Blackstone expressly says, that the right of the subject to petition, as declared by this statute, is under the regulations of the 13 Car. 2. But a question may be made, whether the declaration contained in the bill of rights was not, in this particular, a repeal of the 13 Car. 2.—[Note 200.]

treble dammages, yet shall he recover costs which shall be trebled also.

One may commit a forcible entry, as hath beene said, in respect of the armour or weapons which he hath that are not usually borne, or if he doe use violence, and threats to the terrour of another. And if three or foure goe to make a forcible entry, albeit one alone use the violence, all are guilty of force. If the master commeth with a greater number of servants than usually attend on him it is a forcible entrie.

It is to be understood, that there is a force implied in law, as every trespasse and rescous and disseisin implieth a force, and is *vi et armis*; and there is an actuall force, as with weapons, number of persons, &c. and when an entry is made with such actuall force an action doth lie upon the same statute (1). See before more of force and armes, *Sect.* 240.

10 H. 7. 12.
33 H. 6. 20.

Sect. 432.

ALSO, it is to be seen, (Item *, il est a veier), *if the servant of a man who hath title to enter, may by the commandement of his master make continuall claime for his master or not:*

This needeth no explication.

Sect. 433.

AND it seemeth that in some cases he may doe this: for if he by his commandement commeth to any parcell of the land, and there maketh claime, &c. in the name of his master, this claime is good enough for his master, for that he doth all that which his master should† or ought to do in such case, &c. ‡ *Also if the master saith to his servant, that he dares not come to the land, nor to any parcell of it, to make his claime, &c. and that he dare approch no neerer to the land than to such a place called Dale, and command his servant to go to the same place of Dale, and there make a claime for him, &c. if the servant doth this, &c. this also seemeth*

* il—icy, *L. and M. and Roh.*

† *or ought to do*—not in L. and M. or Roh.

‡ *Also* not in L. and M. or Roh.

(1) The 21 Ja. 1. c. 15. provides a remedy for lessees for years. Tenants by copy of court roll, guardians in chivalry, tenants by elegit, statute merchant, or statute staple, if they be ousted by force, or withheld by force out of their lands or tenements. Till then, if a man entered by force on a copyholder, the lord, as the freehold and inheritance were supposed to be in him, might bring against the person entering, a writ of forcible entry, or might indict him. Upon restitution to the lord, the copyholder might enter.—[Note 201.]

seemeth a good claime for his master, as if his master were there in his proper person (sicome son master la fuit en* proper person), *for that the servant did all that which his master durst and ought to do by the law in such a case, &c.* [258. a.]

HERE it appeareth that where the servant doth all that which he is commanded, and which his master ought to doe, there it is as sufficient as if his master did it himselfe; for the rule is, *Qui per alium facit, per seipsum facere videtur.*

7 E. 3. 69. a. b. 45 E. 3. Release, 28. 45 E. 3. tit. Briefe, 589. 20 E. 3. 62. per Thorp. 11 Ass. p. 11. 39 Ass. p. 18. 10 H. 7. 12. a. 31 H. 8. tit. Entr. Cong. et tit. Fauxifier Recovery, 29. [*] Lib. 9, fo. 106. a. the Lord Awdleye's case.

"*By commandement.*" If an infant or any man of full age have any right of entrie into any lands, any stranger in the name and to the use of the infant or man of full age may enter into the lands, and this regularly shall vest the lands in them without any commandement, precedent, or agreement subsequent. [*] But if a disseisor levy a fine, with proclamation according to the statute, an estranger without a commandement precedent, or an agreement subsequent within the five yeares cannot enter in the name of the disseisee to avoid the fine. And that resolution was grounded upon the construction of the statute of 4 *H.* 7. *cap.* 24. But an assent subsequent within the five yeares should be sufficient. *Omnis enim ratihabitio retrotrahitur, et mandato æquiparatur*, as hath beene said.

"*Also if the master saith to his servant, that he dares not, &c.*" Here it appeareth, that where the servant pursueth the commandement of his master, and doth all that which his master durst and ought to doe by the law, this is sufficient. And although the master feareth more than the servant, or admit that the servant hath no feare at all, yet if he goeth as farre as his master durst, and as he commanded, it is sufficient. And this is implyed in this Section.

Sect. 434.

ALSO, if a man be so languishing, or so decrepite, that he cannot by any meanes come to the land, nor to any † parcell of it, or if there bee a recluse, which may not by reason of his order goe out of his house ‡, if such manner of person (si tiel maner ‖ de person) *command his servant to goe and make claime for him, and such servant dare not goe to the land, nor to any parcell of it* (et tiel servant ne osast aler a le terre, § ne a ascun parcel de ceo), *for doubt of beating, mayhem, or death,* ¶ *&c. and for this cause the servant commeth as nere to the land as he dareth for such doubt* (pur tiel ⸸ doubt), *and maketh* ** *the claime, &c. for his master, it seemeth that such claime for his master is strong enough, and good in law. For otherwise his master should bee in a very great mischiefe; for it may well be that such a person which is sicke, decrepit, or recluse,*

* son *added in L. and M. and Roh.*
† *parcell* not in L. and M. or Roh.
‡ *&c.* added in L. and M. and Roh.
‖ de *not in L. and M.*
§ ne—ou, *L. and M. and Roh.*
¶ *&c.* not in L. and M. or Roh.
⸸ doubt—pavour, *in L. and M. and Roh.*
** *the—such*, in L. and M. and Roh.

recluse, cannot finde any servant which dare go to the land, or to any parcell of it (que osast aler a la terre, ne † ascun parcel de cel), *to make the claime for him, &c.*

REGULARLY it is true, that where a man doth lesse than the commandement or authority committed unto him, there (the commandement or authority being not pursued) the act is void. And where a man doth that which he is authorised to doe and more, there it is good for that which is warranted, and void for the rest; yet both these rules have divers exceptions and limitations (1). (Ant. 52. a.) (Hob. 154.) (1 Leo. 289.)

For the first, *Littleton* here putteth the case where a servant doth lesse than he is commanded, and yet it sufficeth, for that *Impotentia excusat legem*; for seeing the master cannot, and the servant dare not, enter into the land, it sufficeth that he come as neere to the land as he dare.

If a man makes a letter of attorney to deliver seisin to *I. S.* upon condition, and the attorney delivereth it absolute, this is void: and so some hold if the warrant be absolute, and he delivereth ☞ seisin upon condition, the liverie is void. 11 H. 4. 3. 12 Ass. 24. 26 Ass. 39. (Perk. 38. b. Mo. 280.) See before Sect. 419. (2 Inst. 483.) (Ant. 243. b.)

[258. b.]

"*For doubt of beating, mayhem, or death.*" See the Second Part of the Institutes, *W.* 2. *cap.* 49, a diversity betweene the making of an entry or a claime, and the avoydance of an act or deed.

"*Otherwise his master should be in a very great mischiefe.*" *Argumentum ab inconvenienti est validum in lege, quia lex non permittit aliquod inconveniens.* And as hath beene often observed before, *Nihil quod est inconveniens est licitum.*

"*Recluse,*" *Reclusus, Heremita, seu Anchorita,* so called by the order of his religion; he is so mured or shut up, *quòd solus semper sit, et in clausurâ suâ sedet*; and can never come out of his place. *Seorsim enim et extra conversationem civilem hoc professionis genus semper habitat.* Note here, albeit the recluse or anchorite be shut up himselfe, so as he by his order is not to come out in person, yet to avoid a discent he must command one to make claime, and such a recluse shall always appeare by attorney in such cases where others must appeare in proper person. *Impotentia enim excusat legem.* 46 E. 3. Petition, 18. 33 H. 6. 8. 43 E. 3. 8. b. 30. a.

Sect.

† a *added in L. and M. and Roh.*

(1) Where there is a complete execution of a power, and something, *ex abundanti*, added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, or where the boundaries between the excess and execution are not distinguishable, it will be bad. See Alexander *v.* Alexander, 2 Ves. sen. 644. On this doctrine, the reader may always be safely referred to Mr. Sugden's treatise on that abstruse and important subject.—[Note 202.]

Sect. 435.

BUT if the master of such servant bee in good health, and can and dare well goe to the lands, or to parcell of it, to make his claime, &c. if such master command his servant to goe to any parcell of the land to make claime for him, ‖ *and when the servant is in going to doe the commandement of his master* (A), *he heareth by the way such things as he dare not come to any parcell of the land to make the claime for his master, and therefore he commeth as neere to the land as he dare for doubt of death, and there maketh claime for his master, and in the name of his master, &c. it seemeth that the doubt in law in such case shall be, whether such claime shall availe his master* ☞ *or not, for that the servant did not all that which his master at the time of his commandement durst have done, &c.* Quære. [259. a.]

(9 Rep. 79.) THIS continuall claime is void, for that the servant doth lesse than that which is expressely commanded, and there is no impotencie or feare in the master.

(A) "*is in going, &c.*" *This is lord Coke's translation, and renders literally the text,* "est en alant."

Sect. 436.

ALSO, some have said, that where a man is in prison and is disseised, and the disseisor dieth seised during the time that the disseisee is in prison, whereby the tenements descend to the heire of the disseisor, they have said, that this shall not hurt the disseisee which is in prison, but that he well may enter, notwithstanding such a discent, because hee could not make continuall claime when he was in prison.

(1 Roll. Abr. 687.) 9 H. 7. 24. Pl. Com. 360. Bracton, lib. 5. fol. 436. Britton, fol. 116. b. Fleta, lib. 6. cap. 52, 53. & lib. 6. cap. 7. & 14.

"*WHERE a man is in prison and is disseised.*" For if hee bee disseised when he is at large, and the discent is cast during the time of his imprisonment, this discent shall binde him." *Excusatur autem quis quòd clameum suum non apposuerit, si tempore litigii in prisonâ detentus fuerit, ita quòd venire non possit, nec mittere, quia nulli vertitur in dubium, et ubi eadem ratio et idem jus erit, ideò videtur quòd excusari debet quis si per vim majorem, vel per fraudem, extra prisonam detentus fuerit, ita quòd venire non possit nec mittere, dum tamen hoc per certa judicia probari poterit.*

"*Because hee could not make continuall claime when he was in prison.*" Here is to bee observed by the authority of *Littleton*, that he is not enforced in this case by law to doe it by his servant or any other by his warrant or commandement, for things done by deputie are seldome well done, but everie man will see his owne businesse most effectually speeded and performed: and that it may be once spoken for all, the reason that a man imprisoned

Pl. Com. 360. in Stowel's case.

‖ *&c.* added in L. and M. and Roh.

soned shall not be bound in this and the like cases is, for that by the intendment of law he is kept (as it is presumed in law) without intelligence of things abroad, and also that he hath not libertie to goe at large to make entrie or claime, or seeke counsell. And so note a diversitie between a recluse who might have intelligence, and a man in prison.

* Sect. 437.

BUT the opinion of all the justices, p. 11 H. 7. *was, that if the disseisin bee before the imprisonment, although the dying seised be he being in the prison, his entrie is taken away.*

THIS is of a new addition, and mistaken, for there is no such opinion, p. 11 H. 7. but it is, 9 H. 7. fol. 24. b.

AND also, if hee which is in prison be outlawed in an action of debt or trespasse, or in an appeale of robberie, &c. hee shall reverse this outlawry pronounced against him (il reversera tiel utlagarie § envers luy pronounce), *&c.*

[259. b.] ☞ "*HE shall reverse this outlawry.*" *Nota*, the originall is *reversera tiel utlagarie per briefe de error* (1), and so it would bee amended: for outlawries may bee (Post. 260. a. Ante 128. b.) (F. N. B. 236. 11 Rep. 8.

(2 Roll. Abr. 803, 804. 2 Inst. 665. 1 Leo. 22. 186.) Mirror, cap. 3. Britton, fol. 21. Fleta, lib. 1. cap. 28. & lib. 2. cap. 59. Bracton, lib. 2. 2 E. 4. 1. 4 E. 4. 10. 21 E. 4. 73. 11 H. 7. 5. 21 H. 6. 50. 9 H. 4. 3. 21 H. 6. Utlary, 36. 7 H. 6. 27. 21 E. 4. 88. 22 E. 4. 37. 18 E. 3. Villenage, 47. 21 E. 4. 37. 33 H. 6. 45. 46. 44 E. 3. Villeine, 41. 4 H. 4. 19. 11 H. 4. 34. 3 Eliz. Dyer, 192. 2 Eliz. 176. 5 Eliz. ibid. 223. 19 H. 6. 2. 8 H. 6. 37. 37 H. 6. 19. (Doc. Pla. 230. 398.) (Ant. 248. b. 8 H. 4. 7. 21 H. 7. 13. 10 H. 6. 58. 20 H. 6. 20. 21 H. 6. 55. 22 H. 6. 18. 39 H. 6. 1. 33 H. 6. 51. 45. 38 H. 6. 33. 21 E. 4. 94. 21 H. 7. 33. 5 H. 7. 1. 12 H. 6. 8. 11 H. 6. 67. 19. 1 E. 4. 2. 27 H. 8. 2. 38 Ass. pl. 17. Vide Sect. 439.

reversed

§ per brief d'errour, &c. pur ceo qu'il fuist en prison al temps d'utlagarie, *added in L. and M. and Roh. and in MSS.*

* This Section is not in L. and M. or Roh. nor in the edit. 1577, which is esteemed more correct than the common copies.

(1) A writ of error properly lies, where false judgment is given in any court which is a court of record. It was formerly held, that, by the common law, no amendment could be permitted, unless within the very term in which the judicial act so recorded was done. But the courts now allow of amendments at any time while the suit is depending.—After the termination of the suit the judgment can only be reversed by writ of error. From the inferior courts it lies to the king's bench and common pleas;—from the common pleas to the king's bench;—from the king's bench to the house of lords. To amend errors in a base court, not of record, a writ of false judgment lies.—A writ of error only lies upon *matter of law*. There is no method of reversing an error on the determination of facts but by an attaint or a new trial. See Bla. Com. 3 vol. c. 25. s. 3. F. N. B. 20. 4 Inst. 21.—[Note 203.]

reversed two manner of wayes, *viz.* by plea, or by writ of error. By plea, when the defendant commeth in upon the *capias utlagatum, &c.* hee may by plea reverse the same for matters apparent, as in respect of a *supersedeas*, omission of processe, variance, or other matter apparent in the record: and yet in these cases some hold, that in another terme the defendant is driven to his writ of error.

But for any matters in fact, as death, imprisonment, service of the king, &c. he is driven to his writ of error, unlesse it be in case of felonie, and there *in favorem vitæ* he may plead it.

But albeit imprisonment be a good cause to reverse an outlawrie, yet it must be by processe of law *in invitum*, and not by consent or covin, for such imprisonment shall not avoid the outlawrie, because upon the matter it is his owne act.

Sect. 438.

ALSO, if a recovery bee by default against such a one as is in prison (si un recoverie soit † per default vers tiel que est en prison), *he shal avoid the judgement by a writ of error, because he was in prison at the time of the default made, &c. And for that such matters of record shal not hurt him which is in prison, but that they shall bee reversed, &c.* à multò fortiori, *it seemeth that a matter in fact,* scilicet, *such discent had when hee was in prison shall not hurt him, &c. especially seeing he could not goe out of prison to make continuall claime.*

5 E. 3. 50. b. 7 H. 6. 38.

THIS is evident enough.

Fleta, lib. 6. cap. 67. & 24. Vide W. 2. cap. 48. and the exposition thereof, 2 part Instit. 4 E. 2. Discent, 51.

"*By a writ of error.*" For hee shall have no writ of disceit, because the summons was according to the law of the land, by summoners and veiors, and the land taken into the king's hand by the pernor.

Bracton, lib. 5. tract. 3. Fleta, lib. 6. cap. 7. 14. 3 H. 6. 46. 38 E. 3. 5. 31 H. 6. Barre, 66. 12 H. 4. 13. 50 E. 3. 9. 3 H. 6. 48. 2 H. 4. 8. 5 H. 7. 3. F. N. B. 17. Challenge, 153.

"*By default.*" *Default* is a French word, and *defalta* is legally taken for non-appearance in court. There bee divers causes allowed by law for saving a man's default; as, first, by imprisonment, whereof *Littleton* here speaketh. 2. *Per inundationem aquarum.* 3. *Per tempestatem.* 4. *Per pontem fractum.* 5. *Per navigium substractum per fraudem petentis, non enim debet quis se periculis et infortuniis gratis exponere, vel subjicere.* 6. *Per minorem ætatem.* 7. *Per defensionem summonitionis per legem.* 8. *Per mortem attornati si tenens in tempore non novit.* 9. *Si petens essoniatus sit.* 10. *Si placitum mittatur sine die.* 11. *Per breve de warrantiâ diei.* But sicknesse (as one holds) is no cause of saving a default, because it may be so artificially counterfeited, that it cannot be knowne.

Bract. lib. 4. fol. 367. 369. Glan. lib. 1. cap. 8. 28 H. 6. 11. 4 H. 5. Br. Saver. Def. 45. (Cro. Eliz. 306.)

"*Record.*"

† ewe *added in L. and M. and Roh.*

[260. a.] ☞ "*Record.*" (1) *Recordum*, is a memoriall or remembrance in rolles of parchment, of the proceedings and acts of a court of justice which hath power to hold plea according to the course of the common law, of reall or mixt actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or dammage amounts to fortie shillings or above, which wee call Courts of Record, and are created by parliament, letters patents, or prescription. Glanvil. lib. 8. cap. 8. Bracton, lib. 3. fol. 156. Britton in proemio & cap. 27.

It is aptly derived of *recordari*, which is to keepe in memorie or record, as it is said, *quòd dicere nihil aliud est quàm recordari*; and in the same sense the poet useth it, *si rite audita recordor*. But legally records are restrained to the rolles of such only as are courts of record, and not the rolles of inferiour, nor of any other courts which proceed not *secundum legem et consuetudinem Angliæ*. And the rolles being the records or memorialls of the judges of the courts of record, import in them such incontrollable Cicero. Virgil. Pl. Com. 79. b. Mic. 7 & 8 Eliz. Dier, 242. 17 E. 3. 49. 37 H. 6. 21. b. 11 H. 4. 26. b.

21 H. 6. 34. Error, Br. 73. 7 H. 7. 4. 19 Ass. 7. lib. 4. fol. 52. in Rawlin's case. Glanvil. lib. 8. cap. 8. Bracton, lib. 3. fol. 156. Britton, cap. 27. lib. 6. fol. 11. Pentleman's case, and 30. 45. lib. 7. fol. 30. lib. 8. fol. 60. b. & 67. a. 7 H. 6. 28. 19 H. 6. 9.

credit

(1) The public records of the kingdom are considered to relate to the proceedings of the houses of parliament, the court of chancery, the courts of common law, and the revenue. A general table of them, distinguished under these different heads, is to be found in the appendix to the report from the committee appointed to view the Cottonian library. See the report and the appendix, page 183. The rolls or records of parliament were published in the course of his late majesty's reign, in six volumes folio, under the immediate auspices of the house of peers. This extensive and laborious undertaking is executed with the greatest accuracy; it presupposes no common share of antiquarian and diplomatic learning in the gentlemen concerned in it. A part of it was the work of the late Mr. Morant; all the rest was completed by Mr. Astle, the keeper of the records in the Tower, and Mr. Topham, of Lincoln's-Inn. It should be observed, that the proceedings of the legislature till the reign of Edward I. were exceedingly irregular, and greatly defective in point of form. They are sometimes penned, so as to appear to come from the king alone; sometimes as issued jointly by the king and lords; sometimes the assent of the commons is, and sometimes it is not, expressed; sometimes the authority for passing the acts is mentioned; and sometimes the acts are in the form of charters.—The first summons of the knights of shires to parliament, extant on record, is in the 49th year of Henry III.—The first regular summons directed to the sheriff for the election of citizens and burgesses, is in the 23d of Edward I.—In that reign the proceedings of the legislature assumed a more regular form; but far removed from that, in which they appear at present. The consent of the commons to the levying of taxes for the king gave them great weight. They took advantage of this circumstance to obtain a remedy for the grievances they had to complain of.—In the reign of Edward III. the mode of presenting their petitions, and of receiving their answers, was regularly practised. If the petition and the answer to it were of such a nature as to require an express and new provision to be made for it, the king, with the assistance of his council and of the judges, framed, from such petition and answer, an act, which was usually entered on the statute roll: but if an express and new provision were not required, the petition itself and the king's answer to it were entered on the parliament roll, and then usually styled an ordinance.—Alterations and improvements gradually took place; but it was not till the reign of Henry VI. that these petitions of the commons were reduced, in the first instance, into the body of the bill.—[Note 204.]

credit and veritie, as they admit no averment, plea, or proofe to the contrarie. And if such a record be alleaged, and it be pleaded that there is no such record, it shall be tried only by it selfe: and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient. Of courts of record you may read in my Reports: but yet during the terme wherein any judiciall act is done, the record remaineth in the brest of the judges of the court, and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when that terme is past, then the record is in the roll, and admitteth no alteration, averment, or proofe to the contrarie.

(Doc. Pla. 307, 308. 1 Leo. 65.) 18 Eliz. Dier, 353. 3 Mar. Di. 129. Pl. Com. 232. Seignior Berkeley's case. 16 H. 7. 11. b. 22 H. 8. Record. Br. 65. 39 H. 6. 4. 3 Eliz. Dier, 187. lib. 6. fol. 15. Eden's case. Mich. 31 & 32 El. Rot. 365. In Bank le Roy, inter Eden & Franklyn & Browne. (4 Rep. Hind's case.) 7 H. 6. 38. 8 H. 6. 16.

If a grant by letters patents under the great seale be pleaded and shewed forth, the adverse party cannot plead *nul tiel record*, for that it appeares to the court that there is such a record; but inasmuch as it is in nature of a conveyance, the partie may denie the operation thereof, therefore he may plead *non concessit*, and prove in evidence that the king had nothing in the thing granted, or the like, and so it was adjudged. But to return to *Littleton:* What then? shall a man that is in prison be privileged from suits or outlawries? Nothing lesse; for if the tenant or defendant be in prison, he shall upon motion, by order of the court, be brought to the barre, and either answer according to law, or else the same being recorded, the law shall proceed against him, and he shall take no advantage of his imprisonment.

"A multò fortiori." Here is an argument, *à minori ad majus* (A), and the force of our author's argument is this: If a man in prison shall not be bound by a recoverie by default for want of answer in court of record in a reall action, which is matter of record (the height and strength whereof hath beene somewhat touched) *à multò fortiori*, a discent in the countrey, which is matter of deed, shall not for want of claime binde him that is in prison. And as the argument *à minori ad majus* doth ever hold (as our author hath alreadie told us) affirmatively, so the argument *à majori ad minus* doth ever hold negatively, as our author here teacheth us; and the reason hereof is this, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.*

Vide Sect. 418.

"*Seeing he could not go out of prison, &c.*" By this it appeareth, that a man in prison by processe of law ought to be kept *in salvâ et arctâ custodiâ*, and by the law ought not to goe out, though it be with a keeper, and with the leave and sufferance of the gaoler: but yet imprisonment must be, *custodia, et non pœna*; for *carcer ad homines custodiendos, non ad puniendos dari debet.*

Sect.

(A) *It should be said to be* à majori ad minus. *For, the argument of Littleton, in Sect.* 438. *is evidently such; and lord Coke, a few lines farther on, says,* "so the argument *à majori ad minus* doth ever hold negatively, as our author here" (*i. e. in Sect.* 438.) "teacheth us." *Mr. Ritso has made an observation to the same effect. See his Intr. p.* 119.

Sect. 439.

IN the same manner it seemeth, where a man is out of the realme in the king's service, for the businesse of the realme, if such a one be disseised when he is in service of the king, and the disseisor dieth seised, &c. the disseisee being in the king's service (si tiel * home soit disseisie quant il est en service le roy, † et le disseisor morust seisie, le disseisie esteant en le service le roy), *that such discent shall not hurt the disseisee*; *but for that hee could not make continuall claime,‡ it seemes to them, that when hee commeth into England* (que quant il ‖ vient en Engleterre), *he may enter upon the heire of the disseisor, &c. For such a man shal reverse an outlawrie* § *pronounced against him during the time that hee was in the king's service, &c. therefore*, à multò fortiori, *he shall have aid and indemnitie by the law in the other case, &c.*

"*OUT of the realme,*" *(id est) extra regnum*; as much to say, as out of the power of the king of England as of his crowne of England: for if a man be upon the sea of England, he is within the kingdom or realme of England, and within the ligeance of the king of England, as of his crowne of England. 6 R. 2. Protect. 46. Vide Sect. 198. 440, 441. (Cro. Car. 365. 5 Rep. Constable's case. 1 Roll. Abr. 528.)

[260. b.] And yet *altum mare* is out of the jurisdiction of the common law, and within the ☞ jurisdiction of the lord admirall, whose jurisdiction is verie antient, and long before the reigne of *Edward* the third, as some have supposed, as may appeare by the lawes of *Oleron*, (so called, for that they were made by king *Richard* the first when he was there) that there had beene then an admirall time out of minde, and by many other antient records in the reignes of *Henrie* the third, *Edward* the first, and *Edward* the second is most manifest. Rot. { 8 H. 3. / 9 H. 3. / 15 H. 3. } Pat. Temps E. 1. Avowrie, 192. Rot. Vascon. 22 E. 1. m. 8. Pat. 23 E. 1. 1 pars. Pat. 10 E. 2. 8 E. 2. Coron. 399. Staundf. Pl. Coron. 51.

See hereafter in another case, which *Littleton* put in his chapter of Remitter; there he saith, beyond the sea. This great officer in the Saxon language is called *Aen mere al*, *(i. e.)* over all the sea, *præfectus maris, sive classis, archithalassus:* and in antient time the office of the admiraltie was called *custodia marinæ Angliæ*, or *maritimæ Angliæ*. Vide Sect. 677. (Hob. 212.)

And note *Littleton* saith not, beyond the sea, or *extra quatuor maria*, for a man *revera* may be *intra quatuor maria*, and yet out of the realme of England. But *intra quatuor maria*, or *extra*, is taken by construction to be within the realme of England, or the dominions of the same. 3 R. 3. Cont. Claime, 13. 4 E. 3. 46.

But here a question may be demanded, What if a man be out of the realme, and a recoverie is had against him in a *præcipe* by default, whether shall he avoid it in a writ of error, as well as he should do the outlawrie, or if he had beene imprisoned at the time of such recoverie by default? And it seemeth that he shall not avoid

* home *not in L. and M.*

† et le disseisor morust seise, le disseisee esteant en le service le roy, *not in L. and M.*

‡ *&c.* added in L. and M. and Roh.

‖ revient, *in L. and M.*

§ *which is* added in L. and M.

avoid the recoverie, for by that meanes a man might be infinitely delayed of his freehold and inheritance whereof the law hath so great a regard. And few or none goe over, but it is either of their owne free will, or by suit, for what cause soever; and he is not in that case without his ordinarie remedie, either by his writ of higher nature, or by a *quòd ei deforceat*. But outlawrie in a personall action shall be avoided in that case, *quia de minimis non curat lex*, and otherwise he should be without remedie. See Section 437, and note the diversitie betweene that case of the imprisonment, and this of being beyond sea. And *Littleton* putteth the case of imprisonment, and omitteth the being beyond sea here: neither have I seene any booke to warrant, that he that is beyond sea shall in this case avoid the recoverie by default.

Bract. lib. 5. fol 436.

"*In the king's service.*" *Bracton* sheweth, that the exception of being beyond sea is, *quia fuit in servitio domini regis ultra mare, viz. apud talem locum*, and that case is cleere: but you shall heare the opinion of *Bracton* in the next Section, where hee is not in the service of the king.

Sect. 440.

ALSO, others have said, that if a man be out of the realme, though hee be not in the king's service, if such a man being out of the realme be disseised of lands or tenements within the realme, and the disseisor die seised, &c. the disseisee being out of the realme, it seemeth unto them, that when the disseisee commeth into the realme, that he may well enter upon the heire of the disseisor (que il poit * enter sur l'heire le disseisor), *&c. and this seemeth unto them for two causes. One is, that hee that is out of the realme cannot have knowledge of the disseisin made unto him by understanding of the law, no more than that a thing done out of the realme may bee tried within this realme by the oath of* 12 *men*; † *and to compell such a man to make continuall claime, which by the understanding of the law can have no knowledge or conisance of such disseisin made or done, this shall be inconvenient, namely, when such a disseisin is done unto him when he was out of the realme, and also the dying seised was done when he was out of the realme: for in such case he may not by possibilitie after the common presumption make continuall claime; but otherwise it should be if the disseisee were within the realme at the time of the disseisin, or at the time of the dying seised of the disseisor.*

Bract. lib. 5. fol. 436. b. & 163. Brit. fol. 21. 216, 217. Flet. lib. 6. cap. 52, 53. 13 H. 4. Triall, 6. 9 H. 4. 3.

AND herewith the antient law of England is agreeable with *Littleton*, and the law at this day. So as it is *vetus & constans opinio. Excusatur etiam quis quòd clameum* ☞ *non apposuerit, ut si toto tempore litigii fuit ultra mare quácunque occasione.* And this is also agreeable with our yeare bookes (1). [261. a.]

21 H. 6. Error, 27. 33 H. 6. 1. 21 H. 6. 34. 26 H. 8. cap. 18. 5 & 6 E. 6. cap. 11.

"*No*

* bien *added in L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

(1) The *JUS MARIS* of the king may be considered under the two-fold distinction

"*No more than a thing done out of the realme may bee tried within this realme by the oath of* 12 *men.*" And in this rule of law there is warily and truly put by *Littleton*, these words, *(by the oath of twelve men)* meaning by a jury. For by certificate a thing done

42 E. 3. 2 & 3.

Vide Sect. 102.

distinction of the *right of jurisdiction*, which he exercises by his admiral, *and his right of propriety or ownership.*

WITH RESPECT TO THE RIGHT OF JURISDICTION, the subject is elaborately discussed by Mr. Selden, in his *Mare Clausum*, a noble exertion of a vigorous mind, fraught with profound and extensive erudition. In the first part of it, he attempts to prove, that the sea is susceptible of separate dominion. In this, he has to combat the opposite opinion of almost all the civilians, and particularly the celebrated declaration of one of the Antonines, (L. 9. D. De Lege Rhodiâ), "*Ego quidem mundi dominus, lex autem maris, &c.*" by which, the emperor has been generally considered to have disclaimed any right to the dominion of the sea. For a different interpretation of this law, Mr. Selden argues with great ingenuity. In this, he is followed, in some measure, by Bynkershoock, in his treatise *De Lege Rhodiâ de Jactu, Liber Singularis*, in the 2d vol. of the edition of his works published by Vicat, Col. Allob. 1761—Mr. Selden, in the second part of his work, attempts to show that, in every period of the British History, the kings of Great Britain have enjoyed the exclusive dominion and property of the British seas, in the largest extent of those words, both as to the passage through and the fishing within them.—He treats his subject methodically, and supports his position with the greatest learning and ingenuity.—The reader will probably feel some degree of prepossession against the extent of this claim; but he will find it supported by a long and forcible series of arguments, not only from prescription, from history, from the common law, and the public records of this country, but even from the treaties and acknowledgments of other nations. Here he is opposed by Bynkershoock, in his *Dissertatio de Dominio Maris*, also published in the second edition of his works. But it will be a great satisfaction to the English reader to find, how much of the general argument used by Mr. Selden is conceded to him by Bynkershoock. Even on the most important part of the argument, the acknowledgment of the right by foreign princes, Bynkershoock makes him considerable concessions; "Plus momenti," says he, "adferre videntur gentium "testimonia, quæ illud Anglorum imperium agnovere. De confessionibus "loquor non injuria extortis, sed libere et sponte factis. Esse autem hujusmodi "quasdam confessiones, neutiquam negari poterit."—After this acknowledgment, corroborated as it is by other arguments used by Mr. Selden, many will think his positions completely established. The chief objection made by Bynkershoock, to the right of the crown of England to the dominion of the sea is, the want of uninterrupted possession, as he terms it, of that dominion. "So long as a nation has possession of the sea, just so long," says Bynkershoock, "she holds its dominion. But to constitute this possession, it is ne-"cessary that her navies should keep from it the navies of all other nations, "and should themselves completely and incessantly navigate it, avowedly in "the act or for the purpose of asserting her sovereignty to it." This, he contends, has not been done by the English; on this ground therefore he objects to their right of dominion of the English sea; and on the same ground he objects to the right of the Venetians to the dominion of the Adriatic, and to the right of the Genoese to the dominion of the Ligustic. But this seems carrying the matter too far.—If it be admitted, (of which there unquestionably are many instances), that the sovereign power of a state may restrain her own subjects from navigating particular seas, she may also engage for their not doing it, in her treaties with other nations. It can never be contended, that, after such a treaty is entered into, the acts of possession, mentioned by Bynker-

(Ant. 74. a.)
(4 Inst. 123.)
1 H. 4. cap. 14.
13 H. 4. f. 4.
48 E. 3. 2 & 3.

done beyond sea may be tried, as *Littleton* himselfe, *Sect.* 102, hath set downe. And all matters done out of the realme of England concerning war, combate, or deeds of armes, shall bee tried and determined before the constable and marshall of England, before whom the triall is by witnesses, or by combate, and their proceeding is according to the civill law, and not by the oath of twelve men, as *Littleton* here speaketh.

This

shoock, are necessary to give it effect and continuance, unless this also makes a part of the treaty. It is sufficient, if the acts of possession are so often repeated as is necessary to prevent the loss of the right from the want of exercise of it. In those cases, therefore, where the treaty itself, establishing the exclusive dominion, of which we are speaking, is produced, the continued and uninterrupted possession mentioned by Bynkershoock cannot be necessary. But public rights, even the most certain and incontestable, depend often on no other foundations than presumption and usage. The boundaries of territories by land frequently depend on no other title. Then, if Bynkershoock be right in his position, that the sea is susceptible of dominion, should not mere prescription and usage in this, as in any other case, be sufficient to constitute a right? Upon what ground are the continued and uninterrupted acts of possession, mentioned by Bynkershoock, required to constitute a title in this, more than in any other case of public concern?—If this be thought a satisfactory answer to the objection made by Bynkershoock, the remaining difference between him and Mr. Selden, respecting the right of the British monarch to this splendid and important royalty, will be inconsiderable.—It is to be added, that Mr. Selden's treatise was thought so important to the cause, in support of which it was written, that a copy of it was directed to be deposited in the admiralty. Those who wish to procure it in an English translation, should prefer the translation published in 1633, by a person under the initials of J. H., to that by Marchemont Needham. On this subject, (with the exception of sir Philip Medows), subsequent writers have done little more than copy from Selden. The subject, however, is far from being exhausted. The system adopted by sir Philip Medows, in his *Observations concerning the Dominion and Sovereignty of the Seas*, printed in 1689, is more moderate than Mr. Selden's.—He calls in question, at least indirectly, a material part of Mr. Selden's positions, and places the right of the kings of England to the dominion of the sea upon a much narrower ground. He confines it to a right of excluding all foreign ships of war from passing upon any of the seas of England, without special license for that purpose first obtained;—in the sole marine jurisdiction within those seas; and in an appropriate fishery. He denies that the salutation at sea, by the flag and top-sail, has any relation to the dominion of the sea; and he asserts, that it was never covenanted in any of the public treaties, except those with the United Netherlands, and never in any of these, till the year 1654; he contends it is not a recognition of sovereignty, but at most an acknowledgment of pre-eminence. His treatise is deservedly held in great estimation. The late sir Thomas Parker, chief baron of his majesty's exchequer, in a manuscript note in his hand-writing, thus expresses himself respecting it: "This is a most curious and excellent treatise; " and though Mr. Selden's Mare Clausum is a learned and ingenious work, " and will be ever popular with Englishmen, yet sir Philip Medows's rules, " for ascertaining the limits of the sea, seem to be founded on more solid and " prudential reasons, than Mr. Selden has offered, in his book. Thomas " Parker, 14 Sept. 1744."

With respect to *THE KING'S RIGHT OF PROPERTY OR OWNERSHIP*, it is so fully discussed by lord Hale, in his excellent treatises *de Jure Maris, and de Portubus Maris*, published by Mr. Hargrave, that little more is necessary

in

This rule here rehearsed by *Littleton*, is worthy of explication (Doc. Pla. 209.)
If an alien (for example borne in France) being a reall action, and the tenant plead that the demandant is an alien borne under the obedience of the French king, and out of the leigeance of the king

in this place, than to state a few of the leading positions of that distinguished writer.—It may, however, be useful to premise, that where, in inquiries of this kind, it is said, that a person is entitled to the right or property in question, *by common right*, but that it *may* belong to another, it is intended to say that the right or property in question is by the common law annexed to the particular capacity of the party, or to some property of which he is owner; yet that it is not so inseparably or inalienably annexed to this capacity or ownership, but that the party *may* transfer it to another. So that in all these cases the presumption is in favour of him, to whom the right or property is said to belong by common right; yet this does not exclude the possibility of its belonging to another. To another, therefore, it may belong; but, if he claims it, he must prove his title to it. On the other hand, the party to whom it belongs of common right is under no obligation of showing his title to it; to him, in the intendment of the law, it belongs, till there is a proof of the contrary. To exemplify this doctrine, the lord of a manor is lord of the soil of the manor of common right; that is, if it be admitted or proved that he is lord of the manor, his right to the soil so far necessarily follows, that it is not incumbent on him to produce any proof of it. He may, therefore, of common right, dig for gravel, unless it is to the prejudice of his tenants. But this right is not inseparable or inalienable from the seigniory. The lord may grant it to the tenants; to the tenants, therefore, it *may* belong. But if they claim it, it is incumbent on them to prove their title to it. There are two ways of doing this; one by showing the grant from the lord; the other by prescription; that is, by proving an immemorial usage of it, which, in the eye of the law, always pre-supposes a grant. Now, prescription is shown by producing repeated and unequivocal instances of the immemorial usage or exercise of the right contended for. The tenants, therefore, in the case we have mentioned, if they cannot produce the original grant, must, to make out their title to dig for gravel, produce repeated and unequivocal instances of their having done it immemorially. If they do this, they establish their title. But, though the lord be not called upon, in the first instance, to prove his title to the right in question; yet, when it is claimed by others, he may disprove their claim, by showing he has done acts inconsistent with it. Thus, if on the one hand, the tenants can prove, by repeated instances, that they have exercised the right in question of digging for gravel, the lord may, on the other, show that, in all or a considerable number of these instances, the parties have been presented at his court, or otherwise punished for the acts in question; and this may destroy the effect of the evidence in their favour arising from the instances adduced by them. In the same manner, the lord may show that they have dug only in one particular spot of the waste, at particular times, or for a particular purpose; by this, he may circumscribe their right, as to the place, time and manner of its enjoyment.—In cases of this nature, it sometimes happens, that the party claims to be exempted from an obligation or servitude to which, of common right, he is subject. To establish this, he must either produce the release of the right, or produce that kind of evidence which will establish a presumption that it was released, though the instrument by which it was released cannot be produced. Non-user is one of the circumstances most frequently urged to establish the presumption of a release.—But here, an important distinction is to be made, between those cases, where non-user is brought as a bar under the statutes of limitation, and those, where it is brought as evidence to prove a release. In the first case, it is an absolute bar to the claim,

20 E. 3. Averment, 34. 27 Ass. 24. 32 H. 6. 25. 15 E. 4. 15. king of England; shall this case want triall because the matter alleaged is out of the realme? then by the fiction of this plea, no demandant shall recover; therefore in this case the demandant shall reply, that hee was borne at such a place in England, within

7 H. 6. 15. 1 R. 3. 4. 6 H. 7. 6. 7 H. 7. 8. F. N. B. 196. 29 Ass. 11. 13 E. 1. Mord. 47. 12 H. 3. ibid. 55. Lib. 7. fol. 26, 27. Calvin's case. Li. 6. f. 47. Dowdale's case.

the

claim, and there, the strongest evidence of the previous existence of the right is of no avail; in the second, it is only argumentative evidence of the supposed release of the right, and like all other evidence, may be repelled, by stronger evidence to the contrary.—It should also be observed that, though it is said, that prescription pre-supposes a grant, and non-user pre-supposes a release, it is not, that, strictly speaking, the courts always in these cases really believe that, such a grant, or such a release, are actually executed; but because, for the sake of the general principle of quieting possessions, they will not permit them to be disturbed by claims long dormant, and therefore determine in the same manner as they would determine, if the very instrument of grant or release were produced. The principles of which we have here endeavoured to give an outline, are to be found in the cases of the mayor of Kingston upon Hull *v.* Horner, Cowp. 102. and Eldridge *v.* Knott, ib. 214.—Lord Mansfield's arguments in delivering the judgment of the court in these cases, as they are reported by Mr. Cowper, afford a striking display of the comprehensive and luminous understanding, the beautiful arrangement, and the familiar, but elegant enunciation of the most refined and complex doctrines of the law, for which he was so deservedly eminent.

This being premised;—*with respect to the propriety or ownership of the sea*, and its soil, may be considered under these three distinct divisions, the high seas, the shore or the land between high-water mark and low-water mark, and the soil and franchise of ports.—

As to the *high seas and their soil*; the right of fishing in the sea and its creeks and arms, is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord; the king has therefore, *of common right*, the primary right of fishing;—yet the people of England have also, by common right, a liberty of fishing in the sea and its creeks or arms, as a public common of piscary. Yet, in some cases, the king may enjoy a propriety exclusive of their common of piscary. He also *may* grant it to a subject, and consequently a subject *may* be entitled to it by prescription. (Lord Hale, de Juris Maris, page 11.)

As to the *soil between high-water mark and low-water mark*, at ordinary tides, this of *common right* belongs to the king.—It *may* however belong to a subject, by grant or prescription. Sometimes it is parcel of the adjacent manor: Sometimes of the adjacent vill or parish: Sometimes it belongs to a subject in gross: Still however it belongs of common right to the king: It is therefore incumbent on the subject to prove his right. This may be done by producing the grant. (Hale, ib. ch. 4, 5, 6. Sir Henry Constable's case, 5 Rep. 107.) But as it is part of the possessions of the crown, jure coronæ, it does not pass by general words; and therefore to establish a right to it under the grant, it must contain such words, as either expressly or by necessary implication convey the soil. —If the grant cannot be produced, it can no otherwise be proved, than by prescription, that is, as we observed before, by repeated unequivocal and immemorial usage.—

As to ports, there is a very material and important distinction between the franchise of a port and the property of its soil.—As to the franchise; by the common law, a port is the only place where a subject is permitted to unlade customable goods.—This privilege constitutes what is called the franchise of

a port.

the king's leigeance, and hereupon a jury of 12 shall be charged, and if they have sufficient evidence that hee was borne in France, or in any other place out of the realme, then shall they finde that hee was borne out of the king's alleageance; and if they have sufficient evidence that he was borne in *England*, or *Ireland*, or *Jernsey*, or *Jersey*, or elsewhere within the king's ☞ obedience, they shall finde that he was born within the king's leigeance. And this hath ever beene the pleading and manner of triall in that case. And so it is in the case that *Littleton* here putteth, if a man, in avoydance of a fine or a discent, alleage that he was out of this realme in Spaine, at the time of levying of the fine, and at the time of the disseisin and discent, the adverse party may alleage that he was at such a place in England, &c. whereupon issue shall be taken, and then in evidence he may prove that he was out of the realme, &c. which, upon sufficient evidence, the jurie ought to finde. And in both these cases and the like, in a special verdict the jury may finde that he was borne beyond sea, or was beyond sea at that time, &c.

[261. b.]

The

a port.—To create the franchise of a port is part of the royal prerogative. But this does not in anywise affect the propriety of the soil. It may be considered as a striking instance of the respect of the law of England for private property, that though it intrusts the king with the prerogative of originating ports, and though the use of the adjacent soil is essentially necessary to the existence of a port, the law does not permit the king to take any part of the soil from the owner; so that, if the soil is not the property of the king, it is necessary to secure the property of the shore beforehand, for the purposes of the port. The franchise belongs to the king of common right, but by charter or prescription, it may be, and frequently is, the right of the subject.—The soil generally belongs to the owner of the port; but it is going too far to say, that it belongs to him of common right.—The mere grant of a port would not in a modern charter pass the soil, but perhaps it would be sufficient in an ancient charter, to pass it, if no evidence to the contrary could be shown, and it certainly would be considered as sufficient to pass it in an ancient charter, if accompanied with the additional circumstance of immemorial usage. —Having thus shown in whom the soil of the shore and of ports belongs by common right, it remains to state succinctly the nature of the evidence by which the right to it may be proved to exist in another. It may be done by showing that he, and those under whom he claims, have immemorially, frequently, and without restriction to any part of the soil, dug gravel, fetched away sea weed or sand, or embanked against the sea. If it be claimed to be part of a manor, the right of commonage for the cattle of the lord and the tenants, the prosecution and punishment of purprestures in the court of a manor, its being included in the perambulations, and every other act by which the right to the soil of inland property is established, may be given in evidence in support of it. The right to wreck of the sea or royal fish by prescription, infra manerium, is a strong presumption for the shore's being parcel of the manor; lord Hale's expression is very strong—"Perchance," says his lordship, "the shore is parcel almost of all such manors as by pre-"scription have royal fish or wrecks of the sea within their manor." Ib. 27. —But it should be observed, that, though wreck frequently is parcel of a manor, it is a royal franchise. Like other royal franchises, it belongs of common right to the crown. But by grant of prescription it may, and in fact frequently does, belong to a subject, sometimes in gross, but oftener as parcel of his manor, parish, or vill adjacent to the sea.—[Note 205.]

(7 Rep. 26, 27. Calv. case.)

The statute of 25 *E.* 3, *de proditionibus*, doth declare, that it is treason by the common law to adhere to the enemies of the king within the realme, or without, if hee bee thereof proveablement attaint of overt fact, and that he shall forfeit all his lands, &c. A man must not imagine that seeing by the common law declared by authority of parliament, that adhering to the king's enemies without the realme, is high treason, and that the delinquent may be attainted thereof, &c. that this should want triall, for then the judgement of the common law, and declaration of the parliament, should be illusory, which no well advised man will thinke in a matter of so great consequence. But certaine it is, that for necessitie sake, the adherencie without the realme must be alleaged in some place within England. And if upon evidence they shall finde any adherencie out of the realme, they shall finde the delinquent guilty. But most commonly they indited him (if he had lands) in some county where his lands did lie, that were to be forfeited; and this, as appeareth in our bookes, was the common use.

5 R. 2. Triall, 54.

[*] 35 H. 8. cap. 2. Staundford's Pl. Cor. 90. (Cro. Car. 332.)

And so it is declared by the statute [*] of 35 *H.* 8, and that it shall be tried by twelve men of the countie, where the king's bench shall sit, and be determined before the justices of that bench, or else before such commissioners, and in such shire of the realme, as shall be assigned by the king's majestie's commission, and this statute for this point remaines in force at this day, and so it was resolved [*a*] by all the judges in my time, *viz.* in 33 *Eliz.* in the case of *Orurcke*. And *anno* [*b*] 34 *Eliz.* in sir *John Perot*'s case done in Ireland, for that is out of the realme of England, and the case [*c*] in *Mich.* 19 & 20 *Eliz.* was utterly denied, and sir *Christopher Wray* himselfe (who is supposed to give his opinion in that case) protested that he never gave any such opinion, but did hold the contrary. When part of the act, especially the originall, is done in England, and part out of the realme, that part that is to be performed out of the realme, if issue be taken thereupon, shall be tried here by 12 men; and those twelve men shall come out of the place where the writ is brought. For example, (which ever doth illustrate) it was covenanted by indenture, by charter party, that a ship should sayle from *Blackney* haven in Norfolke, to *Muttrel* in Spaine, and there remaine by certaine dayes.

[*a*] 33 Eliz. case Orurke.
[*b*] 34 Eliz. case de Sir John Perots.
[*c*] Mich. 19 & 20 Eliz. Dier, 360. (20 H. 6. 8.)
48 E. 3. 3.
11 H. 7. 16.
1 R. 3. 4.

(1 Roll. 532. Hob. 11. 4 Ins. 138. 140, 141. 7 Rep. 2. a. Sid. 367. Lut. 700. 710. 950.)

In an action of covenant brought upon this charter party, the indenture was alleaged to be made at *Thetford* in the county of Norfolke, and upon pleading, the issue was joyned, whether the said ship remained at *Muttrel* in Spaine by the said certaine dayes. And it was adjudged that this issue should be tried at *Thetford*, where the action was brought, because there the contract tooke his originall by making of the charter partie, and so hath it beene often adjudged in such like case.

Pasch. 28 Eliz. in action de covenant inter Evangelist Constantine pl. & Hughgyn defendant in the king's bench.

An obligation made beyond the seas may be sued here in England, in what place the plaintife will. What then if it beare date at *Bourdeaux* in *France*, where shall it be sued? And answer is made, that it may be alleaged to be made *in quodam loco vocat' Burdeaux* in *France*, in *Islington* in the county of *Middlesex*, and there it shall be tried, for whether there be such a place in *Islington* or no, is not traversable in that case. These points are necessary to be knowne in respect of the variety of opinions in our bookes. And of these thus much shall suffice, and now is *Littleton* worthy to be heard.

Li. 6. f. 47. Dowdale's case. Vid. 32 H. 6. 25. 48 E. 3. 3. 11 H. 7. 16. 2 E. 2. Obligation, 15. (2 Cro. 76. Sid. 228. Hob. 11.)

" *By*

"*By understanding of the law.*" *Vide*, for intendement of law, *Sect.* 99, 100. 110. 293. 377. 393. 406. 367. 462, 463, &c. 439. Intendement of law.

Vide Sect. 269.

"*This shall be inconvenient.*" Here also, as hath beene often said, appeareth, that *argumentum ab inconvenienti*, is strong in law (A).

"*Otherwise it should be if the disseisee were within the realme at the time of the disseisin, &c.*" So as if a man be disseised before he goeth over sea, or commeth into the realme againe before the discent, the discent shall take away his entrie.

[262. a.]

☞ Sect. 441.

ANOTHER matter they alleage for a proofe that before the statute of king Edward *the Third, made the* 34 *yeare of his reigne* (devant le statute fait en le temps de roy *E.* 3. *an** 34. *cap.* 16, de son raigne), *by which statute non-claim is ousted, &c. the law was such, that if a fine were levied of certaine lands or tenements, if any that was a stranger to the fine had right to have and to recover the same lands or tenements, if he came not and made his claime thereof within a yeare and a day next after the fine levied, he shall be barred for ever,* quia dicebatur quòd finis finem litibus imponebat. (B) *And that law was such, it is proved by the statute of West. the* 2. De donis conditionalibus, *where it is spoken if the fine bee levied of tenements given in the taile, &c.* quòd finis ipso jure sit nullus, nec habeant hæredes, aut illi ad quos spectat reversio (licet plenæ ætatis fuerint in Angliâ, et extra prisonam) necessitat' apponere clameum suum, † &c. *So it is proved that if a stranger that hath*

* 34. *cap.* 16, not in L. and M. or Roh.

† &c. *not in L. and M. or Roh.*

(A) *See ante* 66. *a. and note* 1 *there.*

(B) *Upon this section of Littleton, Mr. Ritso observes, that,* "it is plainly contradictory and unintelligible, according to the present reading." *And after citing the same section as far as the words* "*So it is proved, &c.*" *Mr. Ritso argues thus*; "*Now, in the first place,* "*it is not intended to prove that before the statute* 34 *E.* III. *the stranger to a fine, who* "*made not his claim within a year and a day, was for ever barred, &c.*; *but, on the con-* "*trary, that if such stranger was out of the realm, at the time of the fine levied, &c. he* "*was not barred, though he made not his claim, &c. And, secondly, as the law is here* "*stated, in the preceding part of the section, it is not proved by the words of the statute* "de donis, *&c. but the very reverse is proved. In order then, to restore this section, as* "*we may presume it to have been originally written by Littleton, I should read as follows*; "'*Another matter they allege for proof, (of the allegation contained in sect.* 440, *that a* "*disseisin and descent shall not bind the disseisee who is out of the realm at the time, &c.)* "*viz. that before the statute of King Edward III. made the* 34*th year of his reign, (by which* "*statute non-claim is ousted, &c.) the law was such, that if any that was a stranger to* "*the fine, had right to have and recover the same lands and tenements, if he came not and* "*made his claim thereof within a year and a day next after the fine levied, he was for ever* "*barred*;" quia dicebatur quòd finis finem litibus imponebat. "*But if he were out* "*of the realm at the time of the fine levied, &c. or in prison, or not of full age, he was* "*not barred, although he made not his claim, &c. And that the law was such, is proved* "*by the statute of West.* 2. de donis, &c."—*See Mr. Ritso's Intr. p.* 108, 109.

The effect of Time, in barring legal remedies and conferring titles, is excellently shewn, in the argument of the Master of the Rolls in Beckford v. *Wade,* 17 *Ves. jun.* 87. *not only in respect to the point then under the consideration of the court, but also in respect to the general operation of length of possession, as a bar under the statute of limitation, and as affording a presumption in favour of right. On these points, the cases of Eldridge* v. *Knott, Cowp.* 214. *and the Mayor of Kingston upon Hull* v. *Horner, ib.* 102. *may also be usefully consulted.*

hath right unto the tenements, if he were out of the realme at the time of the fine levied, &c. shall have no dammage, though that hee made not his claim, &c. though that such fine was matter of record: by greater reason it seemeth unto them, that a disseisin and discent that is matter in deed, shall not so grieve him that was disseised when he was out of the realme at the time of that disseisin, and also at the time that the disseisor died seised, &c. but that he may well enter, notwithstanding such discent ‡.

34 E. 3. cap. 16. (Ant. 254. b.) 4 H. 7. cap. 24. See as well this statute as the statute of 32 H. 8. cap. 36. well expounded in my Reports. Lib. 3. fol. 84, 85, &c. case del fines per totum. lib. 1. fol. 96, 97, in Shelley's case. lib. 2. fol. 93. Bingham's case. lib. 8. fol. 100. Lechford's case. Lib. 9. fol. 139, 140, 141. Beaumond's case. Lib. 10. fol. 49. b. Lampot's case, and 99. a. Lib. 9. fol. 105, 106. Margaret Podger's case. Lib. 5. fol. 124. Saffyn's case. Lib. 10. 96, 97. Seymour's case. Lib. 8. fol. 72. Grosleye's case. Lib. 11. fol. 69. 71. 78. Pl. Com. in Smith's and Stapl. case, and in Stowe's case, and Howel's case, and Glanvil. li. 13. cap. 11. Bract. 435. Fleta, lib. 6. cap. 53. Brit. 216. (4 H. 7. c. 24. 32 H. 8. c. 36. 2 Cro. 101. 226.)

HERE it appeareth, what the common law was before the said statute, for non-clayme upon a fine levied. But now since *Littleton* wrote, by the statute of 4 *H.* 7, five yeares after proclamations made upon the fine are given to him that right hath to make his claime, or pursue his action, where the common law gave him but a yeare and a day. But this statute of 4 *H.* 7. extends only to fines, and not to non-claime upon a judgement in a writ of right, and therefore the said statute of 34 *E.* 3. here cited by *Littleton*, which ousteth non-claime only to fines levied, extendeth not to a judgement in a writ of right at this day, and therefore the common law in that case remaineth to this day, *viz.* that claime must bee made within a yeare and a day after judgement (1). Also if a fine be levied without proclamations, or without so many as the law requireth, then the statute of non-claime doth extend to such a fine.

[a] Glanvil. lib. 8. cap. 3. Bract. lib. 5. fol. 435. Fleta, lib. 6. cap. 52, 53. [b] Etymologies, &c. Vid. Sect. 74, 174. 194. 441. 520. 592.

"*Dicebatur finis, quia finem litibus imponebat* (2)." Here you may observe the etymologie of a fine. And herewith agreeth [a] antiquity: *Finis ideò dicitur finalis concordia, quia imponit finem litibus.* And after the example [b] of *Littleton*, it is good to search out the etymologie or right derivation of words; for *ignoratis terminis ignoratur et ars*, as hath beene often observed in other places. And the civilians call this judiciall concord *transactionem judicialem de re immobili.*

Stat. de anno 13 E. 1.

☞ "*Licet fuerit plenæ ætatis in Angliâ, et extra prisonam.*" In this act of 13 E. 1. *De donis conditionalibus* is one omitted, who is added in the statute *De modo levandi* [262. b.]

‡ *&c.* added in L. and M. and Roh.

(1) If a disseisor at the common law, before the statute of non-claim, had levied a fine or suffered judgment in a writ of right, until execution sued they were not bars, for the year shall be accounted after the transmutation of the possession by execution of the fine or recovery. 1 Rep. 97.—[Note 206.]

(2) Every part of the law relating to fines and common recoveries has been stated and explained by Mr. Cruise, in his Essays upon those subjects, in a manner that equally recommends them to the student, and the most learned and experienced practitioners. Besides the obligations which the Editor has to him upon this account in common with the rest of the profession, he acknowledges with equal pleasure and gratitude the particular obligations he has to him for the assistance he has derived from them in the course of this work.—[Note 207.]

levandi fines, viz. et sanæ memoriæ. [c] But a fem-covert had no privilege of non-claime at the common law, as some have said, because she had a husband that might make claime for her. But yet *Bracton* saith, *Item excusatur uxor quæ sub potestate viri supposita, quod clameum non apposuerit licet mittere possit,* and citeth a judgement in the point, *Trin.* 4 H. 3. in *Cusin's* case. But *Fleta* saith, *Excusatur si fuerit uxor alicujus, si fuerit per virum impedita, quòd non potuit apponere clameum.* Also they in reversion or remainder expectant upon any estate of freehold were barred by the common law; and yet they could make no claime, because, as hath beene said, it belonged to the particular tenant, and not to them, because their entry was not lawfull; which was one of the principall causes of making of the said statute of 34 *E.* 3. which ousted non-claime. But these cases of coverture, and of them in reversion and remainder, are now without question holpen, and just provision made for the saving of their rights and titles by the said statute of 4 *H.* 7. as by the said act appeareth.

[c] Pl. Com. Stowel's case, 359. Bracton, lib. 5. fo. 436. Brit. fo. 216. b.

Fleta, lib. 6. ca. 53 (A).

(4 H. 7. c. 24. 32 H. 8. c. 36. 2 Inst. 516.)

(A) *This reference to Fleta is incorrect. See Fleta, lib. 6. ca. 54.*

Sect. 442.

ALSO, inquire if a man be disseised, and he arraigne an assise against the disseisor, and the recognitors of the assise chante (1) *for the plaintife* (et les recognitors de le assise † chaunta pur le plaintife), *and the justices of assise will bee advised of their judgements untill the next assise, &c. and in the meane season* (et en ‡ le dementiers) *the disseisor dieth seised, &c. yet the said suit of the assise shall be* ‖ *taken in law for the disseisee a continuall claime, insomuch that no default was in him,* § *&c.*

"*ARRAIGNE an assise.*" To arraigne the assise is to cause the tenant to be called to make the plaint, and to set the cause in such order as the tenant may bee enforced to answer thereunto; and is derived of the French word *arraigner*, which signifieth to order or set in right place. An arraignment is sometime called an astitution, of the verbe *astituo*, compounded of *ad* and *statuo*, that is, to place or set in order one by another. In the same sense that *Littleton* here useth it, it is used when an appeale is ☞ arraigned, both which are arraigned in French, but entred in Latin. And it is to be observed, that *Littleton* saith here *arraigne an assise*, and saith not that the tenant is arraigned; and so of the appeale; for these are the suits of the subject, and no man is said to be arraigned, but merely at the suit of the king, upon an enditement found against him, or other record wherewith he is charged. And there the arraignment of the prisoner is to take order that he

[263. a.]

(10 Rep. 130.)

2 & 3 E. 6. c. 24, towards the end. Staundf. Pl. Cor. 105. C. 3 H. 7. ca. 1.

† chaunta—chaunteront, *in L. and M. and* chaunteront *in Roh.*

‡ le *not in L. and M.*

‖ *taken* not in L. and M. or Roh.

§ *&c.* not in L. and M. or Roh.

(1) *i. e.* Find, or give their verdict.

he appeare, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the enditement or other record, whereupon they which follow for the king may orderly proceed.

Vid. Sect. 514. 233, 234. Magna Charta, 30. W. 2. ca. 3. 30. 39. Stat. de Ebor. ca. 3, 4. Artic. Sup. Cart. ca. 10. 4 E. 3. ca. 11. 7 R. 2. ca. 4. 27 E. 1. de finibus, ca. 4. 28 E. 1. de appellatis. 4 E. 3. ca. 2. 2 H. 5. ca. 8. 3 H. 5. ca. 7. 13 H. 4. ca. 7. North. 2 E. 3. ca. 3. 2 E. 3. ca. 5. 14 H. 6. ca. 1. 21 H. 6. ca. 10. 3 H. 7. ca. 1. 33 H. 8. c. 9. 34 & 35 H. 8. ca. 14. 2 & 3 E. 6. ca. 24. 1 E. 6. ca 7. 2 Mar. Dier, 99. 3 & 4 Eliz. Dier, 205. (F. N. B. 240. C. 4 Ins. 161.)

"*Justices of assise.*" Justices of assise are assigned and constituted by the king of the judges and sages of the law, and are called justices of assise, for that the writs of assise of *novel disseisin* (which in former times were accounted *festina remedia*, and very frequent and common) were returnable before them to be taken in their proper counties twice every yeare at the least, whereupon they had authority to give judgment and award seisin and execution: and therefore both for the number of them in times past, and for the greater authority they had then as justices of *nisi prius* (which was to trie issues only, except in *quare impedit*, and assises *de darreine presentment*, in which cases the justices of *nisi prius* might give judgment) they were denominated justices of assises: and divers acts of parliament have given to them great authority both in criminall causes and common pleas. These justices of assise have also commissions of *oier* and *terminer*, of gaole delivery and of the peace, of association, and *si non omnes* throughout their whole circuits, so as they are armed with ample, provident, but yet ordinary jurisdiction; for all their commissions are bounded with this expresse limitation, *facturi quod ad justitiam pertinet secundum legem et consuetudinem Angliæ*. And in former time, according to the originall institution and their commission, both the justices joined both in common pleas and pleas of the crowne.

"*Yet the said suit of the assise shall be taken in law, &c. a continuall claime.*" And it is holden at this day that it shall amount to a claime, for that there was no default in him, as *Littleton* saith. [*d*] Some have objected, that if the bringing of an assise should amount to continuall claime, and every continuall claime made by the disseisee vest the possession and freehold in him, therefore if bringing the assise, &c. should amount to a continuall claime, that then the writ should abate. But hereunto it hath beene answered in this chapter, that a continuall claime is an entry by construction of law for the advantage of the disseisee, but not for his disadvantage.

[*d*] See before in this chapter, Sect. 419. Vide Sect. 416. (2 E. 3. 8. 14 E. 3. 14.) (Ant. 253. b.

24 E. 3. 25. 9 E. 2. Age, 141. 15 E. 3. Counterplea de Gar. 5.

In a writ of entry *sur disseisin* against one, supposing that he had not entred but by *S.* who disseised him, the tenant said that *S.* died seised, and the land descended to him, and prayed his age; the plaintife counterpleaded his age, for that he arraigned an assise against *S.* who died hanging the assise, and he was ousted of his age, for that the bringing of the assise amounted to a claime.

3 E. 3. tit. Garrantie, 62.

If tenant in dower alien in fee with warranty, and the heire in the reversion bring a writ of entry *in casu proviso, &c.* and hanging the plea the tenant dieth, the heire shall not be rebutted or barred by this warranty, for that the *præcipe* did amount to a continuall claime. And herewith agreeth [*] antiquity; *Et si clameum non apposuerit, sufficit tamen si ille vel antecessor suus faciat quod tantundem valeat, ut si placitum moverit tenenti vel fecerit rem litigiosam; quia sicut plus est facto appellare quàm verbo,*

[*] Fleta, lib. 6. ca. 52 (B). Bract. lib. 5. fo. 436.

(B) *This reference to Fleta is incorrect. See Fleta, lib. 6. ca. 53.*

verbo, ita plus est clameum apponere facto quàm verbo (A) : *et ad hoc facit de termino Sanctæ Trinitatis, anno regni regis H.* 3. 15. *in com. Hunt. de quâdam Guldeburgâ, cui objectum fuit, quod clameum non apposuit, et ipsa respondit, quòd fecit quod tantundem valet, quia tempore finis facti implacitavit tenentem per aliud breve, &c.*

If the goods of a villeine (before any seisure made by the lord) be distreined, the lord may have a replevyn : and notwithstanding before the bringing of the writ he had no property, yet the very bringing of the writ doth amount to a claime of the goods, and vesteth the property in the lord. 33 E. 3. Replevin, 43. 42 E. 3. 18. b. 9 H. 6. 25.

"*Insomuch that no default was in him, &c.*" Hereby it is implyed, that our author inclined to this opinion, that it should amount to a claime, for that no default was in him ; *et nemo debet rem suam sine facto aut defectu suo amittere*, as the rule is.

(A) *The* 53*d chapter of the* 6*th book of Fleta concludes nearly in the words of the first part of the quotation in the text ending with,* "facto quàm verbo." *The whole of the quotation is in Bracton, lib.* 5. *fol.* 436.

[263. b.]

☞ Sect. 443.

ALSO, inquire if an abbot of a monasterie die, and during the time of vacation a man wrongfully entreth in certaine parcels of land of the monasterie, claiming the land unto him and his heires, and of that estate dieth seised, and the land descendeth unto his heires, and after that an abbot is chosen, and made abbot of the monasterie, a question is, if the abbot may enter upon the heire or not (et puis apres un * est elect, et fait abbe de mesme la monasterie, si † mesme l'abbe poit enter sur le heire ou nemy). *And it seemeth to some, that the abbot may well enter in this case, for this that the covent in time of vacation was no person able to make continuall claime; for no more than they be personable to sue an action, no more be they able to make continuall claime, for the covent is but a dead bodie without head* (car nient pluis que ils sont personable de ‡ suer action, nient pluis ils sont able de faire continual claime, car le covent § n'est forsque ‖ un mort corps sans teste); *for in time of vacation a grant made unto them is void; and in this casè an abbot may not have a writ of* entrie upon disseisin *against the heire, for this, that hee was never disseised. And if the abbot may not enter in this case, then hee shall bee put into his writ of right, &c. which shall be hard for the house: by which it seemeth to them, that the abbot may well enter, &c.*

Quæras de dubiis, legem bene discere si vis :
Quærere dat sapere, quæ sunt legitima verè ¶.

HERE, first, it is to be observed, that albeit the freehold and inheritance is in this case in no person, but in abeyance or in consideration of law, yet an entrie and claime by one that hath no (Post. 331. a. 342. b. 345. a.) (Dyer, 71. a.) (2 Roll. Abr. 339.)

* abbe *added L. and M. and Roh.*
† mesme *not in L. and M. or Roh.*
‡ suer—faire, *L. and M. and Roh.*
§ n'est—est, *L. and M. and Roh.*
‖ come *added L. and M. and Roh.*
‡ *&c.* not in L. and M.
¶ verè *not in L. and M. nor is any part of these two verses in the Camb. MSS.*

no right shall gaine the inheritance by wrong. For here *Littleton* saith, and of such estate died seised, &c. And so it is in case of a bishop, parson, vicar, prebend, or any other sole corporation. And in the statute of *Merlebridge* it is called an intrusion.

Merleb. cap. 28.

Secondly, that seeing by the death of the abbot (which is the act of God) no person is able to make continuall claime, therefore a discent during that time shall not prejudice the successor; for, as hath beene said, *Impotentia excusat legem.* If an usurpation bee had to a church in time of vacation, this shall not prejudice the successor, to put him out of possession, but that at the next avoidance hee shall present.

(5 Rep. 21.)

(F.N.B. 34. M. W. 2. cap. 5.)

"*No more than they be personable to sue an action, &c.*" Here that which hath in this chapter beene said is confirmed, *viz.* That the entrie or continuall claime must pursue the action.

(8 Rep. 88. Ant. 252. b.)

"*For the covent is but a dead bodie, &c.*" This is *ratio una*, but not *unica:* for though the rest of the corporation be no mort persons, as the chapter in case of deane and chapter, or the commonaltie in case of mayor and commonaltie; yet cannot they when there is no deane or maior make claime, because they have neither abilitie nor capacitie to take or to sue any action, as our author here saith.

"*For in time of ☞ vacation a grant made unto them is void, &c.*" And the reason is, because the body politique which is capable, is not complete, but wanteth the head. But this is to be understood of an immediate grant; for if during the vacation of the abathie of Dale, a lease for life, or a gift in taile be made, the remainder to the abbot of Dale and his successors, this remainder is good, if there be an abbot made during the particular estate.

[264. a.]

2 H. 7. 13. 40 Ass. 26. 34 E. 3. Garrantie, 69.

(Post. 378.)

(Ant. 239. a.)

If there be maior and commonaltie of *D.* and the maior dieth, a graunt made to the maior and commonaltie of *D.* is void for the cause aforesaid; but in that case, if a lease for life be made, the remainder to the maior and commonaltie of *D.* the remainder is good, if there bee a maior elected during the particular estate.

(10 Rep. 1. Ant. 85. 250. a. 3. a. lib. 10. Lampett's case. lib. 6. Bishop of Wells case. lib. 1. Rector of Chedding-ton's case.)

"*May well enter, &c.*" Here by this *(&c.)* is implyed, or make his continuall claime in such sort as hath beene before expressed.

Quæras de dubiis, legem bene discere si vis:
Quærere dat sapere, quæ sunt legitima verè.

Here *Littleton* expresseth an excellent meanes to attaine to the reason of the law, by enquiring of, and conference had with, learned men, of doubtfull cases:

Horace.

Inter cuncta leges, & percunctabere doctos.

For as *collatio peperit artes*, so *collatio perficit artes:* and this must bee continuall; for as knowledge increaseth, so doubts therewith increase also; *Crescente scientiâ, crescunt simul et dubitationes.*

And

And here *Littleton* citeth verie aptly two verses; for it is truly said, that *Authoritates philosophorum medicorum et poetarum sunt in causis allegandæ et tenendæ:* and our author doth cite a verse for memorie, but it is worthy of memorie.

Chap. 8. Of Releases (1). Sect. 444.

RELEASES are in divers manners, viz. *releases of all the right which a man hath in lands or tenements,* ‡ *and releases of actions personalls and realls, and other things. Releases of all the right which men have in lands and tenements, &c. are commonly made in this forme, or of this effect:*

HERE our author beginneth with a division of releases. Vide Mir. cap. 2. sect. 17.

Vide Brit. 101. Bract. li. 5. Tract. de Except. & lib. 4. fol. 318. b. Fleta, lib. 3. cap. 14.

These words must be referred thus: releases are of two sorts, *viz.* a release of all the right which a man hath either in lands and tenements, or in goods and chattels; or there is a release of actions reall, of or in lands or tenements; or personall, of or in goods or chattels; or mixt, ☞ partly in the realty, and partly in the personaltie. [264. b.] Vide Sect. 492.

"*Release,*" *Relaxatio.* Of the etymologie of this word you have heard before. *Fleta* [a] calleth it *charta de quietâ clamantiâ.* [a] Fleta, ubi supra.

Sect.

‡ *&c.* added in L. and M.

(1) At common law, lands could not be transferred by one person to another but by feoffment, with livery of the seisin. This produced a notoriety of the transmutation of the possession. This notoriety was in some measure effected by a disseisin; but that was only a tortious possession, liable to be defeated by the disseisee. Thus the disseisor had the possession; the disseisee the right. To complete the title of the disseisor, it was necessary he should acquire the right. This could not be done by a feoffment, as that was a transfer of the possession; but it was effected by a release, which in some respects operates as an actual transfer of the right; in others, as an acquittal or discharge from it. The different degrees of title in the disseisor, his heir, or feoffee, and the different natures of the rights of the disseisee, make it necessary that releases should be adapted to the different situation of the parties, and give them, as the circumstances of the parties vary, a different effect and operation.—[Note 208.]

Sect. 445.

KNOW all men by these presents, that I *A.* of *B.* have remised, released, and altogether from me and my heires quiet claimed: *(me* A. *de* B. *remisisse, relaxasse, et omninò de me et hæredibus meis quietum clamâsse): or thus,* for mee and my heires quiet claimed to *C.* of *D.* all the right, title, and claim *(totum jus, titulum, et clameum)* which I have, or by any meanes may have, of and in one messuage with the appurtenances in *F.* &c. *And it is to bee understood, that these words,* remisisse, et quietum clamâsse, *are of the same effect as these words,* relaxâsse.

"KNOW all men by these presents, &c." Here *Littleton* sheweth presidents of releases of right: and presidents doe both teach and illustrate, and therefore our student is to be well stored with presidents of all kindes.

Bract. lib. 4. fol. 308. Fleta, ubi sup. 9 H. 6. 35. 24 E. 3. 27. 13 H. 4. Entr. congeab. 57. (2 Roll. Abr. 400. 403. 9 Rep. 52.)

"*Remisisse, relaxâsse, et quietum clamâsse.*" Here *Littleton* sheweth, that there be three proper words of release, and bee much of one effect: besides, there is *renunciare, acquietare,* and there bee many other words of release; as if the lessor grants to the lessee for life, that he shall be discharged of the rent, this is a good release. *Vide* Sect. 532.

27 H. 8. 29. of an use. 34 H. 6. 44. of an attaint. 3 E. 3. 38. 21 E. 4. 81. Pl. Com. Delamere's case. (8 Rep. 136. Plo. 185, 186. Hob. 10. 1 Sid. 79. 1 Roll. Abr. 934. Plo. 36. 5 Rep. 29.)

And it is to bee understood, that there bee releases in deed, or expresse releases, whereof *Littleton* heere hath shewed an example. These expresse releases must of necessitie be by deed. There be also releases in law, and they are sometime by deed, and sometime without deed. As if the lord disseise the tenant, and maketh a feoffment in fee by deed or without deed, this is a release of the seigniorie. And so it is if the disseisee disseise the heire of the disseisor, and make a feoffment in fee by deed or without deed, this is a release in law of the right. And the same law it is of a right in action.

8 E. 4. 3. 21 E. 4. 2.

If the obligor make the obligee his executor, this is a release in law of the action, but the dutie remaines, for the which the executor may retaine so much goods of the testator (1).

If

(1) What sir Edward Coke observes respecting obligors and obligees holds equally between all other creditors and debtors; but it must be attended with the following observations. A debt is only a right to recover the amount of the money by way of action; and, as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt, and therefore, like other legacies, it is not to be paid or retained till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand,

If the feme obligee take the obligor to husband, this is a release in law. The like law is, if there be two femes obligees, and the one take the debtor to husband (2). 11 H. 7. 4. 20 H. 7. 29. 8 E. 4. 3.

If an infant of the age of seventeene yeares release a debt, this is void; but if an infant make the debtor his executor, this is a good release in law of the action (3).

But if a feme executrix take the debtor to husband, this is no release in law, for that should be a wrong to the dead, and in law worke a *devastavit*, which an act in law shall never worke. And so it was adjudged in the king's bench, *Mich.* 30 & 31 *Eliz.* in which case I was of counsell.

But it is to be observed, that there is a diversitie betweene a release in deed, and a release in law; for if the heire of the disseisor make a lease for life, and the disseisee release his right to the lessee for his life, his right is gone for ever. But if the disseisee doth disseise the heire of the disseisor and make a lease for life, by this release in law the right is released but during the life of the lessee; for a release in law shall be expounded more favourable, according to the intent and meaning of the parties, than 30 E. 3. 24. 32 E. 3. tit. Scire fac. 102. (Mo. 236. 1 Leo. 320. 8 Rep. 152. Plo. 184. a. Finch. 294.)

hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself; but if there are not assets, he may sue the heir, where the heir is bound. See Wankford *v.* Wankford, 1 Salk. 299. Selwin *v.* Browne, 4 Bro. Cas. in Par. 179. For. 243. Vin. vol. 8. p. 198. 2 Eq. Cas. Abr. 461. note at (Q).—[Note 209.]

(2) In the case of Smith & Uxor *v.* Stafford, Hob. 216. the husband promised the wife before marriage that he would leave her worth 100*l.* The marriage took effect, and the question was, whether the marriage was a release of the promise. All the judges but Hobart were of opinion, that, as the action could not rise during the marriage, the marriage could not be a release of it. The doctrine of this case seems to be admitted in the case of Gage or Gray *v.* Acton, 1 Salk. 325. 12 Mod. 290. The case there arose upon a bond executed by the husband to the wife before the marriage, with a condition making it void if she survived him, and he left her 1,000*l.* Two of the judges were of opinion, that the debt was only suspended, as it was on a contingency which could not by any possibility happen during the marriage. But lord chief justice Holt differed from them; he admitted that a covenant or promise by the husband to the wife to leave her so much in case she survives him is good, because it is only a future debt on a contingency which cannot happen during the marriage, and that is precedent to the debt; but that a bond debt was a present debt, and the condition was not precedent, but subsequent, that made it a present duty; and the marriage was consequently a release of it. The case afterwards went into chancery. The bond was taken there to be the agreement of the parties, and relief accordingly decreed. 2 Vern. 481. A like decree was made in the case of Cannel *v.* Buckle, 2 P. W. 243.—[Note 210.]

(3) *If the obligor make the obligee his executor, the obligee may retain; but that is not applicable to the case put here. Therefore he may make an executor at* 17; tamen supra 89. *b. it is said that it is at* 18. *It should seem that the case here is understood of* 17 *complete*, et supra 89. *of* 18 *beginning; and thus the passages agree.* D'Avila His. *King of France is major at* 14 *beginning. Thus it seems that puberty, which by the civil law holds from* 14 *to* 18, *is understood of* 18 *beginning; and thus our law agrees with the civil law*, impuberi non licet testari *before* 17 *complete, and* 18 *beginning.* Lord Nott. MSS.—[Note 211.]

than a release in deed, which is the act of the partie, and ☞ shall be taken most strongly against himselfe, and so in the case aforesaid, where the debtor is made executor. [265. a.]

(10 Rep. 47.) "All the right, title, and claim *(totum jus, titulum, & clameum)*." But note, that *jus*, or right, in generall signification includeth not onely a right for the which a writ of right doth lie, but also any title or claime, either by force of a condition, mortmaine, or the like, for the which no action is given by law, but only an entry.

Sect. 446.

ALSO, these words which are commonly put in such releases, * scilicet (quæ quovismodo in futurum habere potero) *are as voide in law; for no right passeth by a release, but the right which the releasor hath at the time of the release made* (1). *For if there be father and sonne, and the father*

* scilicet—&c. *in L. and M. and Roh.*

(1) To prevent maintenance, and the multiplying of contentions and suits, it was an established maxim of the common law, that no possibility, right, title, or any other thing that was not in possession, or vested in right, could be granted or assigned to strangers.—A right in action could not be transferred even by act of law; nor was it considered as transferred to the king by the general transferring words of an act of attainder. (See the marquis of Winchester's case, 3 Rep. 2. b.—But a right or title to the freehold or inheritance of lands might be released in five manners.—1. To the tenant of the freehold in fact, or in law, without any privity.—2. To him in remainder.—3. To him in reversion.—4. To him who had right only in respect of privity; as, if the tenant were disseised, the lord, notwithstanding the disseisin, might release his services to him.—5. To him who had privity only, though he had not the right; as, if tenant in tail made a feoffment in fee, after this feoffment no right remained in him; yet, in respect of the privity only, the donor might release to him the rent and services.—6. So, if the terre-tenants and the person entitled to the right or possibility joined in a grant of the lands, it would pass them to the grantee discharged from the right or possibility. See 10 Rep. 49. b.—But the common law is altered in the above instances in many respects.—On the assignment of things in action, see ante note 1, to p. 232. b. The passage in the text was cited by lord chief justice Trevor, in delivering his opinion on the case of Arthur *v.* Bokenham, (Fitzgib. 234,) with an observation, that the doctrine laid down there by Littleton had never been contradicted. On the transmissibility, conveyance, assignment, and devise of contingent remainders, and executory estates and interests, see Mr. Fearne's Essay on Contingent Remainders and Executory Devises, 6th ed. pp. 364, 365, 366, 367, 368, 369, 370, 371. 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, and 562; and Mr. Preston's Treatise on Conveyancing, vol. 1. p. 142. 209. 301. The case of Roe dem. Perry *v.* Jones, 1 Hen. Black. 30. seems to have established the power of testamentary dispositions of such contingent and executory estates and possibilities, accompanied with an interest, as would be descendible to the heir of the object of them, dying before the contingency or event, on which

father be disseised, and the sonne (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements without clause of warrantie, &c. and after the father dieth, &c. the sonne may lawfully enter upon the possession of the disseisor, for that hee had no right in the land in his father's life (pur ceo que il n'avoit † droit en la terre ‡ en la vie son pier) *but the right descended to him after the release made by the death of his father, &c.*

NOTE, a man may have a present right, though it cannot take effect in possession, but *in futuro* (2).

As hee that hath a right to a reversion or remainder, and such a right he that hath it may presently release. But here in the case which *Littleton* puts, where the sonne release in the life of his (2 Roll. Abr. 400. 8 Rep. Edw. Altham's case.)

† nul *added in L. and M. and Roh.*

‡ quant il relessasses *added in L. and M. and Roh.*

which the vesting or acquisition of them depends.—It has been contended to be a rule of law, that, whatsoever can be devised, may be granted; and consequently, that this case is an authority to show, that the contingent and executory estates and interests, to which it applies, may be granted.—[Note 212.]

(2) This doctrine was fully investigated in the case of Dormer *v.* Fortescue, Vin. vol. 18, fol. 413. 3 Atk. 123, 135. Bro. Par. Cas. v. 4. 353. 405. The case there was, that an estate was limited to the use of *A.* for 99 years, if he should so long live; and after his decease, or the sooner determination of the estate limited to him for 99 years. to the use of trustees and their heirs, during his life, upon trust to preserve the contingent remainders; and after the end or determination of that term, to the use of *A.*'s first and other sons successively in tail male, with several remainders over. *A.* having a son, they joined in levying a fine and suffering a common recovery, in which the son was vouched. If the trustees took a vested estate of freehold during the life of *A.* the recovery was void, there not being a good tenant to the præcipe; but if they took only a contingent estate, the freehold was in the son, and of course there was a good tenant to the præcipe. Upon this point, the case was argued in the court of king's bench, and afterwards on appeal before the house of lords, where all the judges were ordered to attend. Lord chief justice Lee, when the cause was heard in the king's bench, and lord chief justice Willes, in delivering the opinion of the judges in the house of lords, entered very fully into the distinction between contingent and vested remainders.—They seem to have laid down the following points. That a remainder is contingent, either where the person to whom it is limited is not *in esse*; or where the particular estate may determine before the remainder can take place: but that, in every case, where the person, to whom the remainder is limited is *in esse*, and is actually capable or entitled to take on the expiration, or sooner determination, of the particular estate, supposing that expiration, or determination, to take place at that moment, there the remainder is vested. That the doubt arose, by not adverting to the distinction between the different nature of the contingency, in those cases where the remainder is limited to a person *in esse*, but the title of the remainder-man to take depends on a collateral or extraneous contingency, which may or may not take place during the continuance of the preceding estate, and those cases, where the preceding estate may endure beyond the continuance of the estate in remainder. Thus if an estate is limited to *A.* for life, and after the death of *A.* and *I. S.* to *B.* for life, or in tail: there, during the life of *I. S.* the title of *B.* depends on the contingency of *I. S.* dying in the lifetime of *A.* This is an event, which either may or may not

his father, this release is void, [a] because he hath no right at all at the time of the release made, but all the right was at that time in the father; but after the decease of the father, the sonne shall enter into the land against his owne release.

[a] Britton, fol. 101. 17 E. 3. 67. 42 E. 3. 21. 10 H. 6. 4. 25 Ass. 7. 27 E. 3. Execution, 130. 1 Rep. 112. b.

16 E. 3. Barre, 245. Hoes's case, 5 part. f. 70, 71.

The baron makes a lease for life and dieth, the release made by the wife of her dower to him in reversion is good, albeit shee hath no cause of action against him *in præsenti*.

(Sect. 706.)

"*Without clause of warrantie.*" For if there bee a warrantie annexed to the release, then the sonne shall be barred. For albeit the release cannot barre the right for the cause aforesaid, yet the warranty may rebutt, and barre him and his heires of a future right which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warrantie being a covenant reall should barre a future right, is for avoiding of circuitie of action (which is not favoured in law); as he that made the warrantie should recover the land against the ter-tenant, and he by force of the warrantie to have as much in value against the same person: yet is there a diversity betweene a warrantie and a feoffment; [b] for if there be grandfather, father, and sonne, and the father disseiseth the grandfather, and make a feoffment ☞ in fee, the grandfather dieth, the father against his owne feoffment shall not enter; but if he die, his sonne shall enter. And so note a diversity betweene a release, a feoffment, and a warrantie; a release in that case is void; a feoffment is good against the feoffor, but not against his heire; a warrantie is good both against himselfe and his heires (1).

20 H. 6. 29.

[b] 39 H. 6. 43. 21 E. 4. 81. 15 E. 4. tit. Entr. Cong. 21. 9 H. 7. 1. b. 2 E. 3. 38. (Post. 339. a.) 10 E. 2. Confirmation, 24. 8 E. 2. Garr. 62. 11 H. 4. 33.

[265. b.]

43 E. 3. 17. 42 E. 3. 24. per Finchden. 17 E. 3. 67. Lib. 1. fol. 112, 113. in Albanie's case. (9 Rep. 75.) (1 Roll. Rep. 197.)

And

not take place during the continuance of the preceding estate; and *B.*'s estate therefore is necessarily contingent. But then, supposing *I. S.* to die; still it remains an uncertainty whether *B.*'s estate will ever take place in possession; for, if the remainder be limited to *B.* for life; there if *B.* dies in *A.*'s lifetime, *A.*'s estate would endure beyond the continuance of the estate limited in remainder. The same would be the case if the remainder over were limited to *B.* in tail, and *B.* was to die in *A.*'s lifetime without issue.—Yet, in both cases, it was agreed that *B.* took, not a contingent, but a vested remainder. Hence, they inferred that itwas not the possibility of the remainders over never taking effect in possession, but the remainder-man's not having a capacity or title to take, supposing the preceding estate at that instant to expire, or determine, and its being uncertain whether he ever will obtain that capacity or title, during the continuance of the preceding estate, that makes the remainder contingent. Upon these grounds they determined that the trustees took a vested remainder, and that the recovery therefore was void. The doctrine established in the case of Dormer and Fortescue is laid down by sir Edward Coke, 10 Rep. 85; where he, with great accuracy of expression, observes, that where it is dubious and uncertain whether the use or estate limited in future shall ever *vest in interest* or not, then the use or estate is in contingency; because, upon a future contingent, it may either vest or never vest, as the contingent happens. And see 1 Rep. 137. b.—[Note 213.]

(1) Ant. 186. it is laid down that a man may warrant more than passes from him. In Fitzg. 234. lord chief justice Trevor observes, that the reason why

And here are three diversities worthy of observation, *viz.* First, betweene a power or an authoritie, and a right. Secondly, betweene powers and authorities themselves. Thirdly, betweene a right and a possibilitie.

As to the first, if a man by his last will deviseth that his executors shall sell his land, and dieth, if the executors release all their right and title in the land to the heire, this is void, for that they have neither right nor title to the land, but only a bare authority, which is not within *Littleton*'s case of a release of a right. And so it is if *cesty que use* had devised that his feoffees should have sold the land. Albeit they had made a feoffment over, yet might they sell the use, for their authority in that case is not given away by the livery. 15 H. 7. 11.

As to the second, there is a diversity betweene such powers or authorities as are only to the use of a stranger, and nothing for the benefit of him that made the release (as in the case before) and a power or authority which respecteth the benefit of the releasor; as in these usuall powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uses (being intended for his benefit) he may release; and where the estates before were defeasible, he may by his release make them absolute, and seclude himselfe from any alteration or revocation, as it hath beene resolved; which diversity you may read in [*m*] *Albanie*'s case (2). (1 Rep. 111. a. 173. Ant. 215. a. 218. b. 237. a.)

As to the third, before judgement the plaintife in an action of debt releaseth to the baile in the king's bench all demands; and after judgement is given, this shall not barre the plaintife to have execution against the baile, because at the time of the release he had but a meere possibility, and neither *jus in re*, nor *jus ad rem*, but the duty is to commence after upon a contingent, and therefore could not be released presently. So if the conusee of a statute, &c. release to the conusor all his right in the land, yet afterwards he may sue execution; for he hath no right in the land till execution, but only a possibilitie; and so have I knowne it adjudged (3). [*m*] Lib. 1. Albanie's case, ubi supra. Lib. 5. Hoe's case, 70, 71. 10 H. 6. 4. 25 Ass. p. 7. 27 E. 3. Execution, 130. Pasch. 38 Eliz. Rot. 521. inter Borough et Gray. (2 Roll. Abr. 404. 408. Hob. 46. 2 Cro. 401. 449.)

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why the feoffment prevails against the father is, that by the disseisin he had acquired possession, and might make a feoffment, and the operation of a feoffment is to bar future and contingent rights.—[Note 214.]

(2) See Note 2 to page 113. The doctrine of the suspension and extinction of powers will be considered in a note to the chapter of Discontinuance.

(3) In the king's bench, where the proceeding is by bill, the bail is not bound in a certain sum to the plaintiff, but only undertakes that the defendant shall pay the condemnation money, or render his body to prison; so that they are but in the nature of gaolors to the defendant: but in the common pleas, the bail are bound to the plaintiff in a certain sum. 5 Rep. 70. 10 Rep. 51.—[Note 215.]

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*ALSO, in releases of all the right which a man hath in certaine lands, &c. it behoveth him to whom the release is made * in any case, that he hath the freehold in the lands † in deed, or in law, at the time of the release made, &c.‡ For in every case where he to whom the release is made, hath the freehold in deed, or in law, at the time of the release ‖, &c. there the release is good* (§ donque le releas est bone) (4).

49 E. 3. 28.

"*OF all the right.*" This must be intended of a bare right, and not of a release of right, whereby any estate passeth, as to a lessee for yeares, &c. as shall be said hereafter. Also it must be intended of a release of a right of freehold at the least, and not to a right for any terme for yeares or chattle reall; as if lessee for yeares bee ousted, and hee in the reversion disseised, and the disseisor maketh a lease for yeares, the first lessee may release unto him. All which is implyed in the first *&c.* Also in some case a release of a right made to one that hath neither freehold in deed, nor freehold in law, is good and available in law, [*c*] as the demandant may release to the vouchee, and yet the vouchee hath nothing in the land: but the reason of that is, for that when the vouchee entreth into the warrantie, he becommeth tenant to the demandant, and may render the land to him, in respect of the privitie; but an estranger cannot release to the vouchee, because, *in rei veritate*, he is not tenant of the land.

(Doct. and Stud. 18. a. 10 Rep. 48. b. Post. 276. a.)

[*c*] 7 E. 4. 13. 20 H. 6. 29. 5 H. 7. 41. 18 E. 3. 12. 8 H. 4. 5. 5 E. 3. 36. 5 E. 3. 46. Vide Sect. 490, 491.

[*d*] ☞ And so it is if the tenant alien hanging the *præcipe*, the release of the demandant to the tenant to the *præcipe* is good, and yet he hath nothing in the land. [266. a.]

(Post. 284. b. 1 Rep. 87. b. 3 Rep. 29. b. [*d*] 10 E. 4. 14. 12 Ass. p. 41. 8 E. 3. 21. 46 E. 3. 6. b. 8 H. 6. 23. 21 H. 7. 41.

In time of vacation an annuity, that the person (A) ought to pay, may be released to the patron in respect of the privity; but a release to the ordinary only seemeth not good, because the annuitie is temporall.

If a disseisor make a lease for life, the disseisee may release to him (B); for to such a release of a bare right there needs no privity, as shall be said hereafter. But if the disseisor make a lease for yeares, the disseisee cannot release to him (C), because he hath no estate of freehold. And yet in some case a right of freehold shall drowne in a chattell; as if a feme hath a right of dower she may release to the gardein in chivalry, and her right of freehold shall drowne in the chattle, because the writ of dower doth lie against him, and the heire shall take advantage of it. And

(Post. 284. a. 8 Rep. 148. 5 Rep. 24. b. 2 Cro. 151.)

* *any—such*, in L. and M. and Roh.

† *&c.* added in L. and M. and Roh.

‡ *&c.* not in L. and M. or Roh.

‖ *made* added in L. and M. and Roh.

§ donque *not in L. and M. or Roh.*

(A) "person" *seems to be printed here by mistake instead of* parson. *See Mr. Ritso's Intr. p.* 119.

(B) *i. e. to the tenant for life, as it seems.*

(C) *i. e. to the tenant for years, as it seems.*

(4) Ant. 1st Note to this Chapter.

And it is to be observed, that by the antient maxime of the common law, a right of entrie, or a chose in action, cannot be granted or transferred to a stranger, and thereby is avoyded great oppression, injurie, and injustice. *Nul charter, nul vende, ne nul done vault perpetualment si le donor n'est seisie al temps de contracts de* 2. *droits, si del droit de possession, et del droit del propertie.* And therefore well saith *Littleton*, that he to whom a release of a right is made must have a freehold. (Dyer, 30. b. 2 Cro. 105.) Mirror, cap. 2. § 17. (2 Roll. Abr. 45, 46, 47, 48. Ant. 214. a. 232. b. Post. 280.)

For the better understanding of transferring of naked rights to lands or tenements, either by release, feoffment, or otherwise, it is to be knowne, that there is *jus proprietatis*, a right of ownership, *jus possessionis*, a right of seisin or possession, and *jus proprietatis & possessionis*, a right both of property and possession: and this is antiently called *jus duplicatum*, or *droit droit*. For example, if a man be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis* (A); and if the disseisee release to the disseisor, hee hath *jus proprietatis et possessionis* (1). And regularly it holdeth true, that when a naked right to land is released to one that hath *jus possessionis*, and another by a meane title recover the land from him, the right of possession shall draw the naked right with it, and shall not leave a right in him to whom the release is made. For example, if the heire of the disseisor being in by discent *A.* doth disseise him, the disseisee release to *A.* now hath *A.* the meere right to the land. But if the heire of the disseisor enter into the land, and regaine the possession, that shall draw with it the meere right to the land, and shall not regaine the possession only, and leave the meere right in *A.* but by the recontinuance of the possession, the meere right is therewith vested in the heire of the disseisor. Mirror, ubi supra. Bracton, lib. 2. fol. 32. Britton, fol. 89. 121. Bracton, lib. 5. fol. 372. (2 Rep. 56. Sect. 473. Post. 283. b. 286. a.)

But if the donee in taile discontinue in fee, now is the reversion of the donor turned to a naked right. If the donor release to the discontinuee and die, and the issue in taile doth recover the land against the discontinuee, he shall leave the reversion in the discontinuee; for the issue in taile can recover but the estate taile onely, and by consequence must leave the reversion in the discontinuee, for the donor cannot have it against his release: but if the disseisee enter upon the heire of the disseisor, and infeoffe *A.* in fee, and the heire of the disseisor recover the whole estate, that shall draw with it the meere right, and leave nothing in the feoffee. *Nota* the diversity. Another diversity is observable when the naked right is precedent before the acquisition of the defeasible estate, for there the recontinuance of the defeasible estate (Post. 319. a.)

(A) *But, according to sir William Blackstone, the disseisin gives to the disseisor no more than an actual possession, and leaves the* jus possessionis *in the disseisee.* See Black. Comm. v. 2. p. 195. Archbold's ed.—*However, lord Coke perhaps only meant to say, that the disseisor hath* jus possessionis *against* strangers *only. For though a stranger in the name and to the use of the disseisee may enter into the lands, and thereby revest the same in the disseisee, even without the knowledge or agreement of the latter (see ante* 258. a.*); yet a stranger may not, in this case, enter in his own name and to his own use.*

(1) These may be subdivided, with respect to the disseisor, into that bare, naked, possession which he acquires by the disseisin, and the estate by title which his heir acquires by the descent; and, with respect to the disseisee, into that right of possession which he can restore by entry, and the bare right which he can only recover by action.—[Note 216.]

estate shall not draw with it the preceding right. [e] As if the disseisee disseise the heire of the disseisor, albeit the heire recover the land against the disseisee, yet shall he leave the preceding right in the disseisee. So if a woman that hath right of dower disseise the heire, and he recover the land against her, yet shall he leave the right of dower in her.

[e] 5 Ass. 1. 10 Ass. 16. 50 E. 3. 7. 4 E. 3. Estopp. 133. 30 Ass. 5. 11 E. 3. Entrie, 56. 12 Ass. 41. 27 E. 3. 84. 488. (6 Rep. 70. a.)

Another diversity is to be noted, when the meere right is subsequent, and transferred by act in law; there, albeit the possession be recontinued, yet that shall not draw the naked right with it, but shall leave it in him; as if the heire of the disseisor be disseised, and the disseisor (A) infeoffe the heire apparent of the disseisee being of full age, and then the disseisee dieth, and the naked right descend to him, and the heire of the disseisor recover the land against him, yet doth he leave the naked right in the heire of the disseisee. So if the discontinuee of tenant in taile infeoffe the issue in taile of full age, and tenant in taile die, and then the discontinuee recover the land against him, yet he leaveth the naked right in the issue. [c] But if the heire of the disseisor be disseised, and the disseisee release to the disseisor upon condition, if the condition be broken, it shall revest the naked right. And so if the disseisee hath entred upon the heire of the disseisor, and made a feoffment in fee, upon condition, if he entred for the condition broken, and the heir of the disseisor entred upon him, the naked right should be left in the disseisee. But if the heire of the disseisor had entred before the condition broken, then the right of the disseisee had beene gone for ever. But now let us heare what *Littleton* saith.

23 H. 8. tit. Restore al action. Br. 5. 50 E. 3. 7. Vid. Sect. 473. 475. 478. 487.

[c] 38 E. 3. 16. 9 H. 7. 24. (Post. 279. a. 4 Rep. 9. b.)

☞ Sect. 448. [266. b.]

FREEHOLD in law is, if a man disseiseth another, and dieth seised (Franktenement en ley est, sicome un home disseisist un auter, et * morust seisie), *whereby the tenements descend to his son, albeit that his sonne doth not enter into the tenements, yet he hath a freehold in law, which by force of the discent is cast upon him, and therefore a release made to him, so being seised of a freehold in law, is good enough; and if he taketh wife being so seised in law, although he never enter in deed, and dieth, his wife shall be endowed* †.

(Doct. & Stud. 17. a.)

HERE *Littleton* describeth what a freehold in law is, for he had spoke before in many places of freeholds in deed. This *Bracton* calleth [a] *civilem et naturalem possessionem seu seisinam.* The naturall seisin is the freehold in deed, and the civill the freehold in law(1).

[a] Bract. li. 4. f. 206. 236. Britton, fol. 83. b. Fleta, lib. 3. cap. 15. Vid. Sect. 680.

If

* ent *added in L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

(A) *i. e. he who disseised the heir of the original disseisor, as it seems.*

(1) It may not, perhaps, be improper in this place, to attempt a short explanation of some words familiar both in the ancient and modern law.

Seisin, is a technical term denoting the completion of that investiture, by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the

If a man levie a fine to a man *sur conusance de droit come ceo que il ad de son done*, or a fine *sur conusance de droit tantùm*; these be feoffments of record, and the conusee hath a freehold in law in him before hee entreth (2). 42 E. 3. 20. 10 H. 6. 14. 17 E. 3. 78. 2 E. 3. 33. (5 Rep. 123. b.) Upon (Mo. 141.)

the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a descent the person, on whom the lands descend, has not actually entered, and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally *in* the seisin of the fee. But, in opposition to what may be termed the *expectant* nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the *actual* seisin of the lands. The fee is intrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee.

Disseisin seems to imply the turning the tenant out of his fee, and usurping his place and relation. It has been observed in a preceding note, that persons, to avail themselves of the remedy by assise, frequently supposed or admitted themselves to be disseised, when they were not; and that this was called *disseisin by election*, in opposition to an *actual disseisin*. To constitute an actual disseisin, it was necessary that the disseisor had not a right of entry; (or, to use the old law expression, that his entry was not congeable;) that the person disseised was, at the time of the disseisin, in the actual possession of the lands; that the disseisor expelled him from them by some degree of constraint or force; and that he substituted himself to be tenant to the lord. But, how this substitution was effected, it is difficult, perhaps impossible, now to discover. From what we know of the feudal law, it does not appear how a disseisin could be effected without the consent or connivance of the lord: yet we find the relationship of lord and tenant remained after the disseisin. Thus, after the disseisin, the lord might release the rent and services to the disseisee; might avow upon him; and, if he died, his heir within age, the lord was entitled to the wardship of the heir. See Litt. Sect. 454, and the commentary upon it. It should be observed, that a disseisin did not disturb rent issuing out of land, the seisin of the rent being considered as a separate and distinct seisin from that of the land. 1 Rep. 133. b.

A *discontinuance* is the effect of a disseisin, when, on certain events, the person disseised has lost his right of entry upon the disseisor, and can only recover by action.

The word *freehold* is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps, in the old law, it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then for the life of the tenant; that afterwards they were descendible to some particular heirs of the body of the tenant; then, to all the heirs of his body; and that in succession of time the tenant had the complete dominion or power over the fee. The word *freehold* always imported the whole estate of the feudatory, but varied as that varied. Hence we find the freeholder represented the whole fee, did the duty to the lord, and defended the possession against strangers. See Feud. L. 1. tit. 25. l. 2. t. 1, 2. Craig. lib. 2. tit. 2. 1 Inst. 31. 153. Litt. Sect. 59. 279. 592. Britton, cha. 32. and Sir Ed. Coke's Commentary upon those Sections; and the case of Taylor on the demise of Atkyns v. Horde, 1 Burrow, 60. and post. note 1, to page 330. b.—[Note 217.]

(2) But a common recovery vests no freehold in deed or in law before execution served. See Moor, 141.—[Note 218.]

11 H. 4. 61.
21 H. 7. 12.

Upon an exchange, the parties have neither freehold in deed, nor in law, before they enter; so upon a partition the freehold is not removed untill an entry.

[g] 32 E. 3. Barre, 262. 41 Ass. 2. 13 H. 4. Surrender, 10.

[g] If tenant for life by the agreement of him in the reversion surrender unto him; he in the reversion hath a freehold in law in him before he enter [h]. Upon a livery within the view no freehold is vested before an entrie.

[h] 38 E. 3. 12.

If a man doth bargaine and sell land by deed indented and inrolled, the freehold in law doth passe presently. And so when uses are raised by covenant upon good consideration (A).

17 E. 3. 77.
18 E. 4. 29.

If a tenant in a *præcipe* being seised of lands in fee, confesse himselfe to be a villeine to an estranger, and to hold the land in villenage of him, the estranger by this acknowledgement is actually seised of the freehold and inheritance without any entry. But let us returne to *Littleton*.

(A) *This seems to imply, that the statute of uses gives only a seisin in law.—On this, see Black. Comm. vol. 2. p. 338. Archbold's ed.; Bacon's Reading on the Statute of Uses, p. 48. ed. 1806; Mr. Rowe's note 87. ibid. p. 146; and Green v. Wiseman, Owen, 86. Perhaps the conclusion from these authorities is, that, before entry, the cestuy que use has the possession for all purposes, except Trespass.*

(Plo. 352.)

Sect. 449.

ALSO, in some cases of releases of all the right, albeit that he to whom the release is made hath nothing in the freehold in deed nor in law, yet the release is good enough. As if the disseisor letteth the land which he hath by disseisin to another for terme of his life, saving the reversion to him, if the disseisee or his heire release to the disseisor all the right, &c. this ☞ release is good, because hee to whom the release is made, had in law a reversion at the time of the release made (1).

[267. a.]

7 E. 4. 13.
14 H. 4. 32. b.
41 E. 3. 17.
49 E. 3. 28. case ult.

HERE *Littleton* addeth a limitation to the next precedent Section, *viz.* that a release of all the right may be good to him in reversion, albeit he hath nothing in the freehold, because he hath an estate in him.

" *All*

(1) Releases may enure four manner of ways.—1st, *Per mitter le droit*, where a person is disseised, and he releases to the disseisor his heir or feoffee.—2d, *Per mitter l'estate*, viz. when two or more are seised by a joint title of the same estate, as by a contract, or by descent, as jointenants, or coparceners, and one of them releases to the other, this enures *per mitter l'estate*.—3d, *Per l'enlarger*, is where the possession and inheritance are separated for a particular time, and he who hath the reversion or inheritance, releases to the tenant in possession all his right and interest. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment.—4th, *Per extinguishment*, where the releasee cannot have the thing *per mitter le droit*, yet the release shall enure by way of extinguishment against all manner of persons; as when the lord grants the seigniory to his tenant, such releases absolutely extinguish the rent, &c. although the releasee be only tenant for life. Ant. 193. b. and see post. 273. b.—[Note 219.]

"*All the right, &c.*" Or title, interest, demand, or the like: and so it is if he in the reversion hath an estate for life or in taile in reversion, as in the like case it appeareth in the next Section.

Sect. 450.

IN the same manner it is, where a lease is made to a man for terme of life, the remainder to another for terme of another man's life (pur terme de * auter vie), *the remainder to the third in taile, the remainder to the fourth in fee, if a stranger which hath right to the land releaseth all his right to any of them in the remainder, such release is good, because everie of them hath a remainder in deed vested in him.*

HERE is another limitation, that a release is good to him in the remainder, albeit hee hath nothing in the freehold in possession, because he hath an estate in him, as hath beene said. In both these limitations it is to be observed, that the state which maketh a man tenant to the *præcipe* is said to be the freehold, as here the state of tenant for life, and not the reversion in fee.

7 E. 4. 13. 41 E. 3. 7. 17 E. 3. 54. 18 E. 2. tit. Entrie, 74. 3 E. 2. tit. Entrie, 7. F. N. B. 207. E.

Sect. 451.

BUT if the tenant for terme of life be disseised, and afterwards he that hath right (the possession being in the disseisor) releaseth to one of them to whom the remainder was made all his right (tout † son droit), *this release is void, because he had not ‡ a remainder in deed at the time of the release made, but only a right of a remainder.*

"*BUT only a right of a remainder.*" For a release of a right to one that hath but a bare right regularly is void; for, as *Littleton* hath before said, he to whom a release is made of a bare right in lands and tenements, must have either a freehold in deed or in law in possession, or a state in remainder or reversion in fee or fee taile, or for life.

Vide Sect. 454.

[267. b.]

☞ Sect. 452.

AND note, that every release made to him which hath a reversion or a remainder in deed, shall serve and aid him who hath the freehold, as well as him to whom the release was made, if the tenant hath the release in his hand ⸸ to plead.

Sect.

* auter *not in L. and M. or Roh. nor in Cambr. MSS.*

† son—le, *L. and M. and Roh.*

‡ *in him* added in L. and M. and Roh.

⸸ *to plead* not in L. and M. or Roh.

Sect. 453.

IN the same manner † it is where a release ‡ is made to the tenant for life, or to the tenant in taile, ‖ this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the freehold, and they shall have as great advantage of this, if they can shew it §.

BY this it appeareth, that as a release made of a right to him in reversion or remainder, shall aid and benefit him that hath the particular estate for yeares, life, or estate taile, so a release of a right made to a particular tenant for life, or in taile, shall aid and benefit him or them in the remainder.

(2 Rol. Ab. 414. Post. 275. a. 279. b. 285. b. 297. a. Ant. 147. b. 197.)

If two tenants in common of land graunt a rent charge of 40 *s.* out of the same to one in fee, and the grantee release to one of them, this shall extinguish but twentie shillings, for that the graunt in judgement of law was severall (1). So it is if two men be seised of severall acres, and grant a rent *ut supra*. But there is a diversitie betweene severall estates in severall lands, and severall estates in one land; for if one be tenant for life of lands, the reversion in fee over to another, if they two joyne in a grant of a rent out of the lands, if the grantee releaseth either to him in the reversion, or to tenant for life, the whole rent is extinguished, for it is but one rent, and issueth out of both estates, and so note the diversitie (2).

(1 Rep. Mayoe's case.)

35 H. 6. 8.

"*If the tenant hath the release in his hand to plead.*" And so it is in both cases: for albeit he in the reversion or remainder is a stranger to the deed, when the release is made to the tenant, and the tenant for life or in taile is a stranger to the deed, when the release is made to him in reversion or remainder, yet seeing they are privies in estate, none of them in pleading shall take benefit thereof, without shewing the same in court, which is worthy to be observed.

(Ant. 232. a. Hob. 66. 2 Rol. Ab. 412.)

"*If they can shew this.*" The one cannot plead the release made to the other without shewing of it, for that they are privie in estate, as hath beene said. The residue of these two Sections needs no explication.

Sect.

† *it is where* not in L. and M. or Roh. ‖ *this* not in L. and M. or Roh.
‡ *is* not in L. and M. or Roh. § *&c.* added in L. and M. and Roh.

(1) *If they grant a rent-charge of* 20 *s. which in law amounts to a rent-charge of* 40 *s. as two grants, for otherwise* non est casus. *When two tenants in common grant a rent, that is, several estates in one land, and yet they are several grants, therefore quære of this diversity. Plo. Que. pl.* 315. *contra.* Lord Nott. MS. —[Note 220.] their title are several.

(2) *For Plowd. in his Quære* 315. *if tenant for life grants rent, and the grantee purchases the reversion, the rent remains during the life of the tenant for life.* Lord Nott. MS.—[Note 221.]

[268. a.]

☞ Sect. 454.

ALSO, if there bee lord and tenant, and the tenant be disseised, and the lord releaseth to the disseisee all the right which he hath in the seigniorie or in the land, this release is good, and the seigniorie is extinct: and this is by reason of the privitie which is betweene the lord and the disseissee. For if the beasts of the disseisee be taken, and of them the disseisee sueth a replevin against the lord, hee shall compell the lord to avow upon him: for if he avow upon the disseisor then upon the matter shewn the avowrie shall abate, for the disseisee is tenant to him in right and in law (1).

HEREUPON may bee collected and observed two diversities: first, betweene a seigniorie or rent service, and a rent charge: for a seigniorie or rent service may bee released and extinguished to him that hath but a bare right in the land. And the reason hereof is, in respect of the privitie betweene the lord and the tenant in right; for he is not only as tenant to the avowrie, but if hee die, his heire within age, hee shall bee in ward; and if of full age, hee shall pay releefe; and if he die without heire, the land shall escheat. But there is no such privitie in case of a rent charge, for there the charge only lieth upon the land. (3 Rep. 35. b.)

The second diversitie is betweene a seigniorie and a bare right to land; for a release of a bare right to land to one that hath but a bare right is void, as hath beene said. But here in the case of our author, a release of a seigniorie tohi m that hath but a right, is good to extinguish the seigniorie. Vid. Sect. 451.

Nota, a seigniorie, rent, or right, either *in præsenti*, or *in futuro*, may be released five manner of wayes, and the first three without any privitie. First, to the tenant of the freehold in deed or in law. Secondly, to him in remainder. Thirdly, to him in the reversion. The other two in respect of privitie: as, first, here the lord releaseth his seigniorie to the tenant being disseised, having but a right, and no estate at all: secondly, in respect of the privitie, without any estate or right; as by the demandant to the vouchee, or donor to the donee, after the donee hath discontinued in fee, as appeareth hereafter in this chapter. Lib. 10. fol. 48. Lampet's case. (Post. 275. 2 Roll. Abr. 402.) Sect. 455.

"*By reason of the privitie, &c.*" See for this word *(privitie)*, Sect. 461.

"*He shall compell the lord to avow upon him, &c.*" This is regularly true; but if the lord hath accepted services of the disseisor, then the disseisee cannot enforce the lord to avow upon him, though his beasts be taken, &c. (2) 20 H. 6. 9. b. 41 E. 3. 26. 48 E. 3. 9. 2 E. 4. 6. a.

If

(1) Here the release operates by way of extinguishment. See post. 279. b.

(2) But the opinion of the 48 E. 3. 9. seems to be contrary; because, when the tenant pleads the disseisin, to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. Gilb. Ten. 64, 65.—[Note 222.]

31 E. 1. Discent, 17. 26 E. 3. 72. 4 H. 6. 21. F. N. B. 144. b. [d] 7 E. 6. tit. Escheat. Br. 18.

If a man hath title to have a writ of escheat, if he accept homage or fealtie of the tenant, he is barred of his writ of escheat; but if he accept rent of the tenant, that is no bar to him, for it may be received by the hands of a baylife. [d] But some doe hold, that if there be lord and tenant, and the tenant be disseised, and the disseisee die without heire, the lord accepts rent by the hands of the disseisor, this is no barre to him. Contrarie it is, if he avow for the rent in court of record, or if he take a corporall service, as homage or fealtie, for the disseisor is in by wrong; but if the lord accept the rent by the hands of the heire of the disseisor, or of his feoffee, because they be in by title, this shall barre him of his escheat, which is to ☞ be understood of a discent or feoffment, after the title of escheat accrued: [e] for if the disseisor make a feoffment in fee, or die seised, and after the disseisee die without heire, then there is no escheat at all, because the lord hath a tenant in by title. And when *Littleton* wrote, the disseisee in the case here put, should have compelled the lord to have avowed upon him, as *Littleton* holdeth. But now this is altered by a latter statute of [f] 21 H. 8. For whereas by fines, recoveries, grants, and secret feoffments, &c. made by tenants to persons unknowne, the lords were put from knowledge of their tenants, upon whom by order of law they should make their avowrie, &c. it is by that statute enacted, that if the lord shall distreine upon the lands and tenements holden, &c. that he may avow, &c. upon the same lands, &c. as in lands, &c. within his fee or seigniorie, &c. without naming of any person certaine, and without making avowrie upon a person certaine. Upon which statute these foure points are to be observed. First, that the lord hath still election either to avow according to the common law, by force of the statute, by reason of this word *(may)*. Secondly, albeit the purview of the act be generall, yet all necessary incidents are to be supplyed, and the scope and end of the act to be taken; and therefore, though he need not to make his avowrie upon any person certaine, yet he must alleage seisin by the hands of some tenant in certaine, within forty yeares. Thirdly, that if the avowrie be made according to the statute, everie plaintife in the replevin, or second deliverance, be he termor or other, may have everie answer to the avowrie that is sufficient; and also have aid, and every other advantage in law (disclaimer only except); for disclaime he cannot, because in that case the avowrie is made upon no certaine person. Fourthly, where the words of the statute be, if the lord distreine upon the lands and tenements holden, yet if the lord come to distreine, and the tenant enchase his beasts which were within the view out of the land holden, and there the lord distreine, albeit the distresse be taken out of his fee and seigniorie in that case, yet is it within the said statute: for in judgment of law the distresse is lawfull, and as taken within his fee and seigniorie; and this statute being made to suppresse fraud, is to be taken by equitie (1).

[268. b.]

(9 Rep. 22. 1 Roll. Abr. 316. b.)

[e] 7 H. 4. 17. 3 R. 2. Entr. cong. 38. 2 H. 4. 8. 6 H. 7. 9. Vide Sect. 556.

[f] 21 H. 8. cap. 19. (Hob. 242.)

Lib. 9. fol. 136. Ascough's case.

27 H. 8. fol. 4. 32 H. 8. cap. 2. Lib. 9. fol. 36. Bucknal's case.

34 H. 8. Avowrie. Br. 113. 27 H. 8. 4. & 20. Bucknal's case, ubi supra.

Lib. 9. fol. 22. in case d'avowrie. 44 E. 3. 20. 11 H. 7. 4. 21 H. 7. 40. 34 H. 6. 18. 16 E. 4. 10. 6 R. 2. Rescous, 11. (Ant. 161.)

Sect.

(1) See the following page. Gilb. Distr. 189. Lord Raym. 257.

Sect. 455.

ALSO, if land be given to a man in taile, reserving to the donor and to his heires a certaine rent, if the donee be disseised, and after the donor release to the donee and his heires all the right which hee hath in the land, and after the donee enter into the land upon the disseisor; in this case the rent is gone, for that the disseisee at the time of the release made, was tenant in right and in law to the donor, and the avowrie of fine (2) *force ought to bee made upon him by the donor for the rent behinde* (et avowrie a fine force covient de estre fait sur luy per le donor pur le rent aderere), *&c. But yet nothing of the right of the lands,* (scilicet) *of the reversion, shall passe by such release* (Mes uncore rien de droit de terres, *scilicet,* de le droit de le reversion, * passera per tiel release), *for that the donee to whom the release is made, then had nothing in the land but onely a right, and so the right of the land could not* † *then passe to the donee by such release.*

[269. a.] ☞ "*IF the donee be disseised, &c.*" This is evident by that which hath beene said. But admit that the donee maketh a feoffment in fee, and the donor release unto him and his heires all the right in the land, this shall extinguish the rent, because the lord must avow upon him, and yet the tenant in taile after the feoffment hath no right in the land. But the reason is in respect of the privity, and that the [*m*] donor is by necessity compellable to avow upon him only; for if he should avow upon the discontinuee, then it should appeare of his owne shewing that the reversion whereunto the rent is incident, should be out of him, and consequently the avowrie should abate; and so was it [*n*] resolved *Trin.* 18 *Eliz.* in the court of common pleas in sir *Thomas Wiat*'s case, which I heard and observed. And *Littleton* saith here, that in case of the disseisin of fine force, the avowrie must be made upon the donee.

Vide Sect. 454. 1 H. 5. tit. Grant, 43. 14 H. 4. 38. li. 3. fol. 29. lib. 6. 58. Lampet's case, ubi supra. (Ant. 46. Post. 348.)

[*m*] 10 E. 3. 26. 48 E. 3. 8. b. 31 E. 3. Gard. 116. 5 E. 4. 3. 7 E. 4. 27. 15 E. 4. 13.

[*n*] Trin. 18 Eliz. sir Thomas Wiat's case in communi banco.

"*Yet nothing of the right, &c. of the reversion, &c.*" Here the diversitie aforesaid betweene the rent service and a bare right to the land appeareth.

Sect. 456.

IN the same manner it is, if a lease be made to one for terme of life (si leas soit § a un pur terme de vie), *reserving to the lessor and to his heires a certaine rent, if the lessee be disseised, and after the lessor release to the lessee and to his heires all the right which he hath in the land, and after the lessee entreth, albeit in this case the rent is extinct, yet nothing of the right of the reversion shall passe,* causâ quâ supra.

HEREBY

* adonques ne *added in L. and M. and Roh.*

† *then* not in L. and M.

§ fait *added in L. and M. and Roh.*

(2) That is, of necessity.

HEREBY the diversity is made apparent betweene a release of a rent service out of land, and a release of right to land, in this Section.

Sect. 457.

BUT if there be very lord and very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the lord, † if the lord release to the feoffor all his right, &c. this release is altogether void, because the feoffor hath no right in the land, and he is not tenant in right to the lord, but only tenant as to make the avowrie, and hee shall never compell the lord to avow upon him, for the lord shall avow upon the feoffee if hee will.

"*VERY lord and very tenant.*" This is to be understood of a lord in fee simple, and of a tenant of like estate.

Vide Ascough's case, l. 9. f. 135, 136. 20 H. 6. 9. 2 H. 4. 24. 12 E. 4. 2. 26 H. 6. Avowrie, 17. 9 Eliz. Dier, 257. 5 H. 7. 11. 7 E. 4. 24. 20 E. 3. Avow. 131. (9 Rep. 135. b. 21 H. 8. c. 19.) 47 E. 3. fol. ultimo. 38 H. 6. 23. (Doc. Pla. 53.) 21 H. 8. cap. 19. (Post. 345.)

There be foure manner of avowries for rents and services, &c. *viz.* 1. *Super verum tenentem*, as in the case here put. 2. *Super verum tenentem in formâ prædictâ*, as where a lease for life, or a gift in taile bee made, the remainder in fee. 3. Upon one as upon his tenant by the mannor omitting *(very)*; and this is when the lord hath a particular estate in the seigniorie, and so shall the donor ☞ upon the donee, or lessor upon the lessee. 4. *Sur le matter en la terre*, as within his fee and seigniorie. As where the tenant by knights service maketh a lease for life reserving a rent, and die his heire within age, the gardeine shall avow upon the lessee, *scilicet*, *super materiam prædictam in terris et tenementis prædictis ut infra feodum et dominium suum.* Now by the statute the very lord may avow, as in lands within his fee and seigniorie, without avowing upon any person in certaine (1).

[269. b.]

Here appeareth the diversity betweene a tenant in taile, and a tenant in fee simple; for albeit tenant in taile make a feoffment in fee, yet the right of the entaile remaines, and shall descend to the issue in taile. But when the tenant in fee simple make a feoffment in fee, no right at all remaines of his estate, but the whole is transferred to the feoffee.

Also the lord is not compellable in that case to avow upon the feoffor; but if he will, as *Littleton* here saith, he may avow on the feoffee; but so it is not, as hath beene said, in case of tenant in taile.

Note a diversity betweene actions and acts which concerne the right, and actions and acts which concerne the possession only. For a writ of customes and services lieth not against the feoffor, nor a release to him shall extinguish the seigniorie. So if a rescous

(Doc. Pla. 321.)

† *&c.* added in L. and M. and Roh.

(1) On the continuance of the right of the entail in the tenant in tail after a feoffment made by him, see the case of lord Sheffeild *v.* Ratcliffe, Hob. 334, and see Duncombe *v.* Wingfield, ibid. 254.—[Note 223.]

rescous be made, an assise shall not lie against the feoffor, and him that made the rescous, because the feoffee is tenant, and in assise, the surplusage incroached shall be avoided. For these actions and acts concerne the right; but of a seisin and an avowrie which concerne the possession, it is otherwise. And if the lord release to the feoffor, this is good betweene them, as to the possession and discharge of the arrerages, but the feoffee shall not take benefit of it, for that, as hath beene said, it extendeth not to the right. But the feoffor shall plead a release to the feoffee, for thereby the seigniorie is extinct; as if lessee for life doth waste, and grant over his estate, and the lessor release to the grantee, in an action of waste against the lessee, he shall plead the release, and yet he hath nothing in the land. And so in waste shall tenant in dower or by the courtesie in the like case, and the vouchee, and the tenant in a *præcipe* after a feoffment made. And so in a *contra formam collationis*.

"*The which feoffee doth never become tenant.*" *Nota* here an excellent point of learning, *viz.* if there be lord and tenant, and the rent is behind by divers yeares, and the tenant make a feoffment in fee, if the lord accept the service or rent of the feoffee due in his time, he shall lose the arrerages due in the time of the feoffor; for after such acceptance he shall not avow upon the feoffor, nor upon the feoffee for the arrerages incurred in the time of the feoffor. But in that case if the feoffor dieth, albeit the lord accept the rent or service by the hand of the feoffee due in his time, he shall not lose the arrerages, for now the law compelleth him to avow upon the feoffee (2), and that which the law compelleth him unto shall not prejudice him.

4 E. 3. 22.
7 E. 3. 8.
7 E. 4. 27.
29 H. 8. tit. Avowrie.
Br. 111. li. 3. fol. 65, 66. Pennant's case.
7 H. 4. 14.
2 E. 4. 6.
34 H. 6. 46.
37 H. 6.
29 H. 8. Avowrie.
(6 Rep. 58. b.)

So it is, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behinde, and after the tenant fore-judge the mesne, and the lord receive the services of the mesne which issue out of the tenancie, he shall not be barred of the arrerages which issued out of the mesnalty; and so if the rent be behinde, and the tenant dieth, the acceptance of the services by the hand of the heire shall not barre him of the arrerages; for in these cases, albeit the persons be altered, yet the lord doth accept the services of him which only ought to doe them (3).

But as long as the feoffor liveth the lord shall not be compelled to avow upon the feoffee, unlesse he giveth the lord notice, and tender unto him all the arrerages.

4 E. 3. 22.
47 E. 3. 4.

But now by the statute the lord may avow upon the lands so holden, as in lands within his fee or seigniory, without naming of any person certaine to bee tenant of the same, and without making of any avowrie upon any person certaine, as hath beene said, which hath much altered the common law in the cases abovesaid, for the benefit and safety of the lord.

21 H. 8. cap. 91.

But yet these cases are necessary to be knowne (for which purpose I have added them), for that the lord may avow still at the common law if he will.

Sect.

(2) For the lord could not introduce the heir into the feud contrary to the express alienation of the ancestor. Gilb. Ten. 67.—[Note 224.]

(3) By acceptance of rent from the assignee, the lessor loses his action of debt against the first lessee, but he may still maintain an action of covenant against him. 1 Saund. 240, 241. 2 Saund. 302.—[Note 225.]

☞ Sect. 458. [270. a.]

OTHERWISE it is where the very tenant is disseised, as in the case aforesaid; for if the very tenant who is disseised, hold of the lord by knights service and dieth (his heire being within age,) the lord shall have and seize the wardship of the heire, and so shall he not have the ward of the feoffor that made the feoffment in fee, &c. so there is a great diversitie betweene these two cases.

12 H. 4. 13. 36 E. 3. tit. Gard. 10. 6 H. 7. 9. 37 H. 6. 1. 32 H. 6. 27. 7 E. 6. tit. Gard. Br. (Post. 345. b.)

Of this sufficient hath beene said before.

Sect. 459.

ALSO, if a man letteth to another his land for terme of yeares, if the lessor release to the lessee all his right, &c. before that the lessee had entred into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heire, is sufficient to him by reason of the privitie which by force of the lease is between them, &c.* (1)

49 E. 3. 28. 32 H. 6. 8. 37 H. 6. 18. 22 E. 4. 37. 4 H. 7. 10. 15 H. 7. 14.

"*BEFORE that the lessee had entred, &c.*" For before entry the lessee hath but *interesse termini*, an interest of a terme, and no possession, and therefore a release which enures by way of enlarging of an estate cannot worke without a possession (2), for before possession there is no reversion; and yet if a tenant for twenty yeares in possession make a lease to *B.* for five yeares, and *B.* enter, a release to the first lessee is good, for he had an actuall possession, and the possession of his lessee is his possession. And so it is if a man make a lease for yeares, the remainder for yeares, and the first lessee doth enter, a release to him in the remainder for yeares is good to enlarge his estate (3).

22 E. 4. Surrender, 6. (Post. 273. a.)

But

* *good and*, added in L. and M. and Roh.

(1) On releases which operate by enlargement, see post. 273. a.

(2) But this must be understood of a lease at common law; for if it be so framed as to be a bargain and sale under the statute, the possession is immediately executed in the lessee, so that no entry is necessary. See the note page 271. b. and Cro. Car. 110. 2 Ventris, 35.—[Note 226.]

(3) By this passage it appears, that what sir Edward Coke observes a few lines before, that a release which enures by enlargement cannot work without a possession, must be understood to mean, not that an actual estate in possession

But if a man make a lease for yeares to beginne presently, reserving a rent, if before the lessee doth enter the lessor releaseth all the right that hee hath in the land, albeit this release cannot enlarge his estate, yet it shall in respect of the privity extinguish the rent. And so it is if a lease be made to beginne at *Michaelmas*, reserving a rent, and before the day the lessor release all the right that he hath in the land, this cannot enure to enlarge the estate but to extinguish the rent in respect of the privity, as it was resolved [*b*] in the exchequer, which I observed.

(Ant. 46. b.)

[270. b.]

[*b*] Mich. 39 & 40 Eliz. in Scaccario, betweene sir Henrie Woodhouse and sir William Paston.

A man granteth the next avoidance of an advowson to two, the one of them may before the church become void release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future, and not in possession, yet one of them to extinguish his interest may release to the other in respect of the privity. But after the church become void, then such a release is void, because then it is (as it were) but a thing in action. And this was resolved [*c*] by the whole court of common pleas, which I myselfe heard and observed. And by consequent in the case of *Littleton*, if a lease for yeares be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other.

[*c*] Pasch. 38 Eliz. in quare impedit per Bennet, vers. l'evesque de Norwich in communi banco.

"*But only a right, &c.*" Which is not so to be understood that he hath but a naked right, for then he could not grant it over; but seeing he hath *interesse termini*, before entrie, he may grant it over, albeit for want of an actuall possession, he is not capable of a release to enlarge his estate.

Pl. Com. 423.

"*But if the lessee enter into the land, &c.*" This is evident. And herein note a diversity betweene a lease for life, and for yeares, for before the lessee for yeares enter, a release cannot be made unto him: but if a man make a lease for life, the remainder for life, and the first lessee dieth, a release to him in the remainder and to his heires is good before hee doth enter to enlarge his estate, for that he hath an estate of a freehold in law in him, which may be enlarged by release before entrie.

And where our author speaketh only of a lessee for yeares, the same law it is of a tenant by statute merchant or staple, or tenant by *elegit*, or the like.

25 E. 3. 53. 31 E. 3. Confirmat. 14. 31 Ass. Pl. 13.

Sect.

sion is necessary, but that a vested interest suffices, for such a release to operate upon. By comparing this with what is said in note 1. 271. b. of the operation of a lease and release, it will be seen, that not only estates in possession, but estates in remainder and reversion, and all other incorporeal hereditaments, may be effectually granted and conveyed by lease and release: but it is an inaccuracy to say, that the releasee, in these cases, is in the *actual possession* of the hereditaments; the right expression is, that they are *actually vested* in him, by virtue of the lease of possession, and the statute.—[Note 227.]

Sect. 460.

IN the same manner it is, as it seemeth, where a lease is made to a man to hold of the lessor at his will, by force of which lease the lessee hath possession: if the lessor in this case make a release to the lessee of all his right, &c. this release is good enough for the privitie which is betweene them; for it shall bee in vaine to make an estate by a liverie of seisin to another, where he hath possession of the same land by the lease of the same man before, &c.

But the contrarie is holden, Pasch. 2 E. 4, *by all the justices*.*

21 H. 6. 37. 2 E. 4. 6. b. 7 E. 4. 27. 3 E. 4. 16. 29 H. 6. Release, 6. (5 Rep. 13. 2 Sid. 153. Ant. 47. Cro. Jac. 169.)

BY these two Sections is to be observed a diversity between a tenant at will, and a tenant at sufferance; for a release to a tenant at will is good, because betweene them there is a possession with a privity: but a release to a tenant at sufferance is void, because he hath a possession without privity. As if lessee for yeares hold over his terme, &c. a release to him is void, for that there is no privity betweene them; and so are the books that speake of this matter to be understood (1).

"*But*

* This paragraph is not in L. and M. or Roh.

(1) A tenant at will is he who enters and enjoys the land by the express or implied consent of the owner, without there being any obligation on the part either of the lessor or lessee to continue it for any certain or determinate term. A tenant by sufferance is he who, having entered and obtained possession by title, continues the possession, after his title is ended, by the laches of the lessor. The former is in by the consent of the owner of the lands; this creates a privity between them. A tenant by sufferance is in only by the laches of the owner; so that there is no privity between them. Both these estates differ from that of a tenant from year to year, the tenant of which may determine it at the end of any year; but after a new year is begun, the tenure cannot be determined either by the lessor or lessee till the end of the year. See 1 Lord Raymond, 707, 708. 2 Salk. 413. 3 Salk. 222. If a person holds by lease, and the term expires, the lease itself is notice of the expiration of the term, and the lessor may enter on the lessee without further notice, unless for double rent, under the 4 Geo. 2. c. 28. sect. 1. in which case there must be a previous demand in writing. Where the tenant holds by will, the modern determinations are, that there must be a previous notice; but this notice varies according to the custom of the place, and the nature of the hereditaments in lease.

The editor has been favoured with the following note of an important determination on this point. York, Lammas Assizes 1773. Richard Roe ex d. Chr. Brown, against Ann Wilkinson. Ejectment for two messuages and other premises at North Cowton. Thomas Beaver proved that he, by the lessor of the plaintiff's order, delivered a notice in writing to the defendant, on the 10th of February, which notice he received from lessor of plaintiff. The notice was as follows: "10th February 1773. Ann Wilkinson, Take notice, that "you are to quit and yield up the possession of the dwelling-house, stable, "shop, and coal-house, with their appurtenances, situate at North Cowton, "which you rent under me, on the 13th day of May next. Yours, Chr. Brown." Thomas Masterman deposed, that for 30 years he had been bailiff at North Allerton,

" *But the contrary is holden, &c.*" This is of a new addition, and the booke here cited ill understood, for it is to be understood of a tenant at sufferance.

[271. a.] ☞ Sect. 461.

BUT where a man of his owne head occupieth lands or tenements at the will of him which hath the freehold (Mes lou home de sa teste demesne occupia terres ou tenements a la volunt celuy que ad † le franktenement), *and such occupier claimeth nothing but at will, &c. if hee which hath the freehold will release all his right to the occupier, &c. this release is void, because there is no privitie betweene them by the lease made to the occupier, nor by other manner, &c.*

" *OF his owne head.*" Hee doth not say, *of his owne head entreth*, &c. so as this is to bee understood of a tenant at sufferance, *viz.* where a man commeth to the possession first lawfully, and holdeth over. Vide Sect. 68. (1 Roll. Abr. 658. Ant. 57. Cro. Car. 303.)

For

† ent *added in L. and M. and Roh.*

Allerton, the market town for Cowton; that it was the usage to give half a year's notice in case of lands, but had known a great many given to quit houses at North Allerton at Candlemas for May Day, and submitted to. This place is about eight miles from North Allerton. Verdict for plaintiff, subject to judge Gould's opinion. The question was, This being the case of a house and buildings only, under 10 *l. per annum*, viz. only 5 *l.* 5 *s. per annum*, and the year expiring at May Day, old style, Whether in an holding from year to year, the above notice was sufficient, or whether it ought not to have been given half a year before the expiration of the year? 22d January 1774. Before judge Gould at his chambers, Mr. Davenport for plaintiff argued, that a week's notice to a tenant at will was sufficient; that the defendant was tenant at will; that the custom in London required only three months notice for tenements under 10 *l.* a year; that the same custom was in general observed every where; and it was reasonable and agreeable to late determinations; that the custom of the country was in this case proved in favour of plaintiff, and cited the following cases: 13 Hen. 8. fo. 16.—59. Year Book. Brook, title Leases, pl. 53. Keilway, 163. Co. Lit. 68. See title Tenant at Will, 55. a. 69. Allen, 4 Sir Thomas Bowes's case. 2 Lord Raym. 1008. Title *v.* Grevett. 2 Jones, 5. Timberly *v.* Grobbam—How. 2 Salk. 413, 414. 3 Burrow, 1603. Timmins *v.* Rowlinson. 11 Viner, 406. tit. Estate. Mr. Lee, for defendant, argued, there was not, according to modern determinations, any such estate as an estate at will; every tenant being a tenant for a year or more; and that the rent was immaterial and custom local; and expatiated on the hardship of poor tenants, if turned out on short notice; and cited Brook, tit. Leases, fo. 61. Yelverton, 73, 74. In April following, Mr. justice Gould delivered his opinion to Mr. Davenport thus;—" I have consulted all the other judges, and we are all of opinion that six " months notice to quit is necessary in all cases, whether of houses or lands, " under or above 5 *l. per annum, unless* where there is a particular custom to " the contrary; and the custom at North Allerton was too far distant from " North Cowton to affect the inhabitants there, unless proved to extend to " that place also." Judgment for defendant.—[Note 228.]

[m] Temps H. 8. tit. Tenant a. volunt. Br. 15. 2 E. 4. 38. 18 E. 4. 25. 39 E. 3. 28. 12 E. 3. Ass. 86. 11 E. 3. ibid. 87. 12 Ass. 21. 13 E. 3. Ass. 92. 23 Ass. 11. 34 Ass. 10. 10 E. 3. 41. 8 E. 3. 63. (1 Roll. Abr. 662. Post. 277.) Vide 2 part of the Institutes. Marlb. cap. 16. 10 E. 4. 9, 10. (1 Roll. Abr. 861. Ant. 57. b.)

[m] For if a man entreth into land of his owne wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong, but hee is a disseisor (1), and then the release to him is good; or if the owner consented thereunto, then hee is a tenant at will, and that way also the release is good. But there is a diversitie when one commeth to a particular estate in land by the act of the partie, and when by act in law; for if the gardein hold over, he is an abator, because his interest came by act in law (2.)

Old N. B. 117. 137. Lib. 3. fo. 23. Walker's case. Lib. 4. fol. 123, 124. Vide Sect. 454. (8 Rep. 42. b.) (Ant. 242. a.)

"*No privitie.*" *Privitie* is a word common as well to the English as to the French, and in the understanding of the common law is fourefold.

1. As privies in estate, whereof *Littleton* here speaketh; as betweene the donor and donee, lessor and lessee, which privitie is ever immediate.

2. Privies in bloud; as the heire to the ancestor, or betweene coparceners, &c.

3. Privities in representation; as, executors, &c. to the testator.

And fourthly, privies in tenure, as the lord and tenant, &c. which may be reduced to two generall heads, privies in deed, and privies in law.

Sect. 462, 463.

ALSO, if a man enfeoffe other men of his land upon confidence, and to the intent to performe his last will, and the feoffor occupieth the same land at the will of his feoffees, and after the feoffees release by their deed to their feoffor all their right, &c. this hath beene a question if such release be good or no. And some have said, that such release is void, because there was no privitie betweene the feoffees and their feoffor, insomuch as no lease was made after such feoffment by the feoffees to the feoffor, to hold at their will: and some have said the contrarie, and that for two causes.

Sect. 463.

ONE is, that when such feoffment is made upon confidence to performe the will of the feoffor, it shall bee intended by the law, that the feoffor ought presently to occupie the land at the will of his feoffees; and so there is

(1) This is to be understood when there is no term of years in the land; but if there be a term in *esse*, and one enters claiming the term, he shall not be a disseisor, but an action of debt or waste shall be against him, and one may be executor *de son tort* of a term. 3 Lev. 35.—[Note 229.]

(2) P. 9 Car. C. B. *on the argument of the case of Blundell or Baugh, commonly called the Earl of Nottingham's case, justice Barclay said, that he whom lord Coke calls in this place an abator, must be taken for a disseisor, as he* (A) *had actual possession by the possession of the guardian.* Lord Nott. MSS.—See Cro. Ca. 302. Litt. Rep. 372. 1 Vent. 55. 80.—[Note 230.]

(A) *i. e. the heir in ward.*

is the like kinde of privitie betweene them, as if a man make a feoffment to others, and they immediately upon the feoffment will and grant, that their feoffor shall occupy the land at their will, &c.

HERE is a question moved, and the reasons of both sides shewed, and as it hath beene observed, the latter opinion is the better, being *Littleton*'s owne opinion. 12 E. 4. 12. b. 15 E. 4. 9 H. 7. 25. Vide Sect. 302.

"*It shall be intended by the law, that the feoffor ought presently to occupy the land at the will of his feoffees.*" For intendments of law mentioned by our author see the Sections in the margent. 176. 340. 4 E. 4. 8. b. 9 H. 7. fol. ultimo. 15 H. 7. 2. b. 14 H. 8. 9. a. Sect. 99, 100. 110. 367. 377. 393. 406. 440.

[271. b.] Here is to bee observed the intendment of law, that when a feoffment is made to a future use, as to the performance of his last will, the feoffees shall be seised to the use of the feoffor and of his heires in the meane time. 35 H. 6. Subpena, 22. 15 H. 7. 12. b. 37 H. 6. 36. 11 H. 4. 52. 7 H. 4. 22. 1 Mar. 111. Dier. (6 Rep. 18. a.) (Ant. 111. 112. a.) (2 Rep. 58.)

Ipsæ etenim leges cupiunt ut jure regantur.

And reason would that seeing the feoffment is made without consideration, and the feoffor hath not disposed of the profits in the meane time, that by construction and intendment of law the feoffor ought to occupie the same in the meane time. And so it is when the feoffor disposeth the profits for a particular time *in præsenti*, the use of the inheritance shall be to the feoffor and his heires, as a thing not disposed of; wherein it is to be observed, that lands and tenements conveyed upon confidences, uses, and trusts, are to be ruled and decided, if question groweth upon the confidences, uses or trusts, by the judges of the law; for that it appeareth by this and the next Section, they are within the entendment and construction of the lawes of the realme (1). (1 Roll. Abr. 859. Sid. 458. Dyer, 186. a.) 35 H. 6. Subpena, 22. 30 H. 6. tit. Devise.

And it is to be observed (as hath beene said) that there is a diversitie betweene a feoffment of lands at this day upon confidence, or to the intent to performe his last will, and a feoffment to the use of such person and persons, and of such estate and estates, as hee shall appoint by his last will: for, in the first case, the land passeth by the will, and not by the feoffment; for after the (Ant. 111. b. 112. a.)

(1) Many references have been made, in the foregoing notes, to this part of the work, for some observations on conveyances at common law, and those which derive their effect from the statute of *USES*. It appeared advisable to collect them into one continued note, that the difference between the two modes of conveyance might appear in a stronger light; and to prevent a necessity of frequently repeating those general principles and illustrations, which otherwise must have been introduced, on every occasion, where any point of this nature seemed to require an explanation. On the same ground, it seemed advisable to anticipate some passages which otherwise would have had a place in a subsequent part of the notes.

I. FEOFFMENTS and GRANTS were the two chief modes used in the COMMON LAW for transferring property.

I. 1. The most comprehensive definition which can be given of a *feoffment*, seems to be, a conveyance of corporeal hereditaments, by delivery of the possession upon, or within view of, the hereditaments conveyed. The delivery of the

the feoffment the feoffor was seised in fee simple, as he was before; but in the latter case, the will pursuing his power is but a direction of the uses of the feoffment, and the estates passe by execution of the uses, which were raised upon the feoffment; but in both cases the feoffees are seised to the use of the feoffor and his heires in the mean time: and all this and much more concerning this matter hath beene adjudged.

Lib. 6. fol. 17, 18. Sir Edward Clere's case.

Note, uses are raised either by transmutation of the estate, as by fine, feoffment, common recoverie, &c. or out of the state of the owner of the land, by bargaine and sale by deed indented and inrolled, or by covenant upon lawfull consideration, whereof you may read plentifully in my *Reports*.

Dillon & Frayn's case, l. 1, &c. fol. 113.

A feoffee to the use of *A.* and his heires, before the statute of 27 *H.* 8. for money bargaineth and selleth the land to *C.* and his heires, who hath no notice of the former use; yet no use passeth by this bargaine and sale, for there cannot be two uses *in esse*, of one and the same land; and seeing there is no transmutation of possession by the terre-tenant, the former use can neither be extinct nor altered. And if there could be two uses of one and the same land, then could ☞ not the said statute execute either of them for the uncertaintie. But if *A.* disseise one to the use of *B.* and *A.* doth bargaine and sell the land for money to *C.*, *C.* hath an use; and here be two uses of one land, but of severall natures; the one, *viz.* upon the bargaine and sale to be executed by the statute, and the other not.

[2 Roll. Abr. 797. 1 Rep. 129. b. 192. b. Stat. 27 H. 8. c. 10. Plow. 348. 1 Rep. 127. Sid. 26.)

[272. a.]

(Ant. 22. b.)

But since *Littleton* wrote, all uses are transferred by act of Parliament [*c*] into possession, so as the case which *Littleton* here puts is thereby altogether altered. Yet it is necessarie to bee knowen, what the common law was before the making of the statute, and may serve for the knowledge of the law in like case.

[*c*] 27 H. 8. cap. 10. (Dr. and Stud. 98. a.)

"*Immediately upon the feoffment.*" *Quæ incontinenti fiunt in esse videntur.*

"*At their will, &c.*" Here is implyed, everie tenancie at will is at the will of both parties, as before in his proper place hath beene shewed.

the possession was made on, or within view of, the land, that the other tenants of the lord might be witnesses to it. No charter of feoffment was necessary: it only served as an authentication of the transaction; and, when it was used, the lands were supposed to be transferred, not by the charter, but by the livery, which it authenticated. Soon after the Conquest, or perhaps towards the end of the Saxon government, all estates were called fees. The original and proper import of the word feoffment is, the grant of a fee. It came afterwards to signify, a grant, with livery of seisin, of a free inheritance to a man and his heirs, more respect being had to the perpetuity, than the feudal tenure of the estate granted. In early times, after the Conquest, charters of feoffment were various in point of form. In the time of Edward I. they began to be drawn up in a more uniform style. The more ancient of them generally run with the words *dedi*, *concessi*, or *donavi*. It was not till a later period, that *feoffavi* came into use. The more ancient feoffments were also usually made in consideration of, or for, the homage and service of the feoffee, and to hold of the feoffor and his heirs. But, after the statute *quia emptores*, feoffments were always made, to hold of the chief lords of the fee, without the words *pro homagio et servitio*. Sir Edward Coke mentions in page 6. a. that there

are

are eight necessary parts in a feoffment. The fifth, sixth, and seventh of these are not to be found in many of the ancient charters. When the land comprised in the feoffment descended from the ancestor, or by usage retained the property of the ancient bock-land, of not being alienable from the kindred, the ancient feoffments were often expressed to be made with the assent of the feoffor's wife, his heir or his heirs. In ancient charters there was inserted a general warranty: in that, the phrase was much varied. The oath of the party was often added to it, and sometimes a clause, that if the feoffor's title was evicted, he should give other lands of equal value. Sometimes these clauses extended to a second eviction; and sometimes the feoffor obliged himself, if he should make default in warranting the lands granted, to make restitution to the feoffee. The proper limitation of a feoffment is to a man and his heirs; but feoffments were often made of conditional fees (or of estates tail, as they are now called), and of life estates; to which may be added, feoffments of estates given in frankmarriage and frankalmoigne. To make the feoffment complete, the feoffor used to give the feoffee seisin of the lands: this is what the feudists called investiture. It was often made by symbolical tradition: but it was always made upon, or within view of, the lands. When the king made a feoffment, he issued his writ to the sheriff, or some other person, to deliver seisin: other great men did the same. This gave rise to powers of attorney. (See the preface to Mr. *Madox's Formulare*.)

I. 2. A *grant*, in the original signification of the word, is a conveyance or transfer of an incorporeal hereditament. As livery of seisin could not be had of incorporeal hereditaments, the transfer was always made by writing, in order to produce that notoriety in the transfer of them, which was produced in the transfer of corporeal hereditaments, by delivery of the possession. But, except that a feoffment was used for the transfer of corporeal hereditaments, and a grant was used for the transfer of incorporeal hereditaments, a feoffment and a grant did not materially differ.

I. 3. Such was the original distinction between a feoffment and a grant. But, from this real difference in their subject matter, *a difference was supposed to exist in their operation*. A feoffment visibly operated on the *possession*; a grant could only operate on the *right* of the party conveying. Now, as possession and freehold were synonymous terms, no person being considered to have the legal possession of the lands but he who had the actual freehold of them, a conveyance which was considered as transferring the possession, must necessarily be considered as transferring the freehold; or, to speak more accurately, as transferring the whole fee. But this reasoning could not apply to grants; their essential quality being that of transferring things which did not lie in possession; they therefore could only transfer the right; that is, could only transfer that estate which the party had a right to convey. It is in this sense, we are to understand the expressions which frequently occur in our law-books, where they describe a feoffment to be a *tortious*, and a grant to be a *rightful*, conveyance. Thus, from a difference in the *quality* of the hereditaments conveyed by these two modes of conveyance, a difference has been considered to exist in their *operation*. A great part of Mr. Knowler's celebrated argument in the case of Taylor on the demise of Atkins *v.* Horde, turns on this distinction. See 1 Burr. 92. This appears to have been the outline of conveyances at the common law.

II. The introduction of *USES* produced a great revolution in the transfer and modification of landed property. Without entering into a minute discussion of the difference between uses at common law, and uses since the statute of 27 H. 8.—a point, particularly well explained in *Mr. Sanders's Essay on Uses and Trusts*, it is sufficient to state the following circumstances. Uses at the common law were, in most respects, what trusts are now. When a feoffment was made to uses, the legal estate was in the feoffee. He filled the possession

possession, did the feudal duties, and was, in the eye of the law, the tenant of the fee. The person to whose use he was seised, called by the law-writers the *cestuy que use*, had the beneficial property of the lands, had a right to the profits, and a right to call upon the feoffee to convey the estate to him, and to defend it against strangers. This right at first depended on the conscience of the feoffee: if he withheld the profits from the *cestuy que use*, or refused to convey the estate as he directed, the *cestuy que use* was without remedy. To redress this grievance, the writ of subpœna was devised, or rather adopted from the common-law courts, by the court of chancery, to oblige the feoffee to attend in court, and disclose his trust, and then the court compelled him to execute it. Thus uses were established.—They were not considered as issuing out of, or annexed to the land, as a rent, a condition, or a right of common; but as a trust reposed in the feoffee, that he should dispose of the lands, at the discretion of the *cestuy que use*, permit him to receive the rents, and, in all other respects, to have the beneficial property of the lands. Yet an use, though considered to be neither issuing out of, or annexed to the land, was considered to be collateral to it, or rather as collateral to the possession of the feoffees in it, and of those claiming *that* possession under them. Hence the disseisor, abator, or intruder of the feoffee, or the tenant in dower, or by the courtesy of a feoffee, or the lord entering upon the possession by escheat, were not seised to an use, though the estates in their hands were subject to rents, commons and conditions. They were considered as coming in by a paramount and extraneous title; or, as it is called in the law, *in the post*, in contradistinction from those who, claiming under the feoffee, were said to be *in the per*. Thus, between the feoffee and *cestuy que use*, there was a confidence in the person and privity in estate. (See Chudleigh's case, 1 Rep. 120. and Burgess and Wheate, 1 Bla. 123.) But this was only between the feoffee and *cestuy que use*. To all other persons the feoffee was as much the real owner of the fee, as if he did not hold it to the use of another. *He* performed the feudal duties; *his* wife was entitled to dower; *his* infant heir was in wardship to the lord; and, upon *his* attainder, the estate was forfeited. To remedy these inconveniencies, the statute of 27 H. 8. was passed, by which the possession was divested, out of the persons seised to the use, and transferred to the *cestuys que use*. For, by that statute, it is enacted, that, "when any person shall be "seised of any lands to the use, confidence, or trust of any other person or "persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, "agreement, will, or otherwise: then, and in every such case, the persons "having the use, confidence, or trust, should from thenceforth be deemed "and adjudged in lawful seisin, estate, and possession of and in the lands, in "the same quality, manner, and form, as they had before in the use."

III. There seems to be little doubt, that the intention of the legislature, in passing this act, was utterly to annihilate the existence of uses, considered as distinct from the possession. But they have been preserved under the appellation of Trusts. The courts hesitated much before they allowed them under this new name. On the one hand, it had clearly been the intent of the legislature to destroy them, while they continued uses at the common law; on the other hand, motives of equity, or rather of compassion, and the general bent of the nation, pleaded strongly in their favour. The latter prevailed. Thus (to use the expression of lord Hardwicke, 1 Atk. 591), a statute, made upon great consideration, and introduced in a solemn and pompous manner, has had no other effect than to add, at most, three words to a conveyance. Besides this,—one of the chief inconveniencies produced by trusts, was, the secret method they afforded for the transfer of property.—The statute intended to restore the notoriety of the old common-law conveyances. So far from effecting it, the existence and transfer of fiduciary or trust estates has continued. Secret modes of transferring the possession itself have been discovered, and

and have totally superseded that notorious and public mode of transferring property, which the common law required, and the statute intended to restore; and many modifications or limitations of real property have been introduced in consequence of the statute of uses, which the common law did not admit. An attempt will be made to give the reader a succinct view of these points, by some observations: First, on the nature of the estates of the feoffee and the *cestuy que use*, since the statute of uses: Secondly, on the limitations and modifications of landed property unknown to the common law, which have been introduced under the statute of uses: Thirdly, on the mode by which conveyances to uses operate: Fourthly, on the doctrine of powers deriving their effect from the statute of uses: Fifthly, on uses not executed by the statute. It is to be premised, that what is here said of a feoffee to uses, is equally to be understood of a releasee, conusee, or recoveror, who stands seised to uses.

IV. As to the estates of the feoffee and the cestuy que use; —the statute unites the possession to the use, so that the very instant the use is raised, the possession is joined to it; and the use and the possession are thereupon immediately consolidated, and become convertible terms. Thus, had all uses been vested either in possession or in right, no estate or interest of any kind could have been left in the feoffee. But, uses are frequently limited in contingency, to serve which, as they come *in esse*, it is necessary that there should be a seisin somewhere. When this case was first considered by the lawyers, it was found difficult to discover any mode of reasoning, consistent with the system generally received on the doctrine of uses, by which that seisin could be supposed to exist any where; or what the precise nature of it was. This was the great difficulty in Chudleigh's case. There, the following case was put: Suppose a feoffment is made to the use of *A.* during his life, remainder to the use of his sons successively in tail, and, for want of such issue, to the use of *B.* in fee; is there any, and what seisin, to serve the uses limited to the sons of *A.*?—In whom, does that seisin exist?—and how does it operate? Upon this point the judges seem, by the accounts which have come to us of that case, particularly sir Edward Coke's and lord chief justice Popham's, to have held very different opinions. All agreed, that, to the execution of an use under the statute, it was indispensably necessary, that there should be a person seised to the use; an use in possession, reversion, or remainder; and a cestuy que use *in esse*. From these positions, some of the judges in that case inferred, that the whole use was executed in *A.* and *B.* in a manner that left *nothing* of the ancient seisin in the feoffees; and that the contingent use, when it came *in esse*, was executed out of the first livery, and the original estate of the feoffees. Others held, that an *actual estate* in remainder was vested in the feoffees, to serve the contingent uses as they arose. But both these systems were found to be open to unanswerable objections. For, with respect to the first, one of the requisites indispensably necessary to the execution of an use, under the statute, is, that there must be a person seised to the use, at the time of the execution of it. Now, if the whole original seisin was divested out of the feoffees, there would not, when the son of *A.* was born, be any person seised to his use;—or, in other words, there could be no seisin to that use. This, would make the estates limited to the sons of *A.* and all other contingent remainders, void in their creation, for want of a seisin to feed them, when they come *in esse*. With respect to the latter system,—it is to be observed, that, under the limitations upon which the case arose, *A.* took an estate for life in possession, and *B.* took an estate in remainder in fee;—and that previously to the birth of *A.*'s children, there was no use vested in any person, which separated those two estates. Those uses, therefore, were commensurate to the whole fee, and admitted no opening for any intermediate vested use. Besides, the feoffor neither limited, nor intended to limit, any such intermediate use to the feoffees. Thus, on the one hand, the objection to the supposition, that nothing

nothing of the old seisin remained in the feoffees, on the other, the objection to the supposition, that any use or legal estate remained in them, made it difficult to conceive what estate or seisin could be in them, to serve the contingent use. To clear up this difficulty it was observed, that the possession was not executed by the statute, but in the manner, and to the extent, in which the use was limited. Now, in the case we have mentioned, the use was limited, and consequently the possession executed, to *A.* during his life, remainder to *B.* in fee, but subject to the *possibility* of *A.*'s having sons, and their becoming entitled to the use, and consequently to the possession, for an estate or estates in tail. Thus, during the suspense of the contingent use, the feoffees had a possibility of possession, untouched and unaffected by the statute, as there was no use *in esse* to which it could be executed. The moment the use came *in esse*, the feoffees would be entitled at common law to the possession, to the use, or, as we should now call it, in trust for, the *cestuy que use*; but by the operation of the statute, the possession is instantaneously divested from the feoffees, and executed in the *cestuy que use*. Thus, by supposing a possibility of seisin, but no actual seisin or use to remain in the feoffees during the suspense of the contingent use, a sufficient seisin is provided to serve the contingent use when it comes *in esse*, without interfering with, or breaking in upon, the legal fee. This intricate subject has been elaborately discussed by *Mr. Sanders, in his Essay on Uses and Trusts*; by Mr. Sugden in his *Practical Treatise of Powers*; and by Mr. Rowe in his *Scintilla Juris*. A short, but masterly view of it, is also given by *Lord Chief Baron Gilbert, in his Law of Uses and Trusts*. An attempt to explain it, may be found, in the note in page 291. of the sixth edition of Mr. Fearne's Essay on Contingent Remainders.

V. With respect to the LIMITATIONS AND MODIFICATIONS OF LANDED PROPERTY, UNKNOWN TO THE COMMON LAW, WHICH HAVE BEEN INTRODUCED UNDER THE STATUTE OF USES; the principal of these are known by the general appellation of springing or secondary uses. No estate could be limited upon or after a fee, though it were a base or a qualified fee; nor could a fee or estate of freehold be made to cease as to one person, and to vest in another, by any common-law conveyance. But, there are instances where, even by the common law, these secondary estates seem to have been allowed, when limited, or rather when declared, by way of use. See Jenk. Cent. 8. case 52. After the statute of uses, the judges seem to have long hesitated whether they should receive them. In Chudleigh's case it was strongly contended, that it would be wrong to make "any estate of freehold and inheritance lawfully vested, to cease as to one, and to vest in others against the rule of law, and that no estates should be raised by way of use but those which could be raised by livery of seisin at the common law." The courts, however, admitted them. After they were admitted, it was found necessary to circumscribe them within certain bounds; because, when an estate in fee simple is first limited, there is no method by which the first taker can bar or destroy the secondary estate, as it is not affected either by a fine or common recovery. It is now settled, that when an estate in fee simple is limited, a subsequent estate may be limited upon it, if the event upon which it is to take place be such, that if it do happen it must necessarily happen within the compass of one or more life or lives in being, and 21 years and some months over. It was long before the courts agreed upon this period. In Buckworth and Thirkell, 1 Collect. Jurid. 332. lord Mansfield mentioned that it was not settled till his time. It is observed in note 5. to p. 20. a. "that this period was not "arbitrarily prescribed by our courts of justice with respect to the limitation "of personal estates, but wisely and reasonably adopted in analogy to the cases "of freehold and inheritance, which cannot be limited by way of remainder, "so as to postpone a complete bar of the entail, by fine or recovery, for a "larger

"larger space." The same analogy has been observed with respect to these secondary fees, when limited upon an estate in fee simple. But the reason which induced the courts to adopt this analogy, with respect to these estates when limited upon an estate in fee simple, does not hold when they are limited upon or after an estate in tail; because, when they are limited upon or after an estate in tail, the tenant in tail, by suffering a common recovery before the event takes place, bars or defeats the secondary estate, and acquires the fee simple absolutely discharged from it. See Page *v.* Haywood, 2 Salk. 570. Goodiar *v.* Clarke, 1 Sid. 102. 1 Lev. 35. Hence, if the secondary estates we are speaking of, are limited upon or after an estate in tail, they may be limited generally, without restraining or confining the event or contingency upon which they are to take place, to any period. Thus, if an estate be limited to *A.* and his heirs; and if *B.* (a person *in esse)* dies, without leaving any child of his body living at the time of his decease; or, leaving one or more such child or children, if such child or all such children shall die before any of them attain the age of 21 years, then to *C.* and his heirs; here, the limitation to *C.* is limited after a previous limitation in fee simple; and it is a good limitation, because the event upon which it is to take place, must, if it do take place, necessarily take place within the period of a life in being, and 21 years and a few months. But, if the estate were limited to *A.* and his heirs; and after the decease of *B.* and a total failure of heirs or heirs male of the body of *B.* to *C.* and his heirs; here, as the secondary use is limited after a previous limitation in fee simple, and the event, on which the fee limited to *C.* is to take place, is not such as must necessarily happen within the period we are speaking of, (for *B.* may have issue, and that issue not fail till many years after the expiration of 21 years after *B.*'s decease), the limitation to *C.* and his heirs is void. On the other hand, if the estates were limited to *A.* for life, then to trustees and their heirs during his life, for preserving contingent remainders; then to *A.*'s first and other sons successively in tail male; with several remainders over; with a proviso, that if *B.* dies, and there should be a total failure of heirs or heirs male of his body, the uses limited to *A.* and his sons, and the remainders over, should determine, and the lands remain and go over to *C.* and his heirs; here, the limitation to *C.* and his heirs is limited so as to depend on previous limitations for life, or in tail; and the event, upon which it is so to take effect, may possibly not happen till after a period of one or more life or lives in being, and 21 years. But so far as it is limited on an event which may happen during the continuance either of one or more life or lives in being, it is within the bounds we have mentioned; and so far as it is limited upon an event which may happen during the continuance of the estate of the tenants in tail, or after them, the first tenant in tail in possession by suffering a recovery, before the event happens, may bar the limitations over, and thereby acquire an estate in fee simple; and therefore the limitation over to *C.* and his heirs, is good.

It sometimes happens, that, between the estate of the tenant for life, and the remainders in tail, to his issue, a term for years is limited to trustees, in trust to raise sums of money, for portions for children, or for other purposes.—As a term for years, thus interposed, precedes the estates tail, it is not subject to the operation of a recovery suffered by any tenant in tail under them. Now, it *may* be considered, that the trusts of such a term are subject to the same observation. In declaring trusts of money to be raised under such a term, it is, therefore, advisable not to protract the vesting of the money beyond the boundary prescribed by the law for the suspense of personal estate. See lord Southampton *v.* marquis of Hertford, 2 Ves. and Beames, 54. Thus, where it is intended to limit lands to the issue male of the marriage, in strict settlement, and to provide portions for daughters, on the failure of the issue male, it is advisable to limit, for that purpose, a term for years in remainders immediately expectant on the failure of the issue male entitled or inheritable under the limitations. In this case, the portions may be properly directed to be

raised, in the event of there being a general failure of issue male of the marriage; for, as the term is subject to the recovery of any preceding tenant in tail, the trusts of it will be equally subject to his recovery. But, if the portions are provided under a term preceding the estates tail, such a trust would exceed the boundary prescribed by law for such trusts, and would, on that account, be void. In such a case, therefore, the portions of the daughters should be made raiseable on the event of there being no son of the marriage, who should attain the age of 21 years, or, who should die under that age, leaving issue male of his body, living at the time of his decease, or born in due time after.

VI. With respect to THE MODE, BY WHICH CONVEYANCES TO USES OPERATE.—It is to be observed, that to raise an use under the statute, the possession or seisin to serve the use must be in some person distinct from the *cestuy que use*; as the statute requires that the person seised to the use, and the person to whom the use is limited, should be different persons; so that, if the possession is conveyed, and the use limited to the same person, at least if the use is limited in fee simple, that is not an use executed by the statute, but the party is in by the common law. For the statute of uses mentions those cases only, where "any person or persons stand seised to the use of any other "person or persons." Thus, in the case of Jenkins *v.* Young, Cro. Car. 231. 245. lands were given to two, *habendum* to the use of them and the heirs of their two bodies: It was argued, that the estate out of which the use should rise, was but for their lives, and that therefore, on the death of the *cestuys que vie*, the use limited upon their estate was determined: but the court held, that, where an estate is limited to one, and the use to a stranger, the use should not be more than the estate, out of which it was derived; but that, when the limitation is to two, *habendum* to the use of them and the heirs of their bodies, it was no limitation of the use, nor was the use to be executed by the statute. So in Gilb. Rep. p. 17. it is expressly said, that if a fine be levied to a man and his heirs, to the use of him and his heirs, he shall take by the common law, and not by way of use. And see Dyer, 186. and Ant. 22. b. and Bac. Uses, ed. 1785, p. 63. Com. 313. Skin. 209. On this ground, it has been contended, that, if lands are conveyed to *A.* and his heirs, to such uses as *A.* shall appoint; and, in default of appointment, to the use of himself, his heirs and assigns,—the power of appointment is void; but that,—if lands are conveyed to *B.* and his heirs, to such uses as *A.* shall appoint, and, in default of appointment, to the use of *A.* his heirs and assigns,—the power of appointment is good.

In all limitations of uses now, the possession or seisin on which the use is declared, must either remain in the party, or be transferred to some third person. This is the meaning of those passages in the books, where it is said, that uses are raised *either by transmutation of the possession, or without such transmutation.* A bargain and sale, and a covenant to stand seised, operate on the possession of the bargainor or covenantor. A feoffment, fine, and common recovery, operate on the possession of the feoffee, conusee, or recoveror. A lease and release has a mixt operation; the lease having the operation of, and being in fact, a bargain and sale under the statute, and the estate of the releasee being extended or enlarged to an estate of inheritance by the operation of the release at the common law.

VI. 1. For with respect to *a bargain and sale, and a covenant to stand seised;* a bargain and sale is considered as a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, and contracts to convey the lands to the bargainee. *A covenant to stand seised to uses*, is where a man covenants to stand seised of them to the use of his wife, his child, or kinsman. But it is to be observed, that the words bargain and sell, are not appropriated to the former, nor the words covenant to stand seised, appropriated to the latter of these conveyances. If a person for a pecuniary consideration covenants to stand seised to the use of the purchaser, it is a bargain and sale, and if enrolled,

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is valid and effectual, as a bargain and sale under the statute of uses, to convey the estate to the purchaser. In the same manner, if a person for natural love and affection bargains and sells his lands to the use of his wife, it is a covenant to stand seised, and as such without enrolment, vests the estate in the wife. 7 Rep. 40. b. 2 Inst. 672. 1 Leo. 25. 1 Vent. 137. 1 Mod. 175. 2 Lev. 10. In the case of a bargain and sale, the bargainor stands seised to the use of the bargainee; in the case of a covenant to stand seised, the covenantor stands seised to the use of the parties intended to be benefited. In both, the possession or seisin remains in the party; and the statute draws it from them, and executes it in the *cestuys que use.*

VI. 2. With respect to *a feoffment, fine, and common recovery*; the transfer or transmutation of the possession from the feoffor, conusor, and recoveree to the feoffee, conusee, or recoveror, is effected solely by the operation of these conveyances or assurances at the common law; and if the use is declared to the feoffee, conusee, or recoveror, in fee simple, the conveyance is completed at the common law, in the same manner as if the statute of uses had never passed. It is only when the use is declared to a third person, that the statute has any operation; and then, by the operation of the statute, the possession previously transferred or transmuted to the feoffee, conusee, or recoveror, by the operation of the feoffment, fine, and common recovery, at the common law, is divested from the feoffee, conusee, or recoveror, and vested in the *cestuys que use* by the statute.

As to the conveyance by *lease and release:* The form of that conveyance is originally derived to us from the common law, and it is necessary to distinguish in what respect it operates as a common-law conveyance, and in what it operates under the statute of uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there was a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversioner. As by this mode the reversion or remainder of an estate might be conveyed without livery, when it depended on an estate previously existing, it was natural to proceed one step farther, and to create a particular estate for the express and sole purpose of conveying the reversion; and then, by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that if a particular estate was made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for at the common law, the ceremony of livery of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance. Still an actual entry would be necessary on the part of the particular tenant; for, without actual possession, the lessee is not capable of a release, operating by way of enlargement. But this necessity of entry for the purpose of obtaining the possession, was superseded, or made unnecessary, by the statute of uses: for, by that statute, the possession was immediately transferred to the *cestuy que use*; so that a bargainee under that statute is as much in possession, and as capable of a release before or without entry, as a lessee is at the common law after entry. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the grantor, and, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above mentioned, should be an estate for years) should be so framed, as to be a bargain and sale within the statute. Originally it was made in such a manner as to be both a lease at the common law, and a bargain and sale under the statute. But as it is held, that where conveyances may operate both by the common law and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became

the practice to insert among the operative words, the words *bargain and sale*, (in fact, it is more accurate to insert no other operative words), and to express that the bargain and sale or lease is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of a release. The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee is in the possession, by the statute. The release operates by enlarging the estate or possession of the bargainee to a fee: this is at the common law, and if the use be declared to the releasee in fee simple, it continues an estate at the common law; but if the use is declared to a third person, the statute again intervenes, and annexes or transfers the possession of the releasee to the use of the person to whom the use is declared. It has been said, that the possession of the bargainee, under the lease, is not so properly merged in, as enlarged by the release: but, in all events, it does not, after the release, exist distinct from the estate passed by the release. As the operation of a lease and release depends upon the lease, or bargain and sale, the grantor must be a person capable, at law, of being seised to an use, otherwise the release will be void for want of possession in the releasee. By some very respectable authorities it has been said that a corporation cannot be seised to an use. Pop. 72. 1 Co. Rep. 127. a. Bacon Stat. of Uses, 357. Plo. 102. 538. Jenk. Cent. 195. 2 Ves. 399. Gilb. Uses, 5. 170. 285. Shep. Touchs. 508. A contrary doctrine, so far as relates to the conveyances of corporations by bargain and sale, seems to be laid down in sir Tho. Holland *v.* Bonis. 1 Leo. 183. 2 Leo. 121. 3 Leo. 175. And see 13 H. 7. fol. 9. pl. 5. To avoid doubt upon this subject, it seems advisable that corporations should convey by feoffment, or by a lease and release, with an actual entry by the lessee, previous to the release; after which the release will pass the reversion. It may also be observed, that, in *exchanges*, if one of the parties die before the exchange is executed by entry, the exchange is void. Ant. 50. b. But if the exchange be made by lease and release, this inconvenience is prevented, as the statute executes the possession without entry, and all incidents annexed to an exchange, at common law, will be preserved.—By a temporary Irish statute of 9 Geo. II. ch. 3. § 6, the recital of a lease for a year in a release, is made, in all cases, sufficient evidence of it. By the 1 Geo. III. c. 3, that statute was made perpetual, and profert of the release declared sufficient in pleading.

VII. The next consideration is, upon the doctrine of POWERS DERIVING THEIR EFFECT FROM THE STATUTE OF USES; but the nature of these notes requires, that what is said on this head should be confined to some general observations upon the mode, by which such powers operate; and the relation, which the deeds by which they are executed, bear to the deeds, by which they are created; and Uses of Rents.

VII. 1. *As to the mode in which they operate.*—All powers of this kind are, in fact, powers of revocation and appointment: indeed, every declaration of an use may, in some respect, be considered as an appointment of the use or uses to which the feoffee is to stand seised: but the word appointment is generally applied to those cases, where, either the power of appointment is first reserved, or given, with a subsequent limitation of uses, to take place until, and in default of the appointment; or, where the uses are first limited, and a power is afterwards given to some person to limit other uses. As the uses limited under powers cannot operate, but by the postponing, abridging, or defeating the prior uses, it is usual, in some cases, to precede the power of appointment by a power of revocation. But this is immaterial. The powers of leasing, jointuring, charging, selling, and exchanging, usually inserted in marriage settlements, are powers of revocation and appointment. All of them postpone, abridge, or defeat, in a greater or less degree, the previous uses and estates, and appoint new uses in their stead. As soon as the uses created by them spring up, they draw to them the estate of the feoffee: and the statute executes the possession.

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But it must be observed, that these powers do not operate as a conveyance of the possession of the estate, but as a limitation of the use. Hence, if a person, having a power of appointment, appoints the estate to *A.* and his heirs, to the use of *B.* and his heirs, the use is executed in *A.* and his heirs, and *B.* takes only an equitable fee. Thus, suppose a marriage settlement framed in the usual manner, and with the usual power of selling and exchanging reserved to the feoffees; in these cases, it is sometimes expressed, that it shall be lawful for the feoffees to grant, bargain, sell, and convey. But, whatever are the words made use of, they can only operate as a limitation of the use; and the vendee will take the legal estate. If the feoffees make a conveyance by lease and release, there is no doubt but it will be effectual; it will operate, however, as an appointment; the releasee will take the legal estate, and if the release is made to uses, the intended *cestuys que use* will have only equitable estates. To explain this more fully, it is to be observed, that those uses which are not vested either in possession or right, immediately on the execution of the deed, are termed future uses, and are said to arise, either by the act of God, or the act of the party. Mr. Booth, in his printed opinion, at the end of Mr. Hillyard's edition of Sheppard's Touchstone, gives an explanation of this distinction, which, if his expressions are understood in the sense, in which it is evident he intended using them, will be found perspicuous and exact. "It is wholly immaterial," he says, "how, or by what means, the "future use comes *in esse*, whether by means of some event provided for, in "case it happened, in the creation of the uses, which event may be called the "act of God; or, by means of some work performed by any certain person, "for which provision was likewise made, in the creation of the uses, which "may be called the act of man. In either case, the statute operates the same "way; for the instant the future use comes *in esse*, either by the act of God, "or by the act of man, the statute executes the possession to the use, and "the *cestuy que use* is deemed to have the same estate in the lands as is "marked out in the use, by the deed that created it. When the use arises "from an event provided for by the deed, it is called a future, a contingent, "an executory use; when it arises from the act of some agent or person "nominated in the deed, it is called a use arising from the execution of a "power. In truth, both are future or contingent uses, till the act is done; "and afterwards they are, by the operation of the statute, actual estates. "But till done, they are in suspense, the one depending on the will of Heaven "whether the event shall happen or not, the other on the will of man. Whilst "these last are in suspense, they are called powers." According to this explanation, the uses raised by limitations to first and other sons, or to such first or only son who shall attain twenty-one, or to the survivor of *A.* and *B.* or to the right heirs of *I. S.*—a person then in existence,—or to *C.* if *A.* dies in the life-time of *B.* &c. &c. are all uses arising by the act of God; as they are events, designated by the original deed, but which though designated by the party, depend for their effect, on the will of Providence. On the other hand, where there are limitations to such uses as *A.* shall appoint, or to such of the children of *A.*, as *A.* shall appoint; or, where a power is given to *A.* to jointure, to charge with portions, to mortgage, to lease, to sell, or to exchange;—in all these cases, the persons, and the estates and interests are to be designated by the party. He designates the persons, the children, the mortgagee, the lessee, the vendee, and exchangee. These, therefore, are said to arise by the act of the party. From this explanation it is evident, that there is no material difference in the quality of the uses; the difference is in the act, which produces them. In the latter case, the party has the power of raising them, and it is in that sense, that the word power is used in this place. Now, if an estate is conveyed to *A.* and his heirs, to the use of *B.* for life, remainder to his first and other sons, successively in tail male; upon the birth of the first son, the possession is executed in him by the statute. Suppose the estate were con-

veyed to *A.* and his heirs, to the use of *B.* for life, remainder to such uses generally, or to such son of *B.* as *B.* shall appoint, and *B.* appoints to the use of his first son. Immediately upon the appointment, the use is executed in the son. Then how does this appointment operate? Clearly not as a conveyance. For *B.* had only a life estate, and consequently could not convey an estate-tail, to his own son; it operates therefore as a designation of the person to take the use: *B.*'s right to make this designation is termed a power of appointment, the exercise of it is termed an appointment, the person taking under it is termed the appointee. This may be made more clear, by considering how it would have stood on a limitation of uses at common law, before the statute of uses. Till that statute, a conveyance to *A.* and his heirs, to the use of *B.* for life, with remainder to such uses, or to such of his sons, as he should appoint, was tantamount to what now is a conveyance unto and to the use of *A.* and his heirs, in trust for *B.* for life, remainder in trust for such persons, or for such of his sons, as he shall appoint. When, at common law, an appointment was made, to the use of the first son, the trustee stood seised at common law, to the use, or, as we should now call it, in trust, for that first son; he thereupon became the *cestuy que trust*. Since the statute has executed the use, where the son takes under an appointment of this nature, the use is executed in him, and he is the *cestuy que use*. Thus, at the common law, an appointment operated to substitute one *cestuy que trust* in the room of another. Since the statute, an appointment operates to substitute one *cestuy que use* in the room of another. The conclusion is, that, wherever a party, having a legal estate, conveys it to a person and his heirs, to such uses as that person or any other person shall appoint, and an appointment is made, it operates not as a conveyance of the land, but as an appointment of the use, and consequently the appointee takes the use or legal estate. Therefore, as has been observed before, if a person having a power of appointment, appoints to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is in *A.* In the same manner, if a person having a power of selling and exchanging, conveys the estate to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is equally in *A.* by the exercise of the power.

VII. 2. *As to the relation, which deeds, by which powers are executed, bear to the deeds, by which the powers were created.*—It is generally true, that the use created under the power takes effect in the same manner, as if, in the deed containing the power, it had been inserted instead of the power: thus, suppose an estate conveyed to the use of *A.* for life, remainder to such uses as *B.* should appoint, and in default of appointment, to the use of *B.* and his heirs; *B.* appoints the estate to *C.* for life; remainder to his first and other sons in tail male. After this appointment is made, it is the same as if the estate had been originally limited to the use of *A.* for life, remainder to the use of *C.* for life; remainder to *C.*'s first and other sons in tail male; remainder to *B.* and his heirs. So, if the estate is limited to *A.* for life; remainder to the use of his first and other sons in tail male, with power to *A.* to appoint a rent charge to his wife, with usual remedies and a term of years for securing the same, and to charge the estate with portions, and to create a term of years for securing the same, and he exercises these powers; it is the same, as if, in the original settlement, the estate had been limited to the use of *A.* for life, remainder to the use and intent that the wife might receive her jointure and distrain, and enter upon and take possession of the estate, in case the same should be in arrear; and, subject thereto, to the use of trustees for a term of years for further securing the rent charge; remainder to the use that the lands in question may be charged with portions, and subject thereto, to the use of trustees for a term of years for raising the portions; remainder to *A.*'s first and other sons successively in tail male. The relation therefore which the deed by which the power of appointment is executed, as to the deed by which the power is created, holds so far as the use thus appointed derives its effect from, and is served by or out of, the original seisin of

the conusee, recoveror, feoffee, or releasee; and as it precedes and takes place of all the uses limited subsequent or subject to the power. In this sense it clearly has a relation to the deed by which it is raised. But it has no other relation in point of time. In the case of the duke of Marlborough v. lord Godolphin, 2 Ves. 61. lord Sunderland left the interest of 30,000 *l.* to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2,000 *l.* to Mr. Spencer and 1,500 *l.* to lady Morpeth, who both died in her life-time. It was contended that the appointment related back to the time of lord Sunderland's will, which relation would over-reach the death of the two parties, who were alive at the time of the death of the testator, lord Sunderland; and then it would be considered as vesting in them in their lives. But lord Hardwicke denied this. He admitted that an use taking effect by virtue of an execution of a power, was taken under the authority of that power, but *not from the time* of its creation; and he exemplifies this distinction by appointments of uses; in which case, says his lordship, if a feoffment is executed to such uses as the feoffor shall appoint by will; when the will is made, it is clear the appointee is in by the feoffment, but has nothing from the time of the execution of the feoffment, so as to vest the estate in him; and he thereupon decreed these legacies to have lapsed by the death of the legatees in the life-time of the testator. This shows how much it is necessary to qualify the general expressions above alluded to. It also reconciles them with a known circumstance attending powers of this nature, with which it is otherwise difficult to reconcile them, viz. that by an execution of a general power, a person may limit estates which he could not limit by the deed in which the power is contained. By a general power of appointment is understood that kind of power, which enables the party to appoint the estate to any person he thinks proper; and, in this sense, it is opposed to a qualified or particular power, which enables the party to appoint to or among particular objects only; as a power of appointing to his children, or the children of any other person. The former has been termed a Power of Ownership,—the latter, a Power of Selection. A general power of appointment has no tendency to a perpetuity, as from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely, from every species of limitation, inconsistent with that fee. In fact therefore giving a person such a power, is nearly the same as giving him the absolute fee. The only difference is, that it enables him to do, through the medium of a seisin previously created, that which, if the fee had been actually limited to him, he might do by a conveyance of the land itself; so that in both cases his power of alienation is of the same extent. But in the case of a particular or qualified power, where the objects are limited, the case is entirely different. The limitation of the object takes the land out of commerce, and of course has a tendency to that perpetuity, which the English law of real property does not admit. The consequence therefore is, and by a series of cases it now appears to be settled, that where the power is general, estates for life, with remainders over, to their issue in strict settlement, may be limited under them to persons not *in esse* at the time of the execution of the original deed, in the same manner, and to the same extent, as if instead of being derived out of the seisin of the feoffees of the original deed, and in that point of view, as making a part of that deed, the uses and estates so limited were created by an original, substantive, independent, and integral conveyance. On the other hand, in the case of a particular or qualified power, that is, where the objects are qualified, as a power of appointing to the children of the party himself, though perhaps it may enable him to appoint life estates, to children unborn at the date of the deed creating the power; yet, if it enables him to appoint life estates to those children, it certainly does not authorize him to extend the appointment to the children of these children, so as to make them take by purchase, nor to

appoint any other estate, which might not have been created by the very deed creating the power. In all cases therefore of particular or qualified powers, both in the creation and the exercise of them, care should be taken to ascertain, that the uses which the party is empowered to raise under them, or actually assumes to raise under them, when he comes to exercise the power, are such as the deed creating the power might itself have raised.

It may, however, be proper to add, that between deeds and wills there is this material distinction: a deed takes effect immediately on the execution of it:—a will is ambulatory, and waits for its effect till the testator's decease. In inquiring therefore into the legality of the limitations we are speaking of, the reference in the case of a deed, should be to the time of its execution; but the reference in the case of a will, should be to the death of the party. If, therefore, in a deed exercising such particular power of appointment, there is a limitation for life to a person unborn at the date of the deed creating the power, with remainders over to his sons in strict settlement, these remainders over will be void, and will not be helped though a son is born on the following day. In the case of a will it is different. If the son is born in the party's life, he is capable of a limitation to himself for life, with remainders over to his sons in strict settlement.

In cases of this nature, there is another material distinction between deeds and wills. In deeds, technical expressions are, in some cases, absolutely necessary, so that they cannot be supplied by others, however forcible or clear; in other cases they have a determinate sense appropriated to them by law, in which, and in no other, the law permits them to be construed. In wills there is a greater latitude of construction: technical expressions are never necessary, and every expression is construed in the sense, in which the testator appears to have designed to use it, so that, when his intention is once discovered, whether he uses technical language or not, and if he uses it, whether he uses it in a proper or an improper sense, his will is construed solely with a view to what appears to be his obvious meaning, and not according to the rigid or technical import of his expressions. Another rule in the construction of wills, which is admitted in a much greater latitude than it is in the construction of deeds, is, that when a testator's general intent appears, the court, in order to give it effect, will sacrifice to it a particular intention inconsistent with it. Now, in the cases of which we are speaking, where the limitations are construed to import a life estate to an unborn son, and successive estates tail by purchase to the sons of that son, there, in a deed, the latter limitations suspend the inheritance from vesting beyond the period allowed for its suspension by the rules of law, and are therefore void. But, in the case of wills, the law will not construe these expressions thus rigidly. From the manifest tenor of the devises we are speaking of, it must appear to be the intention of the party, that, all the issue, (male or female, as the case may happen) should take the estate. This is his general intention: besides this, he appears to intend, that they should take the estate in that manner, which, if allowed, must necessarily give estates by purchase to the sons of the unborn son. This is his particular intention; but it cannot be effectuated, being contrary to law. To allow it therefore would subvert his general intention. The court therefore, to give effect, as far as the law admits, to the testator's will, sacrifices the particular to the general intent; and conformably to this principle, as the general intent can only be answered, by giving an estate tail to the unborn son, the court will construe the devise to import an estate tail to him. This construction, by making the sons of the unborn son take by descent, sacrifices the testator's intent that they should take by purchase; but by letting in all the issue, preserves his general intent, that all the issue should take—see Doe d. Blandford & ux. & Dymock *v.* Applin, 4 Term Rep. 82. Humberston *v.* Humberston, 1 Peere Williams, 332; Chapman *v.* Browne, 3 Burr. 1634; Nicholl *v.* Nicholl, 2 Black. Rep. 1159; Pitt *v.* Jackson, 2 Bro. Ch. Cases, 51; and Robinson *v.* Hardcastle, 2 Term Rep. 241. To this point the ultimate decree in the great case of Hopkins *v.*

Hopkins

Hopkins is very important. As the points in that case involve some of the most interesting doctrines of the law of uses, and the printed account of them is to be found only in separate and detached cases, taken by different reporters, and in different stages of the cause, and as no account as yet appeared in print of the final decree, it was thought the following succinct account of the whole cause would be acceptable to the reader, and would not be considered as misplaced in the present Note.—The case was, that Mr. Hopkins by his will devised his estates to the use of trustees and their heirs, in trust for Samuel Hopkins, (the son of John Hopkins the cousin and heir at law of the testator,) for his life; remainder to his first and other sons successively in tail male; and for want of such issue, "in case his said cousin John Hopkins should have "any other son or sons of his body lawfully begotten, then in trust for all "and every of such other son and sons respectively and successively, for their "respective lives; with the like remainders to their several sons, successively "and respectively, as are thereinbefore limited to the issue male of the said "Samuel Hopkins, son of the said John Hopkins; and for default of such "issue, then in trust for the first and every other son of the body of Sarah, "the eldest daughter of his said cousin John Hopkins, lawfully to be begot-"ten, successively and according to priority of birth, for their respective "lives; with remainders to the heirs male of the body of every such son, "respectively and successively, the elder and the heirs male of his body to "take before the younger and the heirs male of his body issuing; and for want "of such issue, then in trust for the first and every other son of the body of Mary, "the second daughter of his said cousin John Hopkins, lawfully to be begotten, "successively and respectively, according to priority of birth, for their re-"spective lives; with remainders to the heirs male of the bodies of every "such son respectively and successively, the elder and the heirs male of his "body to take before the younger and the heirs male of his body issuing; "and for want of such issue, then in trust for the first and every other son of "the body of Elizabeth, the third daughter of his said cousin John Hopkins, "lawfully to be begotten, successively and respectively, according to priority "of birth, for their respective lives; with the like remainders to the heirs male "of the body of every such son, respectively and successively, the elder and "the heirs male of his body to take before the younger and the heirs male of "his body issuing; and for want of such issue, then in trust for the first and "every other son of the body of Hannah, the youngest daughter of his said "cousin John Hopkins, lawfully to be begotten, successively and respec-"tively, according to priority of birth, for their respective lives; with the "like remainders to the heirs male of the body of every such son respec-"tively and successively, the elder and the heirs male of his body to take "before the younger and the heirs male of his body issuing; and for want "of such issue, and in case his said cousin John Hopkins should have any "other daughter or daughters lawfully begotten, then in trust for the first "and every other son of every such other daughter, respectively and suc-"cessively, according to priority of birth, for their respective and successive "lives; with the like remainders to their several and respective heirs males "successively, the elder and the heirs male of his body to take before the "younger and the heirs male of his body issuing; and in default of such "issue, then in trust for the first and every other son of his cousin Hannah "Dare, the then wife of Francis Dare, and daughter of his uncle Samuel "Hopkins, deceased, lawfully begotten or to be begotten, successively and "respectively, according to priority of birth, for their respective lives; with "the like remainders to the heirs male of the body of every such son re-"spectively and successively, the elder and the heirs male of the body of every "such son respectively to take before the younger and the heirs male of his "body issuing; and for want of such issue, then in trust for James Bennett, "the only son of his cousin Sarah Alloway, then the wife of William Alloway,

"and

" and another daughter of his said uncle Samuel Hopkins deceased, by " Mr. Bennett, her former husband, for his the said James Bennett's life; with " remainder to his first and every other son lawfully to be begotten, succes- " sively according to priority of birth, and the heirs male of every such son " respectively and successively, the elder and the heirs male of his body to take " before the younger and the heirs male of his body issuing; and in default " of such issue, then in trust for his own right heirs for ever:" With a proviso, that whoever should come to his estate should take his surname and coat of arms; and a proviso, disposing of the rents during the minorities of the devisees:—And, after giving a great number of legacies, he gave the rest and residue of his personal estate to his executors, in trust that the same should be by them, or the survivors of them, with all convenient speed laid out in the purchase of messuages, lands, and tenements of inheritance in England, to be conveyed to the executors and their heirs, upon the several trusts and for the same purposes as were thereby declared touching the estates he was then seised of, and which he had devised. And the testator appointed sir Richard Hopkins, John Rudge, and James Hopkins, executors of his will. And after his decease it was proved by sir Richard and Mr. James Hopkins. Samuel Hopkins, the son of John Hopkins, the testator's cousin, died in the testator's life. After the testator's death, John Hopkins the cousin and heir of the testator, and his four daughters, the said Sarah, Mary, Elizabeth, and Hannah Hopkins, and also Amey Hopkins, another daughter of John Hopkins the cousin, born after making the said will, exhibited a bill in chancery against sir Richard Hopkins, John Rudge, and James Hopkins, and against John Dare, Francis Dare, and Philip Dare, infants, (children of Hannah Dare) and also against the said James Bennett: stating, amongst other things, the will of Mr. Hopkins; and praying that the executors might account for the testator's personal estate, and the rents and profits of his real estate, and that such of those profits as did not pass by his will, together with the legacy given to John Hopkins the cousin, might be paid to him, and that the residue of the said testator's personal estate, after payment of his debts, legacies, and funeral expenses, might be placed out in proper purchases, according to the directions in the testator's will; and in the mean time be improved at interest. In Hilary term 1732, sir Richard Hopkins and James Hopkins filed a cross bill against the complainants, to have the trusts of the will carried into execution, and for an account of the real and personal estate of the testator. On the 25th October 1733, by a decree in these causes, by the master of the rolls, it was declared, among other things, that the plaintiff John Hopkins was entitled to the rents and profits of the testator's real estate accrued since his decease, till some person should come in being, that should be entitled to an estate for life, according to the limitations in the said will; and that he was in like manner entitled to the surplus produce of the said testator's personal estate, after payment of the annual sums charged thereon by the said testator's will; and that the residue of the personal estate was to be laid out in the purchase of lands, with the approbation of the master, and settled to the same uses and upon the same trusts as the real estates, devised by the said testator's will, stood settled; and that until such purchase could be found out, the personal estate should be put out at interest upon government or other securities, with the approbation of the master, in the names of sir Richard Hopkins and James Hopkins, upon the trusts of the will, and the surplus rents and profits of the estates devised to sir Richard Hopkins and James Hopkins, and the estates to be purchased as aforesaid, and also the surplus produce of the said personal estate, until such purchase was made, was to be paid to John Hopkins, the testator's cousin, until some person should come in being, that should be entitled to an estate for life, according to the limitations of the testator's will. On the 18th November 1734, the cause came before lord chancellor Talbot upon an appeal; and the decree was affirmed, with the addition that the words " in possession" should

should be inserted in the decree in two places next after the clause "until "some person should come in being, that should be entitled to an estate for "life."—The report of this cause in Cas. in Eq. temp. Talbot, 44. reaches this period of the cause. By the decrees made on these parts of it, the two following important points were settled; that during the suspense, which, by the death of Samuel Hopkins in the testator's life-time, took place during the life of John until he had another son, or until, by his decease without other issue, (if that event had happened,) the possibility of his having another son would have determined, the limitations enured as executory devises; and that, during such suspense, the rents and profits of the real estate being undisposed of by the testator, (his disposition of them having effect only during the minorities of the persons actually entitled,) belonged to the heir at law.—Here the cause was left by lord Talbot's decree.—In June 1736, John Hopkins had a second son named William, who died in the following December.—Upon this, the eldest son of Hannah Dare having attained 21, and being the first tenant for life *in esse*, brought his bill to have a settlement made by the trustees, in which settlement he insisted to be made immediate tenant for life.—In this stage of the business it was argued, that the estate having become vested in the second son of John Hopkins (the testator's cousin) and by his death without issue, the suspense of there being a future child of John Hopkins being again renewed, the ulterior limitations must operate as contingent remainders, and that as there was no estate to support them, they were absolutely void, and the heir at law of course entitled to the estate. In answer to this, it was contended, that the subsequent limitations might be supported as so many distinct executory devises; but that, if it was necessary to consider them as contingent remainders, they were good in their original creation, and supported by the legal fee outstanding in the trustees. These points came before lord Hardwicke in 1738, and his lordship was of opinion, that the preceding freehold being once vested, the ulterior devises thereupon operated as contingent remainders; and having once become such, no subsequent event could make them enure as executory devises; so that they were thenceforth to be considered as contingent remainders; and his lordship was of opinion, that the legal fee in the trustees was sufficient to support them. Mr. Atkyns's report of this case, 1 vol. 581. embraces this stage of it. After this there is no printed account of this important case. From the proceedings of the cause, it appears, that John Hopkins, the cousin of the testator, died without issue male, and without having had any son except Samuel and William.—Sarah Hopkins had one daughter, who died an infant and unmarried; and afterwards Sarah died.—Mary had a son and a daughter, who both died without issue; and afterwards Mary herself died.—Elizabeth, the third daughter, intermarried with Benjamin Bond, esquire, by whom she had issue one son, named Benjamin Bond Hopkins, he having taken upon him the name and arms of Hopkins, in pursuance of the directions for that purpose contained in the testator's will.—Hannah, the fourth daughter, intermarried with William Hallet, esquire, and died, leaving one only child, named Hannah. Amey, the youngest daughter of John Hopkins, the cousin, died an infant, and without issue. John Dare also died, leaving one son, also named John Dare; and Francis Dare also died.—In 1772, Mr. Benjamin Bond Hopkins suffered a recovery of the estates, and declared the use to himself in fee simple. In Michaelmas term in the same year, he filed a supplemental bill in chancery against the trustees of the real and personal estate of the testator John Hopkins, and his heirs at law and devisees in remainder, and prayed thereby that the real estates might be conveyed to him and his heirs. On the 8th July 1774, the cause was heard before lord chancellor Bathurst, and his lordship thereupon finally ordered, that the trustees should convey the real estates to Benjamin Bond Hopkins, and his heirs, or as he should appoint.—In the execution of powers, too rigid an adherence to the form prescribed cannot be observed: but it is not necessary that the words, or even the form of the power, should

should be used, if the material circumstances of the power are pursued, and the party appears to have had the subject of his power in contemplation. By a series of acknowledged authorities it is settled beyond all doubt, first, that, to a valid exercise of a power, a reference to or notice of that power is not necessary, if it sufficiently appears that the party intends exercising it: Secondly, that it is considered as sufficient evidence of the party's intention to exercise the power, if his intention appears to be, to do that act, which his power authorizes him to do, but which he is not authorized to do, without resorting to his power. Thus, where tenant for life, with several remainders over in strict settlement, and with a general power of revocation and new appointment, conveys to a purchaser by lease and release, bargain and sale, or feoffment, without noticing his power, it is a valid, but a very informal and improper execution of the power; for the party cannot vest the fee in the purchaser without resorting to his power, it is therefore evident he intends exercising it; and consequently if the formalities prescribed by the power are pursued, it will be considered as a substantial execution of the power. Still it is necessary that it should appear to be the intention of the party to exercise the power; and therefore, generally speaking, it is necessary he should mention the property which is the subject of the power. See sir Edward Clere's case, 6 Rep. 17. b. 12 Mod. 469. Guy *v.* Dormer, sir Tho. Raymond, 295. Snape *v.* Turton, 2 Roll. Abr. 263. Fitzwilliam's case, Moore, 681. Kibbett *v.* Lee, Hob. 312. Fitzgerald *v.* lord Fauconberge, Fitzgibbon, 207—215. Tomlinson *v.* Dighton, 1 P. W. 149. Jenkins *v.* Kemishe, Hard. 395. 1 Lev. 150. Campbell *v.* Leach, Amb. 740. Molton *v.* Hutchinson, 1 Atk. 558. and ex parte George Caswall, ibid. 559.—In all cases, however, where there is an informal execution of a power, it operates in the mode in which the power operates, not in the mode in which the deed, the form of which is used, would operate. If, therefore, a person having a power of appointment, conveys by lease and release, and these can only have effect, as an execution of a power, the conveyance operates as an appointment, and not as a release; and of course, if it is a release to *A.* and his heirs, to the use of *B.* and his heirs, the legal estate is vested in *A.*

In the exercise of powers, conveyancers have introduced two precautions, which are often proper, but certainly sometimes superabundant: one is, to make the party exercising the power, declare, that he acts, not only in exercise of that particular power, but in exercise of every other power, enabling him to do the act in question: the other is, where the party has a special power over land, and is also entitled to the fee, or to any particular estate carved out of it, he is made not only to exercise his power, but also to convey the land as owner of it. Thus, where a person having a power of appointment, intends conveying his estate to a purchaser, he is made not only to appoint the fee, but to convey it by lease and release. Sometimes the appointment and the release are blended together; but this is very informal, and is always improper, where it is not the intent of the deed that the party should have the legal estate. It may however be contended, that the court would marshal the words, so as to give them all their intended effect; as, where a person having a power, is made to grant, bargain, sell, alien, release, limit, appoint, and confirm the lands to *A.* and his heirs, to the use of *B.* and his heirs; it may be contended, that the court would construe the words *grant*, *bargain*, *sell*, *alien*, *release* and *confirm*, as referrible to *A.* and his heirs, and the words *limit* and *appoint* as referrible to *B.* and his heirs. See Cox *v.* Chamberlain, 4 Ves. jun. 631. Roach *v.* Wadham, 6 East, 289. One reason for making the party in these cases both convey and appoint, is, that, if the power either was not well created, or is become suspended, and he has himself any estate in the land, the conveyance will operate on his estate.

In some cases, it is necessary both to appoint and convey; as where an estate is limited to *A.* for life, remainder to such uses as he shall appoint; here the appointment would operate only on the reversion expectant on the life estate:

a conveyance

a conveyance therefore is necessary to pass the life estate. This observation may serve to correct a mistake which is sometimes made by those who levy fines, with a view to enable them to dispose of their estates, and therefore direct the fine to operate to the use of the party himself during his life, remainder to his wife for life, remainder to such uses as he shall appoint. Here the appointment operates only on the reversion, and consequently, to pass the wife's life estate, a new fine is necessary. To prevent this, the power of appointment, in these cases, should precede the uses. For the same reason, when a settlement is executed of personal estate, which it is intended to subject to the appointment of the husband and wife, or either, with successive life estates to them in default of appointment, the power should precede the trusts conferring these life interests on them.

It may be observed, that, when a person creates a power of appointment, to enable him to dispose of his estate, within a short time after, it is better to vest the legal estate in the trustees, by conveying it unto and to the use of them, and their heirs, upon trust to convey it as the party shall appoint, than to convey it to the trustees and their heirs, to such uses as the party shall appoint; for powers are liable to be suspended and extinguished by very secret acts; of these, from their nature, purchasers must often be ignorant. In these cases, therefore, they often rest, in some measure at least, on the honour of the vendor; but, when the legal estate is vested in the trustees, a conveyance from them will, at all events, give the purchasers the legal estate.

As estates created by powers, and estates created by conveyances, are after their creation the same, the terms expressing the operation of appointments and conveyances, are very often, both in the deeds creating the powers, and the deeds by which they are exercised, confounded. Something of this, was, till lately, generally discernible in the best drawn marriage settlements. Thus, in the power of leasing, the party is authorized to grant, lease, or demise, when, in fact, he can neither grant, lease, or demise for a longer term than his own life; the power therefore does not authorize him to grant, &c. the lands, but to appoint the use of the lands, for the number of years or lives in question: the expression therefore should be, to limit or appoint by way of lease or demise. So, in the power of selling and exchanging, it is often said, that it shall be lawful for the trustees to grant, bargain, sell, release, and confirm the lands; but, in the strict sense of these words, it is impossible for the trustees to grant, bargain, sell, release, or confirm; for the trustees have no actual estate, except their estate for preserving contingent remainders; and therefore, cannot convey the lands for a larger term. The power therefore operating as an appointment of the whole fee, the expression here, as in the former case, should be, *limit and appoint*. As this last power amounts to a total determination of all the subsisting uses, and a creation of an entire new estate of inheritance, it seems advisable to accompany it with a power of revocation. It may therefore be expressed, that it shall be lawful for the trustees to sell and exchange, and, for that purpose, to revoke the uses of the deed, and to appoint new uses; and the more general these powers of revocation and new appointment are expressed, the better, as a mere power to revoke the uses of the estate intended to be sold, and to appoint it to the purchaser, is sometimes found insufficient to answer the object, as where there is an agreement between the vendor and vendee to apportion rents. It is also a consequence of these powers operating by way of appointment, that the use is vested by them in the appointee, and, therefore, when by them the lands are expressed to be conveyed to *A.* and his heirs, to the use of *B.* and his heirs, or to the use of *B.* for life, with remainders over, the whole legal fee is vested in *A.* and the uses declared upon it have effect only as trusts in equity. The appointment therefore should be immediately to the use of the persons intended to take beneficially under the proposed instrument.

It is observable, that powers of leasing, and of selling and exchanging, are generally

generally limited to the persons to whom they are intended to be given, and the survivor of them, *and the heirs of the survivor:* it is a necessary consequence of this, that, if the power becomes vested in the heir of the survivor, and that heir is an infant, the power cannot be exercised during his minority. By the act 7 Ann. c. 19, infant trustees, by the direction of the court of chancery, signified by order upon petition, are empowered to convey estates held by them in trust. But infants cannot convey under a power, without an act of parliament. To avoid this inconvenience, it is advisable to limit the power in question to the executors or administrators of the survivor. This observation, however, is confined to the case of powers, and does not extend to the cases of trusts, where the legal estate is vested in trustees; for the trust should always follow the legal estate of the land, when it is conveyed to, and intended to reside in, the trustees. It should consequently be vested in those persons upon whom the lands are intended to devolve. Where therefore lands are conveyed unto and to the use of trustees and their heirs in trust to sell; as the lands necessarily devolve on the survivor, and the heirs and assigns of the survivor, the trust should in like manner be limited to the survivor, his heirs and assigns.

It often happens that the same deed contains several powers; and, supposing all or even more than one of them, to be executed, there is, at least, ground to argue that, generally speaking, the use limited by the power last executed, will take place of all the uses created by the powers previously executed, unless the contrary is expressed or implied in the deed. In Moore, 788. lord Coke is made to say, that if a tenant for life, with a power of leasing, and a general power of revocation, makes a lease under his power of leasing, he may afterwards revoke all but the leases. It is however to be observed, that when a power is exercised for a valuable consideration, in such a manner as shows it to be the intention and agreement of the parties, that the use created under it should not be over-reached by the execution of another power, it is contrary to equity, that it should be thus over-reached, and, consequently, the unexecuted powers may be so far affected, both at law and in equity, as to be subject to the use created under the executed power. To avoid all disputes upon these heads, it is necessary to express very clearly what uses are, and what uses are not, intended to be over-reached, by the execution of the powers, both as to the uses actually limited by the settlement itself, and as to the uses to be limited under the powers contained in that settlement. In a marriage settlement, the wife and the younger children of the marriage are principal objects. Unless therefore the parties intend the contrary, all the powers of charging with money should be declared to be subject and without prejudice to the provisions made for the wife and younger children. With respect to the other powers, the principal of these are the powers of leasing, and of selling and exchanging. As it is equally for the benefit of the persons entitled in remainder or reversion as of the tenant for life, that the estate should be properly let out upon leases, there is no reason why the estate of the wife, or any other person claiming in remainder or reversion, should be made paramount to the leases. With respect to the powers of selling and exchanging, the jointure of the wife, and the portions of the children, may be transferred to the estates to be acquired under those powers, and to the money arising from the sale of the settled estate, till the new estate is purchased: it is also to be observed, that the sales and exchanges cannot be made without the parents consent. There seems therefore no reason for exempting any of the uses, except the leases, from the exercise of that power; but, with respect to the leases, these, from their nature, cannot be transferred to the lands to be acquired under the powers, and consequently these should not be subject to the powers of selling and exchanging. The same objection lies, in a certain degree, to powers of raising money by way of mortgage. No person would advance money on mortgages of this nature, if they were to be made subject to the general powers of sale or exchange; and therefore, to prevent all doubt on this head, it should be declared, that the powers of selling and exchanging

exchanging should be subject to mortgages previously made, unless it shall be with the consent of the mortgagee; and that, in the case of such consent, the lands to be purchased, or taken in exchange, may be mortgaged to them for their security.

It often happens, that powers are given to parties to be exercised by them, when in the actual possession of the estate. In some cases, this is done without adverting sufficiently to the situation and probable wants of the parties. Suppose an estate devised by the husband to his wife for her life, remainder to her son for his life, with remainders over in strict settlement; with powers to the son, when in possession, to jointure and charge with portions. During the mother's life, the son is not in possession, and consequently is not in a situation to exercise those powers. Now, though it may be improper, and contrary to the intention of the parties, that the jointure to be made by the son should charge the mother's estate, during her life, against her consent, there can be no reason why it should not charge the estate with her consent; neither is there any objection to the son's being enabled to exercise the power in her life-time, provided the jointure do not take effect, so as to be payable or to charge the estate, till after her decease. It seems therefore advisable, that, in cases of this nature, the son should be entitled to exercise the powers, with the mother's consent, during her life, or to exercise them, without her consent, subject to her life estate. Sometimes, when the difficulty in question has arisen, it has been attempted to put the party in a situation to exercise the power by accelerating his possession of the estate. In one case this may be thought to answer the object intended; this is, where *A.* is tenant for life with the immediate remainder, (without any limitation to trustees), to *B.* for life, with a power to *B.* to jointure when in possession. Here, if *A.* surrenders to *B.* *B.* is, to all purposes, in possession of the estate, and may therefore be considered to be in a situation to exercise his powers. But, where there is an intermediate estate, this never can be relied on. If it is expressed in the deed, as it generally is, that it shall be lawful for the party to exercise the power when in possession under the limitations, and there is a limitation to trustees to preserve the contingent remainders, the first tenant for life can in no wise put the second tenant for life in possession of the estate but by an actual conveyance of his life estate; consequently the party will then be in possession, not by virtue of the limitations of the deed, but by the act of the first tenant for life. For, instead of being tenant in possession for his own life only, as he would be, if he was in possession under the limitations in the deed, he is tenant in possession for the life of another person, with a remainder for his own life; so that he has two estates which are perfectly distinct, and under the limitations of the settlement, he is only tenant for life in remainder. Where these words therefore are inserted, it seems clear the party is not in possession within the words or meaning of the deeds, and consequently not in a situation of exercising his power. Where these words are not inserted, it may be contended that they ought to be implied.

VII. 3. Before we proceed to the last head of this annotation, of the uses not executed by the statute, the following observations are offered on *USES OF RENTS.*—These are executed by the statute: so that, where lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.* or that *B.* and his heirs may receive a rent, the rent is executed. When therefore lands are conveyed to *A.* and his heirs, to the use, intent, and purpose, that *B.* and his heirs may receive a rent, with a declaration that *B.* and his heirs shall stand seised of the rent, to the use of *C.* for life, with remainders over; the rent is executed in *B.*, and then *C.* and the remainder-men take only the trust of the rent. If the estate be conveyed to *A.* and his heirs, to the use that *B.* may receive a rent for life; and after his decease, to the use that his first and other sons successively, and the heirs of their respective bodies, may receive the rent;

rent; these, it may be contended, are distinct rents; and therefore the rent to the second son may be considered too remote, as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections also may be made to recoveries suffered by the father and son, as the tenant to the præcipe being made by the father he will not be seised of that rent, in which the son's entail subsists. The way therefore to limit the rent is, to grant a rent to a stranger and his heirs, that he may re-grant it to the intended uses.

VIII. The remaining subject for observation is, *WHAT USES ARE NOT EXECUTED BY THE STATUTE.*

VIII. 1. As to *uses created by wills*, it is to be observed, that lands were not devisable at common law, otherwise than by local customs of particular places, except through the medium of a previous feoffment to uses. The *cestuy que trust* might dispose of the use by will: the court of chancery considered the will as a declaration of the use, and compelled the feoffees to convey the lands accordingly. But, when by the statute of the 27th Henry VIII. the possession was annexed to the use, as the use thereby became merged in the land, this indirect power of devising lands was absolutely lost. The 32 and 34 Hen. VIII. gave a power to devise the whole of lands held in socage, and two-thirds of lands held by knight's service. The 12 Car. II. converted knight's service into socage; and thus, all landed property, except that which is of the tenure of copyhold, became devisable. But, as the statute of uses preceded the statutes of wills, it does not necessarily extend to them. It is true, that the statute of uses speaks of persons seised to uses by virtue of wills: but this must apply either to those lands, which were devisable by custom;—as, when a person seised of lands devisable by custom, devised them to *A.* and his heirs, to the use of *B.* and his heirs:—or to uses at common law;—as where a feoffment was made to *A.* and his heirs, to the use of *B.* and his heirs, and *B.* devised the use. To uses of this description the statute extended; but it is difficult to conceive how uses created under the testamentary power given by the statutes of wills can be within the statute of uses. It is said, that though the law will not force the operation of the statute of uses upon devises to which it is the testator's intention it should not extend; yet it will apply it to those cases to which it is his intention it should extend. This opinion makes it depend entirely on the will of the testator, whether the statute of uses shall or shall not operate upon the devises of his will. Thus, if a devise is made to the use of *A.* for life, with remainders over, if it were to be considered as a limitation under the statute of uses, it would be void, for want of a seisin to serve the uses. It cannot therefore be the testator's intention that it should operate under that statute; consequently the law will not force it under that statute, but leave it solely to its effect under the statutes of wills. But, suppose a devise to *A.* and his heirs, to the use of *B.* and his heirs, that would be good to give the legal fee to *B.* as a limitation under the statute of uses. The testator therefore might intend, and the form of the devise shows he did intend, to raise an use under that statute, and the law, in conformity to his intentions, extends its operation to the devise. But, against this it may be argued, that a statute can never be considered as relating to any thing which did not exist at the time of its passing; and therefore, as lands were not devisable till some years after the statute of uses, the statute of uses cannot extend to uses created by devise: that in wills the testator's intention is chiefly considered; and as by a devise to *A.* and his heirs, to the use of *B.* and his heirs, the testator shows it to be his intention that *B.* should have the legal fee, the law will put that construction on the devise, and give it that operation. At the end of Mr. Hillyard's edition of Sheppard's Touchstone, there is a very learned opinion of the late Mr. Booth on the doctrine of uses. In two copies which the editor has seen of this opinion, made immediately under the eye of Mr.

Mr. Booth, and delivered by him to the persons in whose custody they now are, and also in a copy of it bequeathed by Mr. Booth, with his other valuable law manuscripts, to Mr. Holliday, the following note is added to it.—"P. S. Powers under wills are not like powers under conveyances operating "by way of use. The execution of a power under a devise, is not the limitation of a use; no, not where the devise is to uses: as where there is a devise "to *I. S.* and his heirs, to the use of *A.* for life, remainder to *B.* in tail, with "power for *A.* to limit a jointure, or lease, or charge; here there will be no "seisin in *I. S.* consequently no such use in *A.* or *B.* as is executed by "the statute of uses; consequently, the execution of the power is no use; it "operates as a devise under the statute of wills."—See Popham *v.* Bampfeild, 1 Vern. 79. Burchett *v.* Durdant, 2 Vent. 312. Broughton *v.* Langley, 2 Salk. 679. Gilb. Uses, 281.—But whether a devise to uses operates solely by the statute of wills, or by that statute jointly with the statute of uses, is, except where the devisee to uses dies in the lifetime of the testator, rather a matter of speculation than of use; as it is now settled, that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one for the benefit of another, the courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator.

VIII. 2. *With respect to copyhold estates*, the statute of uses does not extend to them, as it is against the nature of a copyhold tenure, that any person should be introduced into the estate without the consent of the lord. Gilbert's Tenures, 170.

VIII. 3. *With respect to leases for years*;—these estates are not executed by the statute. But this must be understood of leases actually in existence, at the time of their being assigned to the use. Therefore, if *A.* possessed of a lease for years, grants it over, or assigns it, to *B.* and *C.* to the use of *D.*; all the estate is in *B.* and *C.*, and *D.* takes only a trust, or equitable estate. But if *A.* being seised of lands in fee, makes a feoffment to the use of *B.* and *C.* for a term of years, this term is served out of the seisin of the feoffee, and is executed by the statute.—It is the same if he bargains and sells the estate, of which he is seised in fee, for a term of years. Gilb. Uses, 198. Dyer, 369. 2 Inst. 671.

Such are the general outlines of the doctrine of uses; one of the most important parts of the law, as all the landed property of the kingdom is, either directly or indirectly, regulated by it. It is to be observed, that one of the chief objects, both of the legislature and the judicature of this kingdom, in their regulations upon this subject, has been, on the one hand, to guard against those restraints upon alienation, which are incompatible with the welfare of a free and commercial country; and on the other, to admit of reasonable settlements and provisions being made for wives and children, and the general wants of families. Experience seems to show that they have accomplished their object. This fully answers the objections which foreigners make to the nature of our family settlements, that we exclude the ancestor, whose character is known to us, from the disposal of the property; and intrust it to the children, with whom we must be perfectly unacquainted.—So detrimental has an unqualified and unlimited power of settlement been found even in France, that it was, under the *ancien regime*, a question there, whether it would not be for the advantage of the nation at large, that all settlements and trusts should be abrogated. This question, so far as it related to moveables, was by the order of Louis XV. proposed in the year 1744 by the Chancellor D'Agueseau to all the parliaments and superior councils of France. See *Questions concernant les Substitutions, avec les Responses de touts les Parlemens et Cours Souverains du Royaume, et les Observations de M. le Chancelier D'Agueseau sur les dits Responses.* Toulouse, 1770. And see also *Commentaire de l'Ordonnance de Louis XV. sur les Substitutions, par Mons. Furgole. Paris*, 1767.

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ANOTHER cause they alleage, that if such land bee worth fortie shillings a yeare, &c. then such feoffor shall be sworn in assise and other enquests in plees reals, and also in plees personals, of what great sum soever the plaintiffe will declare, &c. And this is by the common law of the land.* Ergo, *this is for a great cause. And the cause is, for that the law will that such feoffors and their heires ought to occupie, &c. and take and enjoy all manner of profits, issues, and revenues, &c. as if the lands were their own, without interruption of the feoffees, notwithstanding such feoffment.* Ergo, *the same law giveth a privitie between such feoffors and the feoffees upon confidence, &c. for which causes they have said, that such releases made by such feoffees upon confidence to their feoffor or to his heirs, &c. so occupying the lands,† shall be good enough: and this is the better opinion, as it seemeth.*

‡ Quære, *for this seemeth no law at this day.*

(Ant. 156. b.) 28 H. 8. Dy. fol. 9. Vid. W. 2. cap. 38. L'estat. de 21 E. 1. de juratis ponendis in assisis, &c. (Fortescue, 62. a.)

BY the statute of 2 *H.* 5. cap. 3. statute 2, it is enacted, that, in three cases, he that passeth in an enquest, ought to have lands and tenements to the value of fortie shillings, *viz.* First, upon triall of the death of a man. Secondly, in plea reall betweene partie and partie. And thirdly, in plea personall, where the debt or the dammages in the declaration amount unto fortie markes (1). And it is worth the noting, that the judges that 27 El. c. 6. Ant. 157. a.)

were

* *&c.* not in L. and M. or Roh.
† *&c.* added in L. and M. and Roh.
‡ This paragraph not in L. and M. or Roh.

It is hoped, that the importance of the subject, will be thought a sufficient apology for the great length of the foregoing note. Lord chief baron Gilbert's Essay upon Uses and Trusts, considered in the only light in which it can be considered with justice to its author, as an unfinished sketch, is entitled to great commendation; it certainly contains several most profound and learned observations, but in many instances is very defective and erroneous. Its intrinsic value is greatly increased, by Mr. Sugden's recent edition of it. The want of a comprehensive and systematic treatise upon uses which was mentioned in a former edition of this note, is now supplied by Mr. Sanders's *Essay on Uses and Trusts.* The account given in that work of the Doctrine of Uses, as it stood before the stat. of 27 H. 8. is particularly interesting. The doctrine of *Powers* is exhausted by Mr. Sugden's treatise upon them. Had the public been in possession of these works before this annotation was submitted to them, it would not have been attempted.—[Note 231.]

(1) By 35 H. 8. c. 6. inhabitants of corporate towns worth 40*s.* in goods, may try felonies in sessions and gaol deliveries for such towns, and this is not repealed by subsequent statutes concerning jurors. 1 Vent. 366. The 4th and 5th W. and M. c. 24. requires that all trials in the courts at Westminster, or before the judges of *nisi prius*, oyer and terminer, or gaol delivery, or general sessions of the peace, must be by jurors, each worth 10*l. per annum*, of freehold or copyhold in the same county, if the trial be in England; and by jurors worth

were at the making of that statute did construe it by equitie: for where the statute speakes in the disjunctive debt or dammages, they adjudged that where the debt and damages amounted to fortie markes, that it was within the statute. *Fortescue* [*f*] saith, *Ubi damna vel debitum in personalibus actionibus non excedunt quadraginta marcas monetæ Anglicanæ, hinc non requiritur, quòd juratores in actionibus hujusmodi tantum expendere possint: habebunt tamen terram vel redditum ad valorem competentem, juxta discretionem justitiariorum, &c.* And forasmuch as at the time of the making of this statute, the greater part of the lands in England in those troublesome and dangerous times (when that unhappie controversie betweene the houses of Yorke and Lancaster was begun) were in use; and the statute was made to remedie a mischiefe, that the sheriffe used to return

[272. b.] ☞ simple men of small or no understanding; and therefore the statute provided that hee should returne sufficient men: and albeit in law the land was the feoffees, yet for that they had it but upon trust, and *cesty que use* tooke the whole profits, as our author here saith, and in equity and conscience the land was his, therefore the judges, for advancement and expedition of justice, extended the statute (against the letter) to *cesty que use*, and not to the feoffees (1).

9 H. 5. fol. 5.

[*f*] Fortesc. cap. 15.

15 H. 7. 13. b. 13 H. 7. 7. b. 5 E. 4. 7. a.

[*n*] But note, if a man hath a freehold *pur terme d'auter vie*, or is seised in his wife's right, and is returned on a jurie, yet if after he be returned, *cesty que vie*, or his wife die, hee may be challenged; and so it is if after the returne the lands be evicted.

[*n*] 3 H. 6. 39. Challeng. 19. 21 H. 6. 39. (Ant. 157. a.)

"*And this is by the common law.*" Here three things are to be observed. First, that the surest construction of a statute, is by the rule and reason of the common law. Secondly, that uses were at the common law. Thirdly, that now seeing the statute [*g*] of 27 *H.* 8. *cap.* 10. which hath beene enacted since *Littleton* wrote, hath transferred the possession to the use, this case holdeth not at this day; but this latter opinion before that statute was good law, as *Littleton* here taketh it.

[*g*] 27 H. 8. cap. 10.

"*The same law giveth a privitie, &c.*" Hereof it followeth, that when the law gives to any man any estate or possession, the law giveth also a privitie and other necessaries to the same, and *Littleton* concludeth it with an illative, *ergo, the same law giveth a privitie*, which is verie observable for a conclusion in other cases.

(8 Rep. 42. b.)

And the *(quære)* here made in the end of this Section is not in the originall, but added by some other, and therefore to be rejected.

(Ante, 156. b.)

Also since *Littleton* wrote, the said statute of 2 *H.* 5. is altered: for where that statute limited fortie shillings, now a latter statute hath raised it to foure pounds, and so it ought to be contained in the *venire facias*.

27 El. cap. 6.

Nota,

worth 6*l. per annum*, if in Wales; and talesmen must have 5*l. per annum* in England, and 3*l. per annum* in Wales, excepting strangers returned *propter medietatem linguæ*.—But by the 4th and 5th Ann. c. 16. no hundreders are required except in prosecutions criminal, and on penal statutes, because in other cases the *venire* shall be *de corpore comitatûs*.—[Note 232.]

(1) See lord Bacon's reading on the statute of uses, p. 8. *accord.* edit. 1785.

Pl. Com. 352. b. in Delamere's case, and 349.b. Lib. 1. fol. 121, 122. 127. 140. in Chudleye's case. Lib. 2. fol. 58. 78. Lib. 6. fol. 64. Lib. 7. fol. 13. & 34.

Nota, an use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collaterall, annexed in privitie to the estate of the land, and to the person touching the land, *scilicet*, that *cesty que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cesty que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedie by the common law, but for breach of trust, his remedie was only by *subpœna* in chancerie; and yet the judges, for the cause aforesaid, made the said construction upon the said statute.

Fortesc. cap. 25, 26, 27.

Now how jurors shall bee returned, both in common plees, and also in plees of the crowne, and in what manner evidence shall be given to them, and how they shall be kept, untill they give their verdict, you may read in *Fortescue*, and therefore need not to be here inserted.

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ALSO, releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to whom the release is made. (1) *As if I let certaine land to one for terme of yeares, by force whereof hee is in possession, and after I release to him all the right which I have in the land without putting more words in the deed, and deliver to him the deed, then hath hee an estate but for terme of his life. And the reason is, for that when the reversion or remaynder is in a man who will by his release inlarge the estate of the tenant, &c. hee shall have no greater estate, but in such manner and forme as if such lessor were seised in fee* (il n'avera pluis greinder estate, mes en * tiel manner et forme sicome † tiel feoffor fuit seisie en fee), *and by his deed will make an estate to one in a certain forme, and deliver to him seisin by force of the same deed: if in such deed of feoffement there be not any word of inheritance,* ‡ *then he hath but an estate*

* tiel—la, *L. and M. and Roh.*
† si *added in L. and M. and Roh.*
‡ *&c.* added in L. and M. and Roh.

(1) Here Littleton treats of releases which operate by enlargement of the estate of the releasee. To make releases operate in this manner, it is necessary that the releasee, at the time the release is made, should be in actual possession of, or should have a vested interest in, the lands intended to be released; that there should be a privity between him and the releasor; and that the possession of the releasee should be notorious. Hence it is said, that a person, who is tenant by sufferance, is not capable of a release to operate by enlargement. But a tenant in dower or by the courtesy is capable of that species of release, as they have notoriety of possession, and privity of estate, with respect to the releasor. See Roll. Abr. 400, 401. and Gilb. Ten. To the circumstance requiring the possession of the releasee to be notorious, the statute of uses furnishes an exception exemplified in the effect, which is allowed to the conveyance by bargain and sale for a year, and a release to enlarge that estate. At the common law, till entry or attornment, the lessee was not capable of a release. A bargainee has a vested interest immediately after the execution of the bargain and sale, without any entry, attornment, or other act of notoriety whatsoever.—[Note 233.]

estate for life; and so it is in such releases made by ‖ *those in the reversion or in the remainder. For if I let land to a man for terme of his life, and after I release to him all my right without more saying in the release, his estate is not enlarged. But if I release to him and to his heires, then he hath a fee simple; and if I release to him and to his heires of his bodie begotten, then hee hath a fee taile, &c. And so it behoveth to specifie in the deed what estate hee to whom the release is made shall have.*

IT is a certaine rule, that when a release doth enure by way of enlarging of an estate, that there must be privitie of estate, as betweene lessor and lessee, donor and donee. For if *A.* make a lease to *B.* for life, and the ☞ lessee maketh a lease for yeares, and after *A.* releaseth to the lessee for yeares, and his heires, this release is void to enlarge the estate, because there is no privity betweene *A.* and the lessee for yeares. Flet. lib. 5. cap. 34. 15 H. 7. 14. 22 E. 4. 4. [273. a.] (Post. 296. a.)

If a man make a lease for twenty yeares, and the lessee make a lease for ten yeares, if the first lessor doth release to the second lessee, and his heires, this release is void for the cause aforesaid. (Ant. 270. a.)

For the same cause, if the donee in taile make a lease for his owne life, and the donor release to the lessee and his heires, this release is void to enlarge the estate.

And as privity is necessarie in this case, so privity only is not sufficient. As if an infant make a lease for life, and the lessee granteth over his estate with warranty, the infant at full age bringeth a *dum fuit infra ætatem*, the tenant voucheth his grantor, who entereth into warranty, the demandant releaseth to him and his heires; here is privitie in law, and a tenancie in supposition of law: and yet because hee *in rei veritate* hath no estate, it cannot enure to him by way of inlargement; for how can his estate be inlarged that hath not any? (Ant. 264. a. Post. 285. b. Sect. 490, 491.)

If a tenant by the courtesie grant over his estate, yet he is tenant as to an action of waste, attornement, &c. and yet a release to him and his heires cannot enure to enlarge his estate that hath no estate at all. (Ant. 53. a. 54. a.)

But if a man make a lease for yeares, the remainder for life, a release by the lessor to the lessee for yeares, and to his heires, is good, for that he hath both a privity and an estate; and the release also to him in the remainder for life and his heires, is good also. (2 Roll. Abr. 400.)

If I grant the reversion of my tenant for life to another for life, now shall not I have an action of waste (2): but if I release to the grantee for life, and his heires, now he ☞ hath the fee simple, and shall punish the waste done after (1). 48 E. 3. 16. a. per Persay et Finchden. 41 E. 3. 17. a. 7 E. 4. 17. (Ant. 54. a.) [273. b.]

It is further to be observed, that to a release that enureth

‖ *by those*, not in L. and M. or Roh.

(2) Because no person is entitled to an action of waste, but he who has an estate immediate in remainder or reversion, expectant on the estate of the person committing waste. See ant. note 2. to page 218. b.—[Note 234.]

(1) By the release the tenant for life in reversion obtains the immediate reversion in fee.—[Note 235.]

enureth by way of enlargement of the estate, there is not only required privity, as hath beene said, and an estate also, but sufficient words in law to raise or create a new estate. If a man make a lease to *A.* for terme of the life of *B.* and after release to *A.* all his right in the land, by this *A.* hath an estate for terme of his own life; for a lease for terme of his owne life is higher in judgement of law than an estate for terme of another man's life.

(Ant. 42. a.)

16 H. 6. Release, 45. 22 E. 2. Release. Statham.

If a feme covert be tenant for life, a release to the husband and his heires is good, for there is both privity and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement [*a*]; for by the intermarriage he gaineth a freehold in his wife's right.

[*a*] 13 H. 4. 6. Staunf. prer. 7. b. 18 E. 4, 5. 22 Ass. 12. 11 H. 7. 19. 10 H. 6. 11.

"*All the right.*" *Vide* Sect. 650.

(Post. 299. a. Ant. 270. b.)

"*For terme of yeares.*" So it is if a release be made to tenant by statute staple, or merchant, or tenant by *elegit*, as hath beene said: and so likewise to gardeine in chivalrie which holdeth in for the value, by him in the reversion of all his right in the land, by this a freehold passeth for the life of him to whom the release is made, for that is the greatest estate that can passe without apt words of inheritance.

(1 Leo. 303. 323. Ant. 193. b.)

If a man make a lease for ten yeares, the remainder for twenty yeares, he in the remainder releaseth all his right to the lessee, he shall have an estate for thirty yeares; for one chattle cannot drowne another, and yeares cannot be consumed in yeares.

"*But if I release to him and to his heires, &c.*" Here it is to bee observed, that when a release doth enure by way of enlargement of an estate, no inheritance either in fee simple or fee taile, can passe without apt words of inheritance.

9 Eliz. Dier, 263. 10 Eliz. Bendloes. Litt. lib. 3. fol. 68, 69, 70. b. 130. b.

But there is a diversity betweene a release that enureth by way of enlargement of the state and by way of *mitter l'estate* (2); for when an estate passeth by way of *mitter l'estate*, there sometime there need not any words of inheritance. As if a joynt estate be made to the husband and to his wife, and to a third person and to their heires, the third person releaseth all his right to the husband, this shall enure by way of *mitter l'estate*, and not by way of enlargement of the estate, because the husband had a fee simple, and needeth not to have any words of inheritance. So it is if the release had been made to the wife.

See before in the chapter of Fee Simple, 9.

[*b*] 40 E. 3. 41. 46 E. 3. 19 H. 6. 33 H. 6. 5. 10 E. 4. 3.

[*b*] If there be three joyntenants, and one release to one of the

(2) Here the release operates by *mitter l'estate*; which is, where two persons come in by the same feudal contract, as joint-tenants or coparceners, and one of them releases to the other the benefit of it. In releases which operate by this last mode, the releasee being supposed to be already seised of the inheritance by virtue of the former feudal contract, and the release only operating as a discharge from the right or pretension of another seised under the same contract, words of inheritance in the release are useless; but, where the release operates by enlargement, the releasee having no such previous inheritance, and fiefs being either for life or in fee, as they are originally granted, the release gives the estate to the releasee for his life only, unless it be expressly made to him and his heirs.—[Note 236.]

the other all his right, this enureth by way of *mitter l'estate*, and passeth the whole fee simple without these words (heires). But if there be two joyntenants, and the one of them release all his right to the other, this doth not to all purposes enure by way of *mitter l'estate*, for it maketh no degree, and hee to whom the release is made shall for many purposes be adjudged in from the first feoffor, and this release shall vest all in the other joyntenant without these words (heires).

But if there be two coparceners, and the one release all his right to the other, this shall enure by way of *mitter l'estate*, and shall make a degree, and without these words (heires) shall passe the whole fee simple. And it is to be observed, that to releases that enure by way of *mitter l'estate*, there must be privity of estate at the time of the release.

10 E. 4. 3. b. 37 H. 8. tit. Alienation. Br. 31. 31 H. 4. 8. 40 Ass. 5. 9 Eliz. Dier, 263.

If two coparceners be of a rent, and the one of them take the ter-tenant to husband, the other may release to her, notwithstanding the rent be in suspence, and it shall enure by way of *mitter l'estate*, and she may release also to the ter-tenant, and that shall enure by way of extinguishment: but if she release to her sister and to her husband, it is good to bee seene how it shall enure.

(2 Roll. Abr. 403. 10 E. 4. 3. b.)

Littleton having now spoken of releases that enure by way of enlargement of the estate, and of releases that enure by way of *mitter l'estate*, proceedeth to releases that enure by way of *mitter le droit*. So as of that which hath beene and shall bee said by our author of releases, it appeareth that some doe enure by way of enlargement of estate, some by way of *mitter l'estate*, some by way of *mitter le droit*, by way of entrie and feoffment, and some by extinguishment.

Vid. Litt. fol. 68, 69. (8 H. 4. 8.) (Post. 230. a.)

[274. a.]

☞ Sect. 466.

ALSO, sometimes releases shall enure de mitter, *and vest the right of him which makes the release to him to whom the release is made. As if a man be disseised, and he releaseth to his disseisor all his right, in this case the disseisor hath his right, so as where before his state was wrongfull, now by this release it is made lawfull and right* (1).

"*AND he releaseth to his disseisor, &c.*" This release so putteth the right of the disseisee to the disseisor, that it changeth the quality of the estate of the disseisor; for where his estate

(1) Here Littleton treats of releases which operate by *mitter le droit*. Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor; and the uniting the right to the possession completes the title of the releasee; but the different degrees of title in the disseisor, his feoffee, or his heir, give the releases made to them different operations. They all agree in this respect, that no privity is required, or indeed can, from the nature of the case, exist between them and the releasor.—[Note 237.]

estate was before wrongfull, it is by this release made lawfull. But how farre, and to what respects his estate is changed, shall be said hereafter in this chapter in his proper place.

Sect. 467.

BUT here note, that when a man is seised in fee simple of any lands or tenements, and another will release to him all the right which he hath in the same tenements, he needeth not to speake of the heires of him to whom the release is made, for that he hath a fee simple at the time of the release made. For if the release was made to him for a day, or an hour, this shall be as strong to him in law as if he had released to him and his heirs. For when his right was once gone from him by his release without any condition, &c. to him that hath the fee simple, it is gone for ever.*

"HE *needeth not to speake of the heires, &c.*" And the reason of *Littleton* hereof is, for that the disseisor hath a fee simple at the time of the release made. And this appeareth by that (Post. 280. a.) which hath beene said before, so as regularly hee that hath a fee simple at the time of the release made of a right, &c. needeth not speake of his heires.

Vide 6 E. 3. 17. 12 E. 4. tit. Descent, F. 29.

"*For if the release was made to him for a day, &c.*" For the diversity is betweene a release of part of the estate of a right, and between a release of a right in part of the land. And therefore *Littleton* here saith, that a release of a right for a day or an houre is of as good force, as if he had released his right to him and his (Ant. 252. a.) heires. But if a man be disseised of two acres, he may release his right in one of them, and yet enter into the other.

"*Without any* ☞ *condition, &c.*" Herein is implyed two diversities: first, betweene the quantity of the estate in a right, and the quality thereof; for albeit the disseisee cannot release part of the estate, as hath beene said, yet may he release his right upon condition, as here it appeareth by *Littleton* [*c*], and it agreeth with our bookes. [274. b.]

[*c*] 4 E. 2. Release, 50. 43 Ass. 12. 17 Ass. 2. 31 Ass. 13. 21 H. 24.

Also here is another diversity betweene a right, whereof *Littleton* putteth his case, which is favoured in law, and a condition created by the party which is odious in law, for that it defeateth estates. And therefore if a condition be released upon condition, the release is good, and the condition void.

(6 Rep. 62. a. Post. 297. a. 300. b.)

What things may be done upon condition is too large a matter to handle in this place, our author having treated of Conditions before: only to give a touch of some things omitted there shall suffice. An expresse manumission of a villeine cannot be upon condition, for once free in that case, and ever free; also an attornment to a grantee upon condition, the condition is void because the grant is once settled. But this is to be understood of a condition subsequent, and not of a condition precedent; for

Rot. Parliament 18 H. 6. num. 29 Ap. Gwilliam's case. 10 E. 3. cap. 2. 3 H. 7. f. 6.

in

* *and to his heirs* added in L. and M. and Roh.

in both those cases the condition precedent is good. But letters patents of denization made to an alien, may be either upon condition subsequent or precedent; and so may the king make a charter of pardon to a man of his life upon condition, as is abovesaid.

Sect. 468.

(2 Roll. Abr. 400.)

BUT where a man hath a reversion in fee simple (Mes lou* home ad un reversion en fee simple), *or a remainder in fee simple, at the time of the release made, there if he will release to the tenant for yeares, or for life, or to the tenant in taile, hee ought to determine the estate which he to whom the release is made shal have by force of the same release, for that such release shall enure to enlarge the estate of him to whom the release is made* † (1).

Of this sufficient hath beene said before.

Sect. 469.

BUT otherwise it is where a man hath but a right to the land, and hath nothing in the reversion nor in the remainder in deed. For if such a man release all his right to one which is tenant in the freehold, all his right is gone, albeit no mention be made of the heires of him to whom the release is made. For if I let lands ‖ *to one for terme of his* [275. a.] *life, if I after release* ☞ *to him to enlarge his estate, it behoveth that I release to him and to his heires of his body engendered,* § *or to him and his heires, or by these words, To have and to hold to him and to his heires* ⸸ *of his bodie engendred,* ‡ *or to the heirs male of his bodie engendred, or such like estates, or otherwise hee hath no greater estate than hee had before.*

"*TO one which is tenant of the freehold.*" Here it appeareth, that to a release of a right, made to any that hath an estate of freehold in deed or in law, no privitie at all is requisite. As if a disseisor (Ant. 266.)

* home—un, *L. and M. and Roh.*

† *&c.* added in L. and M. and Roh.

‖ *or tenements* added in L. and M. and Roh.

§ *or* not in L. and M. or Roh.

⸸ *male* added in L. and M. and Roh.

‡ *or to the heirs male of his body engendred*, not in L. and M. or Roh.

(1) All releases *per mitter le droit* also agree in this, that words of inheritance are not necessary in releases which operate by *mitter le droit*; as the disseisor, to whom, or to whose feoffee, or heir, that release is made, acquires the fee by the disseisin, and therefore cannot take it under the release. In this respect they differ from releases by enlargement. – [Note 238.]

a disseisor make a lease for life, if the disseisee release to the lessee, this is good, and directly within the rule of *Littleton*, because the lessee hath an estate of freehold, albeit there be no privitie. And so it is if a disseisor make a lease to *A.* and his heires during the life of *B.* and *A.* dieth, a release by the disseisee to his heire, before hee doth actually enter, is good.

(Post. 327.)

Sect. 470.

BUT if my tenant for life letteth the same land over to another for terme of the life of his lessee, the remainder to another in fee, now if I release to him to whom my tenant made a lease for terme of life, I shall bee barred for ever (ore si jeo relessa a celuy a que mon tenant lessast pur terme de vie, § ceo serra barre a touts jours), *albeit that no mention be made of his heires, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release, and the remainder over, which my tenant made in this case, my reversion was discontinued,* ‖ *&c. and this release shall enure to him in the remainder, to have advantage of it, aswell as to the tenant for terme of life* (1).

(Post. 279.) *LITTLETON* having before spoken of releases which enure by way of enlargement, by way of *mitter l'estate*, and by way of *mitter le droit*, here speaketh of a release of a right which in some respects enureth by way of extinguishment; as in this case which *Littleton* here putteth, the release to the lessee of the lessee doth not enure by way of *mitter le droit*, for then should he have the whole right, but as it were by way of extinguishment, in respect of him that made the release, and that it shall enure to him in the remainder, which is a qualitie of an inheritance ☞ extinguished.' But yet the right is not extinct in deed, as shall be said hereafter in this chapter. [275. b.]

(Post. 327. b.) "*My reversion was discontinued, &c.*" Here discontinue is in a large sense taken for devested, though the entrie of the lessor be not taken away, which is implyed in this *(&c.)*

Sect.

§ ceo—jeo, *L. and M. and Roh.* ‖ *&c.* not in L. and M. or Roh.

(1) Here Littleton shows the operation of a release *per mitter le droit*, when made to the feoffee of the disseisor. The feoffee is in by title; his estate cannot be devested or disaffirmed, but by an act equal to that which created it. A release does not affect his possession or title, but discharges it from the right of the releasor; so that whether the whole fee is in the feoffee, or carved out into particular estates, it remains unaltered by the release, except as it is discharged by it from the right of the releasor.—[Note 239.]

Sect. 471.

FOR to this intent the tenant for terme of life and he in the remainder are as one tenant in law, and are as if one tenant were sole seised in his demesne as of fee at the time of such release made unto him, &c.

"*ARE as one tenant in law.*" Which is certainly true in this case of remainder, and so it is also in case of a reversion; as if a disseisor make a lease for life, and the disseisee doth release all his right to the lessee, this release shall enure to him in the reversion, albeit they have severall estates, as hath beene said, which is implyed in this (*&c.*)

But if a disseisor make a lease for life, the remainder in fee, albeit they to some purposes (as here is said) are as one tenant in law, yet if the disseisee release all actions to the tenant for life, after the death of the tenant for life, he in the remainder shall not take benefit of this release, for it extended only to the tenant for life, as it is holden [*a*] in *Edward Altham's* case. And in like manner, if the disseisor make a lease for life, and the disseisee release all actions to the lessee, this inureth not to him in the reversion; and so our author is to be understood of a release of rights, and not of a release of actions, to the tenant for life, as to or for the benefit of him in the remainder or reversion.

[a] Lib. 8. fol. 148. Edw. Altham's case. (Post.Sect.494.)

Sect. 472.

ALSO, if a man be disseised by two, if he release to one of them (1), *hee shall hold his companion out of the land, and by such release hee shall have the sole possession and estate in the land. But if a disseisor infeoffe two in fee, and the disseisee release to one of the feoffees, this shal inure to both the feoffees, and the cause of the diversity between these two cases is pregnant enough. * For that they come in by feoffment, and the others by wrong, &c.*

"*IF a man be disseised, &c.*" This is to bee understood where tenant in fee simple is disseised and release; for if tenant for 21 H. 6. 41. (Ant. 194. a. b.)

* The remainder of this Section not in L. and M. or Roh.

(1) Here the release is to the disseisors themselves. They have only a bare possession, preceded by no previous conveyance, and founded on no right or title, and therefore the release of the disseisee who has the right, passes the right to the disseisor to whom it is made, and his holding out his companion is an act of notoriety equal to that by which the joint estate by disseisin was originally acquired. Thus the possession of each of the estates being founded on an equal degree of wrongful title, the disseisor to whom the release is made, having the right, must be preferred to him who has none: so that, in this case, the release is tantamount to an actual entry and feoffment.—[Note 240.]

for life be disseised by two, and he releaseth to one of them, this shall inure to them both; for he to whom the release is made, hath a longer estate than hee that releaseth, and therefore cannot inure to him alone, to hold out his companion, for then should the release inure by way of entrie and grant of his estate; and consequently the disseisor, to whom the release is made, should become tenant for life, and the reversion revested in the lessor [b], which strange transmutation and change of estates in this case the law will not suffer. But if lessee for yeares be ousted, and he in the ☞ reversion disseised, and the lessee release to the disseisor, the disseisee may enter, for the terme of yeares is extinct and determined. But otherwise it is in case of a lessee for life, for the disseisor hath a freehold, whereupon the release of tenant for life may enure; but the disseisor hath no terme for yeares, whereupon the release of the lessee for yeares may enure.

[b] 13 E. 4. tit. Discent, F. 29.

[276. a.]

(Ant. 265. b. Ant. 239. a.)

And so it is if donee in taile be disseised by two, and releaseth to one of them, it shall enure to them both. But if the king's tenant for life be disseised by two, and he releaseth to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. So if two joyntenants make a lease for life, and after doe disseise the tenant for life, and he release to one of them, he shall hold out his companion, for the disseisin was but of an estate for life.

If tenant for life be disseised by two, and he in the reversion and tenant for life joyne in a release to one of the disseisors, he shall hold his companion out, and yet it cannot enure by way of entrie and feoffment. But if they severally release their severall rights, their severall releases shall enure to both the disseisors.

But here in *Littleton*'s case, where tenant in fee simple is disseised by two, and releaseth to one of them, this for many purposes enureth by way of entrie and feoffment, and therefore he to whom the release is made shall hold out his companion, and be made sole tenant of the fee simple. And this holdeth not only in case of a disseisin, but also in case of intrusion and abatement: but necessarily he to whom the release is made must bee in by wrong, and not by title.

If two men doe gaine an advowson by usurpation, and the right patron releaseth to one of them, he shall not hold out his companion, but it shall enure to them both; for seeing their clerke came in by admission and institution, which are judiciall acts, they are not merely in by wrong: for an usurpation shall cause a remitter, as it appeareth in *F. N. B.* 31. *m.*

19 H. 6. 22. 38 H. 6. 28. Case de occupant. (Ant. 42. b.)

But if a lease for life be made, the remainder for life, the remainder in fee, and he in remainder for life disseiseth the tenant for life, and then tenant for life dieth, the disseisin is purged, and he in the remainder for life hath but an estate for life. And so note a diversitie where the particular estate for life is precedent, and when subsequent.

Where our author putteth his case of one disseised, put the case that two joyntenants in fee be disseised by two, and one of the disseisees release to one of the disseisors all his right, he shall not hold out his companion, because the release is but of the moytie, without any certaintie. If a man be disseised by two women, and one of them take husband, and the disseisee release to the husband, this shall enure to the advantage of both the

the disseisors, because the husband was no wrong doer, but in a manner in by title. (Post. 278. a.)

" *Hee shall have the sole possession and estate.*" If two disseisors be, and they make a lease for life, and the disseisee release to one of them, this shall enure to them both, and to the benefit of the lessee for life also; for he cannot by the release have the sole possession and estate, for part of the estate is in another.

And so it is (as it seemeth) if the disseisors make a lease for yeares, and the disseisee release to one of them, this shall enure to them both, for by the release he cannot have the sole possession: and it appeareth by *Littleton*, that he must have the sole possession, and hold his companion out. But the morgagee upon condition, having broken the condition, is disseised by two, the morgagor having title of entrie for the condition broken, release to the one disseisor, albeit they be in by wrong, yet the release shall enure to them both for two causes: first, for that they are not wrong doers to the morgagor, but to the morgagee; and by *Littleton*'s case it appeareth, that wrong is done to him that made the release: secondly, that hee that makes the release hath but a title by force of a condition, and *Littleton*'s case is of a right. Like law of an entrie for mortmaine, or a consent to ravishment, &c.

" *But if a disseisor infeoffe two, &c.*" And the reason of this diversitie is, for that the feoffees are in by title, and are presumed to have a warrantie, which is much favoured in law, and the disseisors are meerely in by wrong. And the equitie of the law doth preserve in this case the benefit of the estranger to the release comming in by one joynt title. 21 H. 6. 41. (Ant. 194. b. 5 Rep. 70.)

" *For that they come in by feoffment, and the others by wrong.*" This is of a new addition, and not in the originall, and therefore I passe it over.

[276. b.]

☞ Sect. 473.

ALSO, if I bee disseised, and my disseisor is disseised, if I release to the disseisor of my disseisor, I shall not have an assise nor enter upon * *the disseisor, because his disseisor hath my right by my release, &c.* † *And so it seemeth in this case, if there be xx. disseised one after another, and I release to the last disseisor,* ‡ *this disseisor shall barre all the others of their actions and their titles. And the cause is,* § *as it seemeth, for that in many cases, when a man hath lawfull title of entrie, although he doth not enter, he shall defeat all meane titles by his release* (quant un home ad loyal title d'entre, ‖ coment que il n'entra pas, il defeatera touts meane titles

* *the—his*, in L. and M. and Roh.

† *And* not in L. and M. or Roh.

‡ *this disseisor—he*, L. and M. and Roh.

§ *as it seemeth*, not in L. and M. or Roh.

‖ coment que il n'entra pas—et entre, *L. and M. and Roh.*

titles per son release), *&c. But this holds not in everie case* (mes ceo n'est ¶ my en chescun case), *as shall be said hereafter* (1).

HERE it is to be observed, that a release by one whose entry is lawfull to him that is in by wrong, shall purge and take away all meane estates and titles. And where our author first putteth his case of two estates by wrong, and after of twentie disseisins, all estates be wrong.

(Post. 277. b. 278. a.) 21 H. 6. 41. 11 H. 4. 33. 9 H. 7. 25. 2 E. 4. 16. 21 E. 4. 78.

If *A.* disseise *B.* who enfeoffeth *C.* with warrantie, who enfeoffeth *D.* with warrantie, and *E.* disseiseth *D.* to whom *B.* the first disseisee releaseth, this doth defeat all the meane estates and warranties, because the release of *B.* is made to a disseisor, and his entrie is lawfull.

12 Ass. 22. Vide 3 H. 6. 38.

Sect. 474.

ALSO, if my disseisor letteth the tenements whereof he disseised mee to another (a un * auter home) *for terme of life, and after the tenant for terme of life alieneth in fee, and I release to the alienee, &c. then my disseisor cannot enter* causâ quâ suprà, *albeit that at one time the alienation was to his disinheritance, &c.*

"*ALSO, if my disseisor letteth, &c.*" If the disseisor make a lease for life, and the lessee maketh a feoffment in fee, and the disseisee releaseth to the feoffee, the disseisor shall not enter upon the feoffee; for albeit the release to one joynt feoffee of a disseisor, as hath beene said, shall not exclude the other, yet a release to the feoffee of a tenant for life in this case shall take away the entrie of the disseisor for the alienation which was made to his ☞ disinheritance, hee having the inheritance by disseisin, so as hee could have no warranty annexed to it, and tenant for life hath forfeited his estate. But if the entrie of the disseisee were not lawfull, it is otherwise. As if a man make a lease for life, and the lessee for life is disseised, and that disseisor is disseised, and he in the reversion releaseth to the second disseisor, the first disseisor shall enter upon the second disseisor, and his entry is lawfull; and if the lessee for life re-enter, he shall leave the reversion in the first disseisor; and the cause is, for that the entry of the disseisor (A) at the time of the release made was not lawfull. And the

[277. a.]

(8 Rep. 148. Sect. 447. 6 Rep. 70. Hob. 279.)

(A) disseisor *seems to be here printed by mistake instead of* disseisee. *See Mr. Ritso's Intr. p.* 119.

¶ my—pas, *L. and M. and Roh.* * auter *not in L. and M. or Roh.*

(1) This is upon the same principle, that, where the title to the possession is equal, the party who obtains the right shall be preferred.—So, by the modern law, where the equity of the parties is equal, he who has the law, is to be preferred.—[Note 241.]

the booke of [m] 9 *H.* 7. 25. is to be intended (B) of an estate taile *mutatis mutandis*. [m] 9 H. 7. 25.

If, in the case aforesaid, the disseisor make a lease for life, and the lessee infeoffeth two, and the disseisee release to one of the feoffees, this shall barre the disseisor, as hath beene said; but yet he shall not hold out his companion for the cause aforesaid.

Sect. 475.

ALSO, if a man be disseised, who hath a sonne within age and dieth, and the sonne being within age the disseisor dieth seised, and the land descend to his heire (1), *and a stranger abate, and after the sonne of the disseisee, when hee commeth to his full age, releaseth all his right to the abator; in this case the heire of the disseisor shall not have an assise of mor-d'ancester against the abator; but shall be barred* (en cest case l'heire le disseisor n'avera assise de mor-d'ancester envers l'abator, mes serra bar,*) *because the abator hath the right of the sonne of the disseisee by his release, and the entry of the sonne was congeable,* † *for that hee was within age at the time of the discent, &c.*

THE reason of this case is, for that the entry of the heire is congeable, and the abator is in the land by wrong.

"*Abate*," is both an English and French word, and signifieth in his proper sense to diminish or take away, as here by his entrie he diminisheth and taketh away, the freehold in law descended to the heire: and so it is said to abate an account, signifying subtraction or withdrawing, &c. and to abate the courage of a man. In another sense it signifyeth to prostrate, beat downe, or overthrow, as to abate castles, houses, and the like, and to abate a writ; and hereof commeth a word of art, *abatamentum*, which is an entrie by interposition. Now the difference *inter disseisinam, abatamentum*, Vet. N. B. 115. Britton, cap. 5 f. Bracton, lib. 4. cap. 2. F. N. B. 203. F. W. 1. ca. 17.

(B) *For it is not so* expressed *in any part of page* 25 *of the year book referred to; and in another place lord Coke, after observing that the case in* 9 *H.* 7. 25. *a. is misprinted, mentions what the reading should be according to the manuscript, which he had seen. See* 6 *Rep.* 70.

* d'assise *added in L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

(1) Littleton having treated of releases *per mitter le droit*, when made to the disseisors themselves and their feoffees, now treats of their operation when made to the heir of the disseisor. In note 1. to page 239. it was observed, that a disseisor has a mere naked possession, unsupported by any right, and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by entry. But, though the feoffee of the disseisor comes in by title, still the right of possession remains in the disseisee, and he may equally enter on the feoffee as on the disseisor; so that a release *per mitter le droit* gives both to the disseisor and his feoffee the right of possession and the right of property: but if the disseisor dies, the entry of the disseisee is taken away, and a presumptive right of possession is in the heir; so that the release of the disseisee only passes the right of property.—[Note 242.]

abatamentum, intrusionem, deforciamentum, et usurpationem, et purpresturam, is this:

A disseisin is a wrongfull putting out of him that is actually seised of a freehold. And abatement is when a man died seised of an estate of an inheritance, and betweene the death and the entry of the heire, an estranger doth interpose himselfe, and abate.

[n] F.N.B. 203. Fleta, li. 4. cap. 30.

Intrusion first properly [n] is, when the ancestor died seised of any estate of inheritance expectant upon a estate for life, and then tenant for life dieth, and between the death and the entry of the heire an estranger doth interpose himselfe and intrude.

[o] Pl. Com. case de mynes.

Secondly, [o] he that entreth upon any of the king's demesnes, and taketh the profits, is said to intrude upon the king's possession.

[p] F.N.B. 141. F. G. H.

☞ Thirdly, [p] when the heire in ward entreth at his full age without satisfaction for his mariage, the writ saith, *quòd intrusit.* [277. b.]

Deforciamentum comprehendeth not only these aforenamed, but any man that holdeth land whereunto another man hath right, be it by discent or purchase, is said to be a deforceor.

Usurpation hath two significations in the common law: one, when an estranger that no right hath presenteth to a church, and his clerke is admitted and instituted, hee is said to bee an usurper, and the wrongfull act that he hath done is called an usurpation.

Secondly, when any subject doth use, without lawfull warrant, royal franchises, he is said to usurpe upon the king those franchises.

[q] Glanvil. lib. 9. cap. 11. Britton, fol. 28, 29. (Cro. Car. 17. 2 Inst. 278.)

Purprestura, or *pourprestura*, a purpresture. [q] *Purprestura est, &c. generaliter quoties aliquid fit ad nocumentum regii tenementi, vel regiæ viæ (vel aliquarum publicarum) vel civitatis, &c.* And because it is properly when there is a house builded, or an enclosure made of any part of the king's demesnes, or of an highway, or a common street or publike water, or such like publike things, it is derived of the French word *pourpris*, which signifieth an inclosure, but specially applied, as is aforesaid, by the common law.

Sect. 476.

BUT if a man be disseised (Mes si * home soit disseisee), *and the disseisor maketh a feoffement upon condition*, viz. *to render to him a certaine rent, and for default of payment a re-entry, &c. if the disseisee release to the feoffee upon condition, yet this shall not amend the estate of the feoffee upon condition* (uncore ceo † n'amendra l'estate le feoffee sur condition); *for notwithstanding such release, yet his estate is upon condition, as it was before* (1).

‡ *And with this agreeth the opinion of all the justices*, Pasch. 9 H. 7.

HERE

* ascun *added in L. and M. and Roh.*

† n'amendra — ne abatera, *L. and M. and Roh.* ne alterast, *Pap. MS.* n'avoidera, *Vell. MS.*

‡ This paragraph not in L. and M. or Roh.

(1) The observations made on note 1. to page 275. a. note 1. to page 276. b. and the note to the preceding page, apply to the cases put by Littleton in this and

HERE the entry of the disseisee is congeable, and yet the release doth not avoid the condition, because the feoffee is in by title, as hath beene said, and may have a warranty (2). And herein our author expresseth a diversitie betweene a condition in law, and a condition in deed; for in the case before when the disseisee releaseth to the feoffee of the tenant for life, the condition in law is taken away, but otherwise it is in this case of a condition in deed. 9 H. 7. 25.

But if the feoffee upon condition make a feoffment in fee over without any condition, and the disseisee release to the second feoffee, the condition is destroyed by the release before the condition broken or after. For the state of the second feoffee was not upon any expresse condition, as *Littleton* here putteth his case, and he may have advantage of the release, because it is not against his owne proper acceptance, as *Littleton* speaketh in the next Section. (Sect. 415.) Lib. 1. f. 147. Mayowe's case.

But if it be a wrongfull title, such a title is taken away by a release; as if *A.* disseised *B.* to the use of *C.* *B.* release to *A.* this shall take away the agreement of *C.* to the disseisin, because it should make him a wrong doer: as if the disseisor be disseised, the disseisee releaseth to the second disseisee (C), this taketh away the right the first disseisor had against the second, and a relation of an estate gained by wrong shall never defeat an estate subsequent gained by right, against a single opinion, not affirmed by any other in one of our bookes. 14 H. 8. 18. per Port. (Ant. 271. a. 276. b.)

Sect. 477.

IN the same manner it is where a man is disseised of certaine lands, and the disseisor grant a rent-charge out of the same land, &c. albeit the disseisee doth afterwards release to the disseisor, &c. yet the rent-charge remaynes in force. And the reason in these two cases is this, that a man shall not have advantage by such release which shall bee against his proper acceptance, and against his own grant. And albeit some have said, that where the entry of a man is congeable upon a tenant, if hee releases to the same tenant, that this shall availe the tenant, as if he had entered upon the tenant, and after enfeoffed him, &c. this is not true in every case. For in the first case of these two cases aforesaid, if the disseisee had entered upon the feoffee upon condition, and after enfeoffed him, then is the condition wholly defeated and avoided. And so in the second case, if the disseisee entereth and enfeoffeth him who granted the rent-charge, then is the rent-charge taken away and avoided, but it is not void by any such release without entrie made, &c.

"*AND*

(C) disseisee *seems to be here printed by mistake instead of* disseisor. *See Mr. Ritso's Intr. p.* 119.

and the following Section, and by sir Edward Coke in his commentary. The whole of the doctrine contained in this chapter is particularly well explained by lord chief baron Gilbert in his treatise on tenures.—[Note 243.]

(2) *The reason of this case in the book here cited is, that the condition is like a covenant between them; and he is estopped from claiming it otherwise; and the diversity following seems to warrant this. Post.* 278. *b.*—Lord Nott. MSS. —[Note 244.]

"*AND the disseisor grant a rent-charge, &c.*" Here is implyed commons or any other ☞ profit out of the lands. And the reason is, because he shall not avoid his owne grant by a release hee himselfe hath acquired since the grant: but if the disseisor in that case be disseised, and the disseisee release to the second disseisor, he shall avoid it, as by that which hath beene said, *Sect.* 473, appeareth. So likewise if *A.* and *B.* bee joynt disseisors, and *B.* grant a rent-charge, and the disseisee release to *A.* all his right, *A.* shall avoid the rent-charge, because it was not granted by him, and so not within the reason of our author. [278. a.]

(6 Rep. 78. b.) (7 Rep. 38.) (Post. 349. a.) (Mo. 95.)

If there bee two femes joint disseisors, and the one taketh husband, and the disseisee release to the other, shee is sole seised, and shal hold out the husband and wife.

(Ant. 276. a.)

If two disseisors bee, and they infeoffe another, and take backe an estate for life or in fee, albeit they remaine disseisors to the disseisee as to have an assise against them, yet if he release to one of them, he shall not hold out his companion, because their state in the land is by feoffment.

If there be two disseisors, and they be disseised, and they release to their disseisor, and after disseise him, and then the disseisee release to one or both of them, yet the second disseisor shall re-enter, for they shall not hold the land against their owne release; for *Littleton* here saith, that they shall not avoid their owne grant, and by like reason they shall not avoid their owne release, *et sic de similibus.*

"*As if he had entered upon the tenant, and after enfeoffed him, &c.*" Here is another kinde of release, *viz.* a release which enureth by way of entry and feoffment; for if a disseisee release to one of the disseisors to some purpose, this shall enure by way of entry and feoffment, *viz.* as to hold out his companion.

(Ant. 194.)

But as to a rent-charge ☞ granted by him, it shall not enure by way of entrie and feoffment; for if the disseisee had entred and enfeoffed him, the rent-charge had beene avoided. But it is a certaine rule, that when the entry of a man is congeable, and he releaseth to one that is in by title, (as here to the feoffee upon condition is) it shall never enure by way of entry and feoffment, either to avoid a condition with which he accepted the land charged, or his owne grant, or to hold out his companion. [278. b.]

And where it appeareth by our author, that acts done by the disseisor shall not be avoided by the release of the disseisee, it is to be noted, that acts made to the disseisor himselfe shall not be avoyded by the alteration of his estate by the release of the disseisee; as if the lord before the release had confirmed the estate of the disseisor to hold by lesser services, the disseisor shall take advantage of it, and so of estovers to be burnt in the house, and the like law of a warrantie made unto him.

(Dr. and Stud. 50. a.)

If the heire of the disseisor indow his wife *ex assensu patris*, and the disseisee release to the disseisor, he shall not avoide the indowment, for that is like the case put by *Littleton* of the rent-charge.

If an alien be a disseisor, and obtaine letters of denization, and then the disseisee release unto him, the king shall not have the land, for the release hath altered the estate, and it is as it were a new purchase; otherwise it is if the alien had beene the feoffee of a disseisor.

If

If the lord disseise the tenant, and is disseised, the disseisee release to the second disseisor, yet the seigniorie is not revived, for betweene the parties the release enures by way of entrie and feoffment as to the land; but not having regard to the seigniorie, and for that the possession was never actually removed or revested from the disseisor, who claimeth under the lord, the seigniorie is not revived. But if the lord and a stranger disseise the tenant, and the disseisee release to the stranger, there the seigniorie by operation of law is revived, for the whole is vested in the stranger which never claimed under the lord: and in that case, if the lord had died, and the land had survived, the seigniorie had beene revived. But if the lord had disseised the tenant, and beene disseised by two, and the disseisee released to one of them, the seigniorie is not revived, because he claimed (as hath beene said) under the lord.

Sect. 478.

ALSO, if a man be disseised by an infant, who alien in fee, and the alienee dieth seised, and his heire entreth, † the disseisor being within age, now is it in the election of the disseisor* (ore est en election ‡ le disseisour) *to have a writ* ‖ *of* dum fuit infra ætatem, *or a writ of right against the heire of the alienee, and which writ of them he shall chuse, hee ought to recover by the law,* § *&c. And also he may enter into the land without any recovery, and in this case the entrie of the disseisee is taken away, &c. But in this case if the disseisee release his right to the heire of the alienee, and after the disseisor bringeth a writ of right against the heire of the alienee, and hee joyne the mise upon the meere right, &c. the great assise ought to finde by the law, that the tenant hath more meere right* + *than the disseisor,* ¶ *&c. for that the tenant hath the right of the disseisee by his release, the which is the most ancient and most meere right: for by such release all the right of the disseisee passeth to the tenant, and is in the tenant. And to this some have said, that in this case where a man which hath right to lands or tenements (but his entrie is not congeable) if he release to the tenant** all his right, &c. that such release shall enure by way of extinguishment. As to this it may bee said, that this is true* (que ceo est †† voyer) *as to him which releaseth; for by his release he hath dismissed himself quite* (‡‡ quietment) *of* ++ *his right as to his person, but yet* ‖‖ *the right which he hath may well pass to the tenant by his*

* *within age* added in L. and M. and Roh.

† *the disseisor—the alienor* in L. and M. and Roh.

‡ le disseisour—d'alienour, *L. and M. and Roh.*

‖ *of* not in L. and M. or Roh.

§ *&c.* not in L. and M. or Roh.

+ *&c.* added L. and M. and Roh.

¶ *&c.* not in L. and M. or Roh.

** *&c.* added L. and M. and Roh.

†† voyer—verite, *L. and M. and Roh.*

‡‡ quietment *not in L. and M. or Roh.*—nettement, *MSS.*

++ *all* added L. and M. and Roh.

‖‖ *the right which he hath may well pass to the tenant by his release,* not in the Vell. MS. but omitted most probably through mistake.

his release. For it should bee inconvenient that such an ancient right should bee extinct altogether, &c. for it is commonly said, that a right cannot die (1).

"*WHICH*

(1) Few parts of Littleton's tenures require more attention than the present Section, and the five Sections, by which it is immediately followed.

The case, propounded by Littleton, is, that *A.* is disseised by *B.* an infant;—that *B.* during his infancy, executes a feoffment, with livery of seisin, to *C.* and his heirs;—that, while *B.* continues an infant, *C.* dies, and the land descends to *D.* and his heirs;—that, after this descent, *B.* attains 21;—that *A.* then releases to *D.* and his heirs;—and that *B.* then brings a writ of right against *D.* to recover the land.

The feoffment of *B.* being executed by him during his minority, was originally voidable by him; yet, being only voidable and not void, it conferred on *C.* an actual estate in fee simple; and this estate would remain in *C.* till it should be recovered from him by *B.* or his heirs. Thus the rights of the parties stood immediately upon the execution of the feoffment; and both *A.* and *B.* might recover against *C.* by entry, or by a possessory action, or by a writ of right;—and in addition to these remedies, *B.* might recover against *C.* by the writ *dum fuit infra ætatem.*

The death of *C.* during the minority of *B.* produced a considerable alteration in the right of *A.* In the chapter on *Descents, which take away Entries*, it has been shown, (c. 6. § 385), that, if a disseisor hath issue, and dies seised of the land acquired by the disseisin, the law casts the land on the issue; and the disseisee thereby loses his right to recover the land by entry, and can only recover it by action. The law is the same, when the disseisor aliens; and the alienee dies seised and the land descends to his issue. But, in Section 402, it is observed, that this effect of a disseisin does not hold in cases, where both the disseisin and the descent take place during the minority of the disseisee. In respect therefore to *A.* the death of *C.* during the minority of *B.* was attended with this important consequence, that it deprived *A.* of his right to restore his possession by entry, and reduced him, if he sought to restore it, to the necessity of doing it by action. In respect to *B.* the descent of the land, on *C.*'s decease, to *D.* was altogether inoperative: so that, in this stage of the title, *A.* was equally, in respect to *B.* and *D.* the rightful owner of the fee; *B.* in respect to *A.* was the tortious possessor, and in respect to *D.* was the rightful owner of it; and *A.* by action, and *B.* both by entry and action, might recover the land from *D.* The actions by which *A.* and *B.* might recover were either possessory, as a writ of disseisin or assize, or droitural, as a writ of right;—in addition to the writs which have been mentioned, *B.* had the writ *dum fuit infra ætatem.*

Under these circumstances *A.* released to *D.*—Now, if *B.* had either entered on the land, or brought his possessory action against *D.*, *B.* would have recovered. For, in a suit upon either, the gist would have been, whether *B.* or *D.* had the better right to the possession. Now, *B.* would prove his actual seisin; *D.* could only produce the feoffment from *B.* to *C.* and prove his heirship to *C.* Against these, *B.* would plead his non-age; and by proving it, would avoid the feoffment, and consequently obtain judgment. But, instead of entering on the land, or bringing his possessory action, *B.* unadvisedly proceeds by writ of right. In such an action, the gist is, which has the most mere right, the demandant or tenant. If *A.* had not executed the release to *D.*, *B.* must have recovered; for possession, standing singly, carries with it, as well in a writ of right, as in a possessory action, a good title, till a better is shown. Now, *B.* was evidently in possession, when he executed the feoffment; but that feoffment was voidable on account of the non-age, and was

avoided

"WHICH *writ of them hee shall chuse, &c.*" Note, many times in one case the law doth give a man severall remedies, and of severall kindes, as in this case by action and by entry; by action, either a writ of right, or *dum fuit infra ætatem.* (Ant. 45. a.) Vide Sect. 514. 28 E. 3. 93. 9 E. 4. 46. 21 E. 4. 55. 41 E. 3. 10. 2 H. 4. 12.

"*And after the disseisor bringeth a writ of right, &c.*" Here it appeareth that there is a great art and knowledge for a man that hath divers remedies to chuse his aptest remedie; as in this case, if

avoided by the action. Thus, the feoffment, standing singly, was no defence against *B.*

But the release altered the case; it conferred the right on *D.*: and consequently in a droitural action, where the question to be tried is, which of the parties has the most mere right, it gave *D.* a better title than *B.*

This, however, was open to the objection noticed by Littleton;—that *D.* having the actual estate of freehold, *A.*'s right was merged in it by the release; and as, on this supposition, it ceased to exist, *D.* could not avail himself of it, as a defence against *B.*—Something of this nature occurs in modern law. If a person purchase an estate, which is subject to a judgment, of which, at the time of the purchase, he has not notice, and procures a term of years, prior in its creation to that judgment, to be assigned to a trustee for him, the term will protect him against the judgment. But if, instead of having the term assigned to a trustee, he takes an assignment of it to himself, it merges in the freehold, and cannot afterwards be set up as a protection against the judgment.

Such is the nature of the objection noticed by Littleton. He answers it by observing, that, in these cases, the effect of the release is different, in respect to the releasor, from what it is in respect to strangers; for that, in respect to the releasor, it ceases to exist, as by his release the releasor hath dismissed himself quite of his right; but that, in respect to strangers, the right, which the releasor had, passes by his release to the releasee, and subsists in him for all beneficial purposes.

He proves his position,—1st, by producing the maxim of the common law, that a right cannot die;—2dly, from the general rule, that a release can never operate by way of extinguishment, if the releasee *can* have that, which is released to him. This he shows, by the nature of the cases, to which only such releases apply; as, when a lord releases service to a tenant (Sect. 479), or where the owner of a rent-charge or common, releases it to the owner of the land, which is subject to it. In the first of these cases, the tenant could not do the service to himself; and in the second, he could not hold, distinct from his land, the servitude with which it was charged:—in each case, therefore, the release necessarily operates by way of extinguishment. Hence Littleton infers, that, as releases can only operate by way of extinguishment, when the releasee cannot have the subject which is released, and in the case proposed, the releasor could take and hold the right, the release could not operate to extinguish it.

In support of this conclusion, he states (Sect. 481), that, as the law stood before the statute of Westm. 2, if a lease were made to a man for the term of his life, with the remainder over in fee, and a stranger, by a feigned action, recovered the land against the tenant for life, by default, and after the tenant died, the person in remainder had no remedy. On this doctrine of the common law, Littleton (Sect. 482) proposes the following case: *A.* is tenant for life, with the immediate remainder to *I. S.* in fee. *I. S.* disseises *A.*, and *A.* being thus disseised, enters on *I. S.*, and *C.* then brings a feigned action against *A.* and recovers, by default. *A.* then dies, and *I. S.* brings a writ of right against *C.* Now *A.* by his entry, defeated the fee, which *I. S.* acquired

if he bring his writ of right, the disseisor shall be barred, but if he had entred upon the heire of the alienee, he should have enjoyed the land for ever. For in that case the heire of the alienee after such an entrie shall never have a writ of right, no more than if the disseisee entreth upon the heire of the disseisor, and

by the disseisin, but restored his own life estate, and the remainder in fee of *I. S.* expectant on it; and then in consequence of *A.*'s default, *I. S.* according to the doctrine of the common law, would, on *A.*'s decease, if the previous disseisin had not taken place, have been wholly without remedy. Yet, says Littleton, *I. S.* shall recover in a writ of right.—The reason is given by lord Coke, in his commentary on Section 482. "The seisin," says his lordship, "is defeated, *between the tenant for life and him in remainder*, yet, having re-"gard to the recoveror, who is a mere stranger, and hath no title, it is suffi-"cient against him. But otherwise it is, against the party who defeated the "seisin, the law being propense to give remedy to him that right hath." This case and lord Coke's explanation of it, exemplify, and, to a certain extent, establish Littleton's position. The analogy between the case propounded by Littleton, and the case, which he cites in support of his conclusion on that case, seems to be, that, in each case, the possession of the parties in contest was equally tortious: and the law, therefore, preferred the title of him, who had the most mere right. For, in the first case, *B.* the infant acquired the possession by disseisin: *D.* acquired it by descent from *C.* who claimed under the voidable feoffment of *B.* But, as the release of *A.* conferred *A.*'s right to the land on *D.* the law preferred his title to that of *B.* as *D.* by the acquisition of the right of *A.* had most mere right.—In the other case, *I. S.* acquired the possession by disseisin, and *C.* acquired it under a covinous default. But though *I. S.* by his tortious entry, accelerated his possession of the estate, yet, under the original settlement of the land, he became, on *A.*'s decease, the rightful owner of it. The law therefore considered, that the title of *I. S.* which was originally a rightful estate, should be preferred to the title of *C.* which was originally founded in collusion between him and *A.*; and therefore adjudged it to *I. S.* as having the most mere right.—These observations seem to explain the sections to which they are applied; and the nature of the argument, suggested by Littleton in support of his opinion, and the case, by which he illustrates it.

With respect to the statute of Westminster 2, mentioned by Littleton—it has been stated, that, at common law, if a man were tenant for life, with remainders over, and a stranger, by a feigned action, recovered against the tenant for life, the remainder-man had no remedy, till it was supplied by this statute.

Further remedy was provided for them, by the statute 32 Hen. 8. c. 31. which enacted, that all common recoveries suffered by tenant for life, without the consent of the persons in remainder or reversion, should be totally void.

To avoid the effect of this statute, the tenant for life sometimes made a lease for years; the lessee then made a feoffment, and a præcipe was brought against the feoffee, and he vouched the tenant for life. It was held that, as the tenant for life was disseised by the feoffment of his lessee for years, he was not the actual tenant for life, or seised of the actual freehold, when the recovery was suffered; and did not, therefore, fall within the terms of the statute of Hen. 8. To bring such cases within the intended remedy the statute of 14 Eliz. c. 8. was passed; which enacted that recoveries, prosecuted against tenants for life, or in tail after possibility of issue extinct, or against any other with the voucher of the particular tenant, should be void against all persons in remainder or reversion; with a proviso, that nothing in the act should extend to recoveries by good title, or to recoveries by assent and agreement of the persons in remainder or reversion, so that such assent and agreement appeared of record in

[279. a.] and make a feoffment in fee, if the heire of the disseisor ☞ re-enter he shall detaine the land for ever, and the feoffee shall not maintaine any writ of right; for a bare right shall never be left in the feoffee, but shall ever follow the possession, as hath beene said: but if the disseisee entreth upon the heire of the disseisor, and make a feoffment in fee upon condition, and entreth for the condition broken before the heire of the disseisor enter, hee is restored to his right againe. (Ant. 266. a.) 38 E. 3. 16. 24 H. 8. Restore al primer action, 5. Vide Sect. 447.

A man maketh a gift in taile, the remainder in fee, tenant in taile dieth without issue, an estranger intrude, and he in the remainder brings a formedon, and recovereth by default, and maketh a feoffment in fee, the intrudor reverse the recoverie in a writ of disceit and entreth, he shall detaine the land for ever, and the feoffee shall not have a writ of right. 9 H. 7. 24.

And so likewise if a disseisor die seised, and a stranger abate, and the disseisee release to him, the heire of the disseisor shall enter and detaine the land for ever. For the right to the possession shall draw the right of the land to it, and shall not leave a right in him to whom the release is made, as hath been said before in the 447 Section. 9 H. 7. 24.

"*The right of the disseisee passeth to the tenant, and is in the tenant.*" For seeing the tenant hath the whole fee simple, he is capable of the whole right of the disseisee, and, as *Littleton* here saith, the right is in the tenant.

"*It should be inconvenient.*" Here againe, as hath beene often observed, an argument *ab inconvenienti* is forcible in law; and that judges by the authoritie of our author are to judge of inconveniences as of things unlawfull (A) as hereby and [279. b.] ☞ by many other places it appeareth. Vide Sect. 87. 138, 139. 231. 269. 440. 722.

"*A right cannot die.*" *Dormit aliquando jus, moritur nunquam.* For of such an high estimation is right in the eye of the law, as the law preserveth it from death and destruction: trodden downe it may bee, but never trodden out. For where it hath beene said, that a release of right doth in some cases enure by way of extinguishment; it is so to be understood, either (as *Littleton* doth here) in respect of him that makes the release, or in respect that by construction of law it enureth not alone to him to whom it is made, but to others also who be estrangers to the release,

(A) *Vid. ante* 66. *a. n.* 1. *as to the necessity of qualifying the maxim here alluded to.*

in any of her majesty's courts: and the statute of 32 Hen. 8. was repealed." In consequence of the last proviso in the statute, a tenant for life may now join with the person in remainder or reversion, in suffering a common recovery. This was first settled in Wiseman *v.* Crow, Cro. Eliz. 562; and is every day's practice.

It sometimes happens, that a tenant in tail supposing himself seised in fee, executes a settlement, and takes an estate for life under it: a question has been made, whether such a tenant for life is prevented from suffering a recovery by the statutes cited. It seems to be clear, that he is not; as all the deeds must be considered as forming one conveyance, and as referring back to the original conveyance, executed by the party when he was actually tenant in tail;—so that the recovery, and the deed leading the uses of it, operate merely by way of further assurance.—[Note 244*.]

release, which, as hath beene said, is a qualitie of an inheritance extinguished.

14 H. 8. 6. b. As if there be lord and tenant, and the tenant maketh a lease for life, the remainder in fee, if the lord release to the tenant for life, the rent is wholly extinguished, and he in the remainder shall take benefit thereof; even so when the heire of a disseisor is disseised, and the disseisor make a lease for life, the remainder in fee, if the first disseisee release to the tenant for life, this is said to enure by way of extinguishment, for that it shall enure to him in the remainder, who is a stranger to the release; and yet in truth the right is not extinct, but doth follow the possession, *viz.* the tenant for life hath it during his time, and he in the remainder to him and to his heires, and the right of the inheritance is in him in the remainder; for a right to land cannot die or be extinct in deed; and therefore, if after the death of tenant for life, the heire of the disseisor bring a writ of right against him in the remainder, and he joyne the mise upon the meere right, it shall be found for him, because in judgment of law he hath by the said release the right of the first disseisee.

Sect. 479.

BUT releases which enure by way of extinguishment (1) *against all persons, are where hee to whom the release is made cannot have that which to him is released. As if there bee lord and tenant, and the lord release to the tenant all the right which hee hath in the seigniory, or all the right which he hath in the land, &c. this release goeth by way of extinguishment against all persons, because that the tenant cannot have* service to receive of himselfe.*

14 H. 8. fol. 5, 6.
11 H. 7. 25.
30 H. 6. tit. Barre, 39.
38 E. 3. 10. HERE *Littleton* putteth a diversity betweene releases which enure by way of extinguishment against all persons, and whereof all persons may take advantage, and releases which in respect of some persons enure by way of extinguishment, and of other persons by way of *mitter le droit:* or betweene releases which in deed enure by extinguishment, for that hee to whom the release is made, cannot have the thing released, and releases which, having some quality of such releases, are said to enure by way of extinguishment, but in troth doe not, for that he to whom the release is made may receive and take the thing released. And here *Littleton* putteth cases where releases do absolutely enure by extinguishment without exception, having respect to all persons. And first of the lord and tenant: secondly, of the rent-charge: thirdly, of the common of pasture.

Sect.

* *service to receive—this*, L. and M. and Roh.

(1) Here Littleton returns to releases by extinguishment. See ant. 268.

Sect. 480.

IN the same manner is it of a release made to the tenant of the land of a rent-charge or common of pasture, &c. because the tenant cannot have that which to him is released, &c. so such releases shall enure by way of extinguishment in all wayes (issint tiels releases urera * per extinguishment en touts voyes).

[280. a.] FIRST, of the lord and tenant, and the lord release to the tenant his seigniorie, ☞ this must of necessity enure by way of extinguishment to all men; for the tenant cannot have service to be taken of himselfe, nor can one man be both lord and tenant. The second is of a rent-charge; a man cannot have land and a rent issuing out of the same land. Thirdly, a man cannot have land and a common of pasture issuing out of the same land, *et sic de cæteris*. For in all these cases and the like he to whom the release is made cannot have and enjoy the thing that is released. But in the case of the right of the land, the tenant of the land may take and enjoy it for strengthening his estate therein. (2 Roll. Abr. 405.)

The mesne being a feme entermarrie with the tenant peravaile, if the lord release to the feme, the seigniorie only is extinct; but if hee release to the husband, both seigniorie and mesnaltie are extinct. And in this case, if the lord release to the husband and wife, it is a question how the release shall enure; but it is no question but that a release may be made to a mesnaltie or a seigniory suspended in part of the estate. (Ant. 273. b.)

But here observe a diversity where a release enureth by way of extinguishment of an inheritance, which is in possession and may be granted over, and a release of a right, or an action to lands which cannot be granted over. [r] For the lord may release his seigniorie to the tenant of the land for life or in taile, *et sic de cæteris*. But so cannot one release a right or an action; for if it be released but for an houre, it is extinct for ever, as hath beene said. (274. a. 1 Roll. Abr. 412.) (Ant. 214. a. 232. b. 266. a.) [r] 13 E. 3. tit. Extinguishment. Brooke 45. et tit. Voucher, F. 120. 30 E. 3. 13. 19 H. 6. 19. 21 E. 3. 33. 38 Ass. 17. 11 H. 4. tit. Release, 21. 18 F. 2. ibid. 5. 26 H. 8. 5. 41 Ass. 6.

And two things are to be observed here. First, that by the release of all the right in the land the seigniorie is extinct, as well as by the release of all the right in the seigniorie, for the seigniorie issueth out of the land. Secondly, that by the release of all his right in the seigniorie or the land, the whole seigniorie is extinct without any words of inheritance. If the tenancie be given to a lord and to a stranger, and to the heires of the stranger, the lord release to his companion all the right in the land, this release doth not onely passe his estate in the tenancie, but extinguisheth also his right in the seigniorie, and so one release enures to extinguish severall rights in one and the same land.

If there be lord and tenant by fealty and rent, the lord granteth the seigniorie for yeares, and the tenant atturneth, the lord releaseth his seigniorie to the tenant for years, and to the tenant of the land generally, the whole seigniorie is extinct, and the state of

* per extinguishment en touts voyes, envers toutz persons, *L. and M. and Roh.* —toutz foitz per voie d'extientisement

of the lessee also. But if the release had beene to them and their heires, then the lessee had had the inheritance of the one moitie, and the other moitie had beene extinct. And the reason of this diversity is, because when the release is made generally, it can enure to the lessee but for life, because it enureth by way of enlargement of estate, and being made to the tenant of the land, it enureth by way of extinguishment, as *Littleton* here saith, and then there cannot remaine a particular estate in the seigniorie for life. But when the release is made to them and their heires, each one takes a moitie, the one by way of encreasing of the state, and the other by extinguishment.

(Ant. 152. b.) (Mo. 59.)

Sect. 481.

ALSO, to prove that the grand assise ought to pass for the demandant, in the case aforesaid, I have often heard the reading of the statute of West. 2. which begun thus (jeo aye oye sovent* la lecture de l'estatute de Westminster second, que commence): In casu quo vir amiserit per defaltam tenementum quod fuit jus uxoris suæ, &c. *that at the common law before the sayd statute* (devant† mesme l'estatute), *if a lease were made to a man for term of life* (si lease soit fait‡ a un home pur terme de vie), *the remainder over in fee, and a stranger by feigned action* (per feint action) *recovered against the tenant for life by default, and after the tenant dieth* (et puis§ le tenant morust), *he in the remainder had no remedie before the statute, because he had not any possession of the land.*

(2 Inst. 345.)

"*I HAVE often heard the reading of the statute of West. 2.*" Here it is to be observed, of what authoritie antient lectures or readings upon statutes were, for that they had five excellent qualities. First, they declared what the common ☞ law was before the making of the statute, as here it appeareth. Secondly, they opened the true sense and meaning of the statute. Thirdly, their cases were briefe, having at the most one poynt at the common law, and another upon the statute. Fourthly, plaine and perspicuous, for then the honour of the reader was to excell others in authorities, arguments, and reasons for proofe of his opinion, and for confutation of the objections against it. Fifthly, they read, to suppresse subtill inventions to creepe out of the statute. But now readings having lost the said former qualities, have lost also their former authorities: for now the cases are long, obscure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vanish away like smoke, and the readers are like to lapwings, who seeme to bee neerest their nests, when they are farthest from them, and all their studie is to find nice evasions out of the statute. By the authority of *Littleton*, ancient readings may be cited for proofe of the law; but new

[280. b.]

* en *added in L. and M. and Roh.*

† mesme *not in L. and M. or Roh.*

‡ a un home—al tenant, *L. and M. and Roh.*

§ le tenant, *not in L. and M. or Roh.*

new readings have not that honour, for that they are so obscure and darke.

" *The statute of West.* 2." Which is the third chapter.

" *The remainder over in fee.*" Here is to be observed, that although the statute speaketh of a reversion [*a*], yet by the authority of *Littleton* a remainder is within the statute.

See the statute of 14 *Eliz. cap.* 8, which provideth fully for him in the remainder.

[*a*] 24 E. 3. 35. 28 E. 3. 96. 18 E. 2. Entrie, 74. 3 E. 2. Entrie, 7. 6 E. 3. 24.

" *Feigned action,* (feint action)." *Feint* is a participle of the French word *feindre*, which is to feigne or falsely pretend, so as a feint action is a false action (A).

7 E. 3. Ent. 62. 7 E. 3. 54, 55. 15 E. 4. 15. F. N. B. 217. D. Register, 241.

" *Had no remedie before the statute.*" [*b*] Here it appeareth by *Littleton*, that if a man maketh a lease for life, the remainder in fee, and tenant for life suffereth a recovery by default, that he in the remainder should not have a formedon by the common law: for *Littleton* saith, that he hath not any remedy before the statute. Neither is there any such writ in that case in the Register, albeit in some bookes mention is made of such a writ.

[*b*] W. 2. cap. 5. Vide 34 E. 3. Formedon, 31. 11 E. 3. ibid. 31. 8 E. 3. 59. F. N. B. 217. D. 7 H. 7. 13.

Sect. 482.

BUT if he in the remainder had entered upon the tenant for life, and disseised him, and after the tenant enter upon him, and after the tenaunt for life by such recoverie lose by default and die, now he in the remainder may well have a writ of right against him which recovers, because the mise shall be joyned only upon the mere right, &c. Yet in this case the seisin of him in the remainder was defeated by the entry of the tenant for life. But peradventure some will argue and say, that hee shall not have a writ of right in this case, for that when the mise is joyned, it is joyned in this manner, (scilicet) *if the tenaunt hath more mere right in the land in the manner as he holdeth, than the demandant hath in the manner as hee demandeth, and for that the seisin of the demandant was defeated by the entry of the tenant for term of life, &c. then he hath no right in the manner as he demandeth.*

HERE a disseisin (B) gotten by wrong, and defeated by the entrie of him that right hath, is sufficient to maintaine a writ of right against the recoveror in this case, for albeit ☞ the seisin is defeated between the lessee for life and him in the remainder, yet having regard to the recoveror, who is a meere stranger, and hath no title, it is sufficient against him. But otherwise it is against the party himselfe

38 E. 3. 3. tit. Juris Utrum, 1.

[281. a.]

7 E. 3. 62. 38 E. 3. 37. tit. Jur. Utr. 1.

(A) *Vide Sect.* 688, & 689; *for Littleton there makes a distinction between a feint action and a false action.*

(B) disseisin *seems to be here printed by mistake instead of* seisin; *as it was the tortious seisin, which the remainder-man acquired by his disseisin of the tenant for life, that enabled him to defeat, in a writ of right, the recoveror by the default of the tenant for life.*

himselfe that defeated the seisin, and the law is propense to give remedie to him that right hath. And where some have thought, that there is no authority in law to warrant *Littleton*'s opinion herein, they are greatly mistaken, for *Littleton* hath good warrant for all that he hath written.

(Post. 315. a.)

Lands are letten to *A.* for life, the remainder to *B.* for life, the remainder to the right heirs of *A.*; *A.* dieth, *B.* entreth and dieth; a stranger intrudeth, the heire of *A.* shall have a writ of right of the seisin which *A.* had as tenant for life.

Lands are letten to *A.* and *B.* and to the heires of *A*: *A.* dyeth; a recovery is had against *B.*; the heire of *A.* shall have a writ of right of the whole, for every joyntenant is seised *per my et per tout.*

(Ant. 184. a. b.)

If lands be given in tayle, the remainder to *A.* in fee, the donee dyeth without issue, his wife *privement enseint*, *A.* entreth, the issue is borne and entreth upon him and dyeth without issue, *A.* shall have a writ of right of the seisin which he had.

If lands be given in tayle to *A.* the remainder to his right heires, *A.* dieth without issue, the collaterall heire of *A.* shall have a writ of right of the seisin of *A.*

4 E. 3. 16, 17.

And so note a diversity betweene a seisin to cause *possessio fratris, &c.* for there is required a more actuall seisin, and a seisin to maintaine a writ of right. And hereby also are the *(&c.)* in this Section explained.

(Ant. 14. b. 15. a.) 40 E. 3. 8. 42 E. 3. 20. 37 Ass. 4. 24 E. 4. 24. 7 H. 5. 4. 11 H. 4. 11.

Sect. 483.

(Yelv. 148. Hob. 73. 105.) (6 Rep. 24.)

TO this it may bee said, that these words (modo et formâ prout, &c.) *in many cases are words ☞ of forme of pleading, and not words of substance. For if a man bring a writ of entrie* in casu proviso, *of the alienation made by the tenant in dower to his disinheritance, and counteth of the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict that the tenant aliened in taile, or for tearme of another man's life, the demandant shall recover: yet the alienation was not in manner as the demandant hath declared, &c.* [281. b.]

WHERE *modo et formâ* are of the substance of the issue, and where but words of forme, this diversity is to be observed.

[c] 9 H. 6. 1. 40 E. 3. 35. 21 E. 4. 22. F.N.B. 206. G. 40 E. 3. 5. 32 H. 8. Issue. Br. 80. Vid. Sect. sequent. 12 E. 4. 4. (Doc. Pla. 175. 199. 344, 345.

[c] Where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of forme, as here in the case of the writ of entrie *in casu proviso*, and so is the *(&c.)* well explained in this Section. But otherwise it is when a collaterall point in pleading is traversed; as if a feoffment be alleadged by two, and this is traversed *modo et formâ*, and it is found the feoffment of one, there *modo et formâ* is materiall. So if a feoffment be pleaded by deede, and it is traversed *absque hoc quòd feoffavit modo et formâ*; upon this collaterall issue, *modo et formâ* are so essentiall as the jury cannot find a feoffment without deed.

Sect.

Sect. 484.

ALSO, if there bee lord and tenant, and the tenant hold of the lord by fealty only, * *and the lord distreine the tenant for rent, and the tenant bringeth a writ of trespasse against his lord for his cattell so taken, and the lord plead that the tenant holds of him by fealtie and certaine rent, and for the rent behinde he came to distreine, &c. and demand judgement of the writ brought against him,* quare vi et armis, &c. *and the other saith that hee doth not hold of him in the manner as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty onely; in this case the writ shall abate, and yet hee doth not hold of him in the manner as the lord hath said. For the matter of the issue is, whether the tenant holdeth of him or no; for if hee holdeth of him, although that the lord distreine the tenant for other services which he ought not to have, yet such writ of trespasse* quare vi et armis, &c. *doth not lie against the lord, but shall abate.*

Vi. Sect. preced. (8 Co. 89. Sid. 15.) 10 E. 4. 7. 8 E. 4. 15. 20 E. 4. 3. 21 E. 4. 3. Merlebr. cap. 3. (Doc. Pla. 191. 344.)

"*IT is found by verdict that he holdeth of him by fealty onely.*" Here is another diversitie to be observed: That albeit the issue bee upon a collaterall point, yet if by the finding of part of the issue it shall appeare to the court that no such action lieth for the plaintife no more than if the whole had been found, there *modo et formâ* are but words of forme, as here in the case which *Littleton* putteth of the lord and tenant appeareth.

(9 Rep. 33.) (Doc. Pla. 191. Ant. 227. 2 Roll. Abr. 704. 708. Sid. 5. Hob. 18. 73. 81. Doc. Pla. 355. 344. 345.) Pl. Com. 101. (9 Rep. 348. Haw. P. C. 266.)

"*For the matter of the issue is, whether the tenant holdeth of him or no, &c.*"

[282. a.] Here it appeareth, that ☞ if the matter of the issue be found it is sufficient. And this rule holds in criminall causes. For if *A.* be appealed, or indicted of murder, *viz.* that hee of malice prepense killed *I. A.* pleadeth that he is not guilty *modo et formâ*, yet the jury may find the defendant guilty of manslaughter without malice prepensed, because the killing of *I.* is the matter, and malice prepensed is but a circumstance.

1 Cro. 14. 16.

6 E. 3. 41. b. 25 E. 3. 50. 9 H. 7. 3. 13 H. 7. 14. 29 E. 3. 38. (Sid. 21, 22.) (Doc. Pla. 348.)

In assise of *darreine presentment*, if the plaintife alleage the avoydance of the church by privation, and the jurie find the voydance by death, the plaintife shall have judgment: for the manner of voydance is not the title of the plaintife, but the voydance is the matter.

[*d*] 8 E 3. 70. 8 Ass. 29 & 39. 9 E. 3. 338. 24 E. 3. 34. 5 H. 4. 2.

[*d*] If a gardeine of an hospitall bring an assise against the ordinary, he pleadeth that in his visitation he deprived him as ordinary, whereupon issue is taken, and it is found that he deprived him as patron, the ordinary shall have judgement, for the deprivation is the substance of the matter.

7 H. 4. 11. Pl. Com. 92. 3 Mar. Dier, 116. 40 E. 3. 35. Dier, 2 & 3 Ph. & Mar. 115. b. Trin. 22 Eliz. Rot. 920. Wolman's case. 41 E. 3. 28. 34 Ass. 3. 30 Ass. 5. 33 E 3. Verdict, 47. 22 E. 3. 1. b. 18 E. 3. 48. 31 E. 3. Account, 58. 28 Ass. 48. (2 Roll. Abr. 704. 719.)

The

* and – if, *L. and M. and Roh.*

The lessee covenant with the lessor not to cut downe any trees, and bind himself in a bond of forty pounds for performance of covenants, the lessee cut downe ten trees, the lessor bringeth an action of debt upon the bond, and assigneth a breach that the lessee cutteth down twenty trees, whereupon issue is joined, and the jury finde that the lessee cut downe ten, judgement shall be given for the plaintife; for sufficient matter of the issue is found for the plaintife.

Sect. 485.

ALSO, in a writ of trespasse for batterie, or for goods carried away, if the defendant plead not guilty, in manner as the plaintife suppose, and it is found that the defendant is guiltie in another towne, or at another day than the plaintife supposes, yet hee shall recover (Auxy, * en briefe de trespasse de batterie, ou des biens emports, si le defendant plede de rien culpable, en le manner come le plaintife suppose, et trove est que le defendant est culpable en auter ville, ou a auter jour que le plaintife suppose, uncore il recovera). *And † so in many other cases* (en ‡ plusors auters cases) *these words,* viz. *in manner as the demandant or the plaintife hath supposed, do not make any § matter of substance of the issue; for in a writ of right, where the mise is joyned upon the meere right, that is as much as to say, and to such effect,* viz. *whether the tenant or demaundant hath more meere right to the thing in demand.*

(11 Rep. 5.) (7 Rep. 2. b. 2 Roll. Abr. 688. Doc. Pla. 93. 369. 386.)

"*IN a writ of trespasse for batterie, or for goods carried away,*" *&c.*

Here *Littleton* speaketh of actions brought for things transitory. In which cases the wrong being done in one towne, the plaintife may not only alledge it in another towne, as *Littleton* here saith, but also in another county, and the jurors upon not guilty pleaded are bound to find for the plaintife.

(1 Roll. Abr. 335. Hob. 103, 104. Doc. Pla. 367. 5 Rep. 77.) (1 Rep. 1. 396. 6 Rep. 65. b.) (Doc. Pla. 367. 2 Cro. 45. 372. Noy, 57. 3 Cro. 353. Doc. Pla. 361.) (1 Leo. 39. Sid. 234. 294. 3 Rep. 52. b. Ant. 145. b. Doc. Pla. 43. 2 Sid. 118. Cro. El. 99.)

Neither can the assault, battery, or taking of goods, &c. alledged in another county, be traversed without speciall cause of justification which extendeth to some certaine place; as if a constable of a towne in another county arrest the body of a man that breaketh the peace, there he may traverse the county (but he must not rest there) but all other places saving in the towne whereof he is constable. And so it is of taking of goods, if the defendant justifie for damage feasant in another county he must traverse as before. But where the cause of the justification is not restrained to a certaine place, that is so locall as it cannot be alledged in any other towne, as in the cases before alledged, and the like, then albeit the action bee brought in a forraine countie, yet he must alledge his justification in the county where the action is brought. As if a man be beaten in the county of *Middlesex*, and hee bringeth his action in the county of *Buck.* the defendant cannot pleade that the plaintife assaulted him in the county of *Midd. &c.* and traverse the county, but

[282. b.]

* en—un, *L. and M. and Roh.*
† *so*, not in L. and M. or Roh.
‡ moltes *added in L. and M. and Roh.*
§ *matter—manner* L. and M. and Roh.

but he must pleade his justification in the county of *Buck.* for that the cause of his justification is good in any place. And so it is in case of bailement of goods, and other cases for transitory things; as for example:

In an action upon the case the plaintife declared for speaking of slanderous words, which is transitory, and laid the words to be spoken in *London*, the defendant pleaded a concord for speaking of words in all the counties of England, saving in *London*, and traversed the speaking of the words in *London:* the plaintife in his replication denied the concord, whereupon the defendant demurred, and judgment was given for the plaintife. For the court said, that if the concord in that case should not be traversed, it would follow, that by a new and subtile invention of pleading, an ancient principle in law (that for transitorie causes of action the plaintife might alledge the same in what place or county he would) should be subverted, which ought not to be suffered; and therefore the judges of both courts allowed a traverse upon a traverse in that case: and the wisedome of the judges and sages of the law have alwayes suppressed new and subtile inventions in derogation of the common law. And therefore the judges say in one booke [*e*], We will not change the law which alwayes hath been used. And another saith [*f*], It is better that it be turned to a default, than the law should be changed, or any innovation made.

Trin. 30 Eliz. in the king's bench, betweene Inglebert and Jones. And herewith agreeth a judgement in the court of common pleas, Pasch. 38 Eliz. Rot. 1656.

[*e*] 38 E. 3. 1. (1 Cro. 105. Ant. 72. Mo. 350. 2 Cro. 372.)

[*f*] 2 H. 4. 18. 31 E. 3. Gager deliver. 5.

A man did grant a rent, with a new invented clause of distresse, *viz.* that the grantee should hold the distresse against gages and pledges; and yet by the whole court he shall gage deliverance, for otherwise by this new invention all replevyes shall be taken away.

[*] See many other new inventions in derogation of the common law disallowed by the judges, and by the court of parliament.

[*] 42 Ass. 12. 4 E. 3. ca. 5. 18 E. 3. ca. 1. & ca. 6. 4 H. 4. ca. 2.

[*h*] Where the jury is bound to finde aswell locall things in many cases as transitory in other counties, see at large in my Reports.

[*h*] Li. 6. fo. 46, 47. Dowdale's case. 3 E. 3. Ass. 446.

27 E. 3. 86. 1 Ass. 16. 3 Ass. 4. 6 Ass. 4. 5 Ass. 7. 18 E. 3. 38. 21 Ass. 8. 29 Ass. 5. 44 E. 3. 6. b. 14 H. 4. 35. 5 H. 5. 2. 10 H. 6. 13. 21 H. 6. 51. 37 H. 6. 2. 7 E. 4. 45. 18 E. 4. 1. 22 E. 4. 19. 13 H. 7. 17. 2 Mar. Br. Attaint. 104. 10 Eliz. Dier, 171.

By this which hath beene said you shall know the law as it is now in use in these cases, and the better understand our [*i*] books, when you shall reade them concerning as well locall as transitory things, wherein you shall finde great variety of opinion in our bookes.

[*i*] 19 H. 6. 48. 11 H. 6. 16. 43 E. 3. 23. b. 46 E. 3. 3. a. 9 H. 6. 62.

21 H. 6. 27. 14 H. 8. 24. 18 E. 4. 1. 20 H. 6. 2. 34 H. 6. 42. 14 H. 6. 21, 22. 4 H. 6. 13. 33 H. 6. 25. 12 E. 4. 12. 28 H. 8. Dier, 29. 21 E. 4. 19. 80. 27 H. 8. 19. 12 H. 8. 1. 11 H. 4. 65. 19 H. 8. 6. (Hob. 134. 1 Leo. 301. Cro. Car. 514. Cro. Ja. 366.) 25 H. 8. Br. (Doc. Pla. 197.) 22 H. 6. 33. (4 Rep. 33. 2 Roll. Rep. 491. Post. 303. 1 Leo. 228.)

"*If the defendant plead not guilty.*" This is a good issue, if the defendant committed no battery at all; but regularly by the common law if the defendant hath cause of justification or excuse, then

then can he not pleade not guilty, for then upon the evidence it shall be found against him, for that he confesseth the battery, and upon that issue cannot justifie it, but he must pleade the speciall matter, and confesse and justifie the battery.

The like law is in other cases, and therefore this is a learning necessary to be knowne, for that the losse of most causes dependeth thereupon. As if in battery the defendant may justifie the same to be done of the plaintife's own assault, he must pleade it specially, and must not pleade the generall issue, and so of the like. In trespasse of breaking his close, upon not guilty ☞ he cannot give in evidence, that the beasts came thorow the plaintife's hedge, which he ought to keep, nor upon the generall issue justifie by reason of a rent-charge, common, or the like. [283. a.]

In detinue the defendant pleadeth *non detinet*, he cannot give in evidence that the goods were pawned to him for money, and that it is not paid, but must pleade it; but he may give in evidence a gift from the plaintife, for that proveth he detaineth not the plaintife's goods.

[*d*] 12 H. 8. 1. 19 E. 3. Wast. 30. 20 E. 3. Wast. 32. [*e*] 10 Eliz. Dier, 276. 2 Mar. Dier. 212.

[*d*] So in an action of waste, upon the plea *nul wast fait*, he may give in evidence any thing that proveth it no waste, as by tempest, by lightening, by enemies, and the like; but he cannot give in evidence justifiable waste, as to repaire the house, or the like. [*e*] If one doth waste, and before the action brought the lessee repaireth it, and after the lessor bringeth an action of waste, and the lessee pleade *quòd non fecit vastum*, he cannot give in evidence the especiall matter.

(1 Sid. 450. Doc. Pla. 198.)

If two men be bound in a bond jointly, and the one is sued alone, he may plead this matter in abatement of the writ; but he cannot plead *non est factum*, for it is his deed, though it be not his sole deed.

[*f*] Lib. 5. fo. 119. Whelpdale's case. 7 E. 4. 5.

[*f*] See in *Whelpdale*'s case, where a man may safely plead *non est factum*, and where not, and the former books that treat of that matter well reconciled.

7 E. 6. Br. non est fact. 14. 1 H. 7. 15. 14 H. 8. 28. Pl. Com. Dive and Man case. 36 H. 8. Dier, 59. 2 Mar. Dier, 112. 1 Eliz. Di. 167.

[*g*] Hill. 10 H. 8. Rot. 323. in com. banc. et Mich. 6 E. 6. in com. banco. Bendloes. 7 H. 5 9.

[*g*] Upon *plenè administravit* pleaded by an executour, *et issint riens inter maines*, if it be proved that he hath goods in his hands which were the testatour's, he may give in evidence that he hath paid to that value of his owne mony, and need not plead it specially (1).

6 H. 7. 10. 34 E. 3. Droit. 29. 9 E. 3. 32. 8 E. 3. 24. 33 E. 3. Verd. 18 H. 6. 24. 39 H. 6. 38. 18 E. 3, 19. Pl. Com. 81. 173. 21 H. 7. 76. 16 Kielw. 21 E. 4. 11. 22 E. 4. 45. 13 H. 7. 13. Staundf. Pl. Cor. 15. 22 Ass. 55. 37 H. 6. 21. (Doc. Pla. 198. Ant. 227. a. Hob. 174. Post. 303. b.)

In an assise, if the tenant plead *nul tort nul disseisin*, he cannot give in evidence a release after the disseisin; but a release before the disseisin he may, for then there is no disseisin upon the matter.

In

(1) *Yet if the matter be pleaded specially, that is not cause of demurrer, though it amounts to the general issue, because it has no colour of matter in law, as was adjudged by justice Walmesley.* Hob. 127. Lord Nott. MSS. —[Note 245.]

In a writ of right, if the tenant joyne the mise upon the meere right, he cannot give in evidence a collaterall warranty; for he hath not any right by it, and therefore it ought to have been pleaded.

Of this learning you shall reade plentifully in our bookes, and in my Reports. This little taste shall here suffice to make the reader capable of the rest. Regularly whensoever a man doth any thing by force of a warrant or authority, he must plead it.

But all that hath been said must be under two cautions: first, that whensoever a man cannot have advantage of the speciall matter by way of pleading, there he shall take advantage of it in the evidence. For example, the rule of law is, that a man cannot justifie in the killing or death of a man; and therefore in that case he shall be received to give the especiall matter in evidence, as that it was *se defendendo*, or in defence of his house in the night against theeves and robbers, or the like.

Secondly, that in any action upon the case, trespasse, battery, or of false imprisonment against any justice of peace, maior, or bailife of city or towne corporate, headborough, port-reve, constable, tithingman, collector of subsidy or fifteen, in any his majesty's courts in *Westminster*, or elsewhere, concerning any thing by any of them done by reason of any of their offices aforesaid, and all other in their aide or assistance, or by their commandement, &c. they may pleade the generall issue, and give the speciall matter for their excuse or justification in evidence. 7 Ja. ca. 5.

In an action of trespasse or other suit against any person for taking of any distresse or other act doing by force of the commission of sewers, the defendant in any such action shall and may make avowry, conusance, or justification generally, that it was done by authority of the commission of sewers for lotte or taxe assessed by that commission, &c. and the plaintife shall reply he did it of his own wrong without such cause. And both these acts were made for avoiding of prolixity and captiousnesse of pleading, tending to the great charge and danger of officers and ministers of justice, &c. Evidence, *evidentia*. This word in legall understanding doth not only containe matters of record, as letters patents, fines, recoveries, inrolments, and the like, and writings under seale, as charters and deeds, and other writings without seale, as court rolles, accounts, and the like, which are called evidences, *instrumenta*, but in a larger sense it containeth also *testimonia*, the testimony of witnesses, and other proofes to be produced and given to a jury, for the finding of any issue joined betweene the parties. And it is called evidence, because thereby the point in issue is to be made evident to the jury. *Probationes debent esse evidentes* (*id est*) *perspicuæ et faciles intelligi*. But let us now returne to *Littleton*. 23 H. 8. ca. 5.

"*Or at another day than the plaintife supposes.*" [*h*] As if the trespasse were done the fourth of May, and the plaintife alledgeth the same to be done the fifth of May, or the first of May, when no trespasse was done; yet if upon the evidence it falleth out that the trespasse was done before the action brought, it sufficeth: and this is warranted by *Littleton*, who speaketh indefinitely, that the jury may find the defendant guilty at another day than the plaintife supposeth. [*h*] 19 H. 6. 47. 5 E. 4. 5. 21 E. 4. 66. (Cro. Jac. 366. 1 Cro. 501 514, 515. 228, 229. 2 Cro. 202. Sid. 308.

"*And to such effect.*" Here is to be observed, that the law of England respecteth the ☞ effect and substauce of the matter, and not every nicety of forme or circumstance: *Qui hæret in literâ, hæret in cortice, et apices juris non sunt jura.* [283. b.]

Sect. 486.

*ALSO, if a man be disseised, and the disseisor dyeth seised, &c. and his sonne and heire is in by discent, and the disseisee enter upon the heire of the disseisor, which entrie is a disseisin, &c. if the heire bring an assise, or a writ * of entrie in nature of an assise, hee shall recover.*

AND the reason hereof is, for that in the writ of right mentioned in the next Section, the charge of the grand assise upon their oath is upon the meere right, and not upon the possession.

Sect. 487.

BUT if the heyre bring a writ of right against the disseisee, he shall bee barred, for that when the graund assise is sworne, their oath is upon the meere right, and not upon the possession. For if the heyre of the disseisor sue an assise of novel disseisin, (car si l'heire le disseisor † suist un assise de *novel disseisin*), *or a writ of* entrie *in nature of an assise, and recovers against the disseisee, and sueth execution, yet may the disseisee have a writ of* entrie *in the* per *against him, for the disseisin made to him by his father, or he may have against the heire a writ of right.*

(Ant 266. a.) "*FOR if the heyre of the disseisor, &c.*" Here is a diversity to be observed concerning that which hath been said, when the possession shall draw the right of the land to it, and when
6 E. 3. 7. not. And therefore when the possession is first, and then a right commeth thereunto, the entry of him that hath right to the possession shall gaine also the right which, as before it appeareth in those cases there put, followeth the possession, and the right of
Vid. Sect. 447. possession draweth the right unto it; but when the right is first, and then the possession commeth to the right, albeit the possession be defeated, (as here in *Littleton*'s case it is by the heire of the disseisor,) yet the right of the disseisee remaineth.

5 Ass. 1.
10 Ass. 16. "*A writ of entrie in the per.*" *A.* dyeth seised, and the land descendeth to *B.* his sonne; before he entreth an estranger abateth and dyeth seised, *B.* entreth, against whom the heire of the

* *of entrie in nature of an assise, he shall recover. But if the heir bring* (the beginning of next Section) not in L. and M. or Roh. but in both MSS.

† suist—porta, *L. and M. and Roh.*

[284. a.] the abator recovereth in an assise, *B.* may have a writ of *mort ☞ d'ancester*, and recover the land against him. And if the disseisin had beene done to *A.* &c. then after the recovery in the assise, *B.* should have had a writ of *entrie* in the *per*, because the heyre that is in by discent is in the *per*.

Sect. 488.

BUT if the heire ought to recover against the disseisee in the case afore said by a writ of right, then all his right should be cleerely taken away, for that judgement finall shall bee given against him, which should bee against reason where the disseisee hath the more meere right.

"*JUDGMENT finall.*" The forme whereof you shall see in the last Section of this chapter.

"*Which should be against reason.*" *Argumentum ab inconvenienti.* Vid. Sect. 87. &c. (Post. 295. b.)

Sect. 489.

AND know (my sonne) that in a writ of right, after the foure knights have chosen the grand assise, then he hath no greater delay than in a writ of formedon, *after the parties be at issue, &c. And if the mise bee joyned upon battaile, then he hath lesser delay.*

"*BATTAILE.*" See for this word in the last Section of this chapter. (Post. 294. b.)

"*Issue, &c.*" Or demurrer, which is an issue in law. (5 Rep. 104.)

Sect. 490.

(2 Inst. 244.) (Ant. 266, 267.)

ALSO, a release of all the right, &c. in some case is good, made to him which is supposed tenant in law, albeit he hath nothing in the tenements. As in a præcipe quòd reddat, *if the tenant alien the land* [284. b.] *hanging the writ, and after the demandant releaseth ☞ to him all his right, &c. this release is good, for that he is supposed to be tenant by the suit of the demandant, and yet hee hath nothing in the land at the time of the release made.*

Sect.

Sect. 491.

IN the same manner it is if in a præcipe quòd reddat *the tenant vouch, and the vouchee enters into warranty, if afterward the demandant release to the vouchee all his right*, this is good enough, for that the vouchee after he hath entred into warranty, is tenant in law to the demandant†, &c.*

HERE it doth appeare, that there is a tenant in deed and a tenant in law, and *Littleton* in this and the next Section putteth two examples of tenants in law, *viz.* [*h*] the tenant to a *præcipe* after alienation, and of the vouchee, whereof somewhat hath been said before.

[*h*] 10 E. 4. 13. 12 Ass. 41. 22 Ass. 13. 23 E. 3. 21. 25 E. 3. 40. 38 E. 3. 10. 11. 7 E. 3. 6. 19 E. 3. tit. Resceit. 34 E. 3. tit. Resceit. 9 E. 4. 16. 39 H. 6. 40. 17 Ass. 24. 8 H. 7. 5. 20 Ass. 2. 14 E. 3.

And it is observable, that *Littleton* saith, that in both cases hee is tenant in law to the demandant, and yet he hath nothing in the land. And therefore if after the vouchee hath entered into warranty, and become tenant in law, an ancestor collaterall of the demandant releaseth to the vouchee with warranty, he shall not plead this against the demandant, for that the release by the estranger is voide, which, besides the authorities before vouched, appeareth by *Littleton* himselfe*; for he saith, that he is tenant in law to the demandant, whereby he excludeth that he is tenant in respect of any estranger.

Procedendo, 4. 9 E. 3. 17. 32 E. 3. Quare Imp. 2 Dyer. 17 Eliz. 341. Sect. 447.
* Vi. devant Sect. 447. (Ante 265. b. 273. a.)

Sect. 492.

ALSO, as to releases of actions, realls and personals, it is thus. Some actions are mixt in the realty and in the personalty: as an action of wast sued against tenant for life; this action is in the realtie (cest action est ‡ en le realtie), *because the place wasted shall be recovered; and also in the personaltie, because treble damages shall be recovered for the wrongfull waste* (pur le ‖ tortious wast) *done by the tenant; and therefore in this action a release of actions reals is a good plea in bar, and so is a release of actions personals.*

Glan. li. 1. ca. 1. Bract. li. 3. fo. 101. Brit. fo. 71. Flet. li. 1. ca. 15 & 16. Mir. ca. 2. § 1. Bract. ub sup. Flet. li. 1. ca. 1.

NOTA, there be two kind of actions, *viz.* one that concern the pleas of the crowne, *placita coronæ*, or *placita criminalia*; another that concerne common pleas, *placita communia, seu civilia*. Of that which concerneth pleas of the crowne, *Littleton* speaketh hereafter in this chapter. Of actions concerning common pleas, *Littleton* speaketh in this place. And these are three fold (that is to say), reall, personall, and mixt. *Placitorum aliud*

* *&c.* added L. and M. and Roh.
† *&c.* not in L. and M. or Roh.
‡ en *not in L. and M. or Roh.*
‖ tortious wast—tort et wast, *L. and M. and Roh.*

[285. a.] *aliud personale, aliud reale, aliud mixtum.* Or, *Actionum quædam sunt in ℞ rem, quædam in personam, et quædam mixtæ.* And generally, *actio* is defined, [*i*] *Actio nihil aliud est quàm jus prosequendi in judicio quod sibi debetur.* Or, *Action n'est auter chose que loyall demande de son droit.* (lo. 484.)

[i] Vide Sect. 444. Bract. lib. 3. fol. 98. Fleta, lib. 1. c. 15. Mirror, c. 2. § 1.

[*k*] And by the release of all actions, causes of action be released; but within a submission of all actions to arbitrement causes of action are not contained.

[k] Lib. 8. 151. Altham's case. 35 H. 8. Dier, 57. 5 Mar. 217.

Vide 36 H. 6. 8. Vide 42 E. 3. 22, 23. (5 Rep. 8. a. 103. 77. b.)

"*Tenant for life.*" And so it is if it be brought against tenant for yeares, because it agreeth with the reason of *Littleton* here rendred, *viz.* that the place wasted shall be recovered, and therefore soundeth in the realty. (Cro. Car. 171.)

"*Also in the personaltie, because treble damages shall bee recovered,*" which doe sound in the personaltie. Wherefore *Littleton* concludeth, that in an action mixt a release of all actions reals is a good barre, and so is a release of all actions personals.

And here is to be observed a diversity betweene the act of the party, and an act in law; for a man by his owne act cannot alter the nature of his action: and therefore if the lessee for life or lessee for yeares doe waste, now is an action of waste given to the lessor, wherein he shall recover two things, *viz.* the place wasted, and treble damages: in this case if the lessor release all actions realls, he shall not have an action of waste in the personalty only; and if he release all actions personals, he shall not have an action of waste in the realty only.

[*l*] And so it is if the lessee doth waste, and after surrendreth to the lessor his estate, and the lessor accept thereof, the lessor shall not have an action of waste.

[l] 19 H. 6. 66. 14 H. 6. 14. 11 R. 2. Wast. 99. 14 H. 8. 14. 23 H. 8. Br. Waste. (5 Rep. 75. (Noy, 118.)

But by act in law the nature of the action may be changed; as if a man make a lease *pur terme d'auter vie*, and the lessee doth waste, and then *cesty que vie* dyeth, an action of waste shall lye for damages only because the other is determined by act in law.

And againe, hereupon is another diversity to be observed, that in case when an action is well begun, and part of the action determineth by act in law, and yet the like action for the residue is given, there the writ shall not abate, but proceed. But where by the determination of part the like action remaineth not for the residue, there the action well commenced shall abate. As if an action of waste be brought against tenant *pur terme d'auter vie*, and hanging the writ *cesty que vie* dyeth, the writ shall not abate, but the plaintife shall recover damages only, because if *cesty que vie* had died before any action brought, the lessor might have an action of waste for the damages. So if an *ejectione firmæ* be brought, and the terme incurreth hanging the action, yet the action shall proceed for damages only, because an *ejectione* doth lye after the terme for damages only. But if tenant *pur auter vie* bring an assise, and *cesty que vie* dyeth hanging the writ, albeit the writ were well commenced, yet the writ shall abate, because no assise can be maintainable for damages only.

11 H. 6. 43. 9 E. 4. 50. 24 E. 3. 72. 18 E. 3. 28. 9 H. 6. 30. (7 Rep. 77. 80. a.) (Sid. 61. Hob. 322.)

So if an action of waste be brought by baron and fem in remainder, in especiall tayle, and hanging the writ the wife dieth

2 H. 4. 22. 6 E. 2. Briefe, 807.

(Ant. 53. b. Plo. 18. b.) 34 H. 6. 10. 9 E. 4. 39. 14 H. 7. 31. 18 E. 3. Scire facias, 10. (Wm. Jones, 215. Cro. Car. 171. 5 Rep. 48. b.)

without issue, the writ shall abate, because every kind of action of waste must be *ad exhæredationem.*

If a writ of annuity be brought, and the annuity determineth hanging the writ, the writ faileth for ever, because no like action can be maintained for the arrerages only, but for the annuity and arrerages.

But where damages only are to be recovered, there albeit by act in law the like action lyeth not afterwards, yet the action well commenced shall proceed; [*m*] as if a conspiracy be brought against two, and one of them dyeth hanging the writ, it shall proceed.

[*m*] 22 R. 2. Briefe, 888. 18 E. 4. 1. (Doct. Pla. 47.) (Ray. 180, and 176. S. C.) (1 Saun. 228. S. C.

And in an assise of *novel disseisin*, a writ of annuity, *quare impedit*, and other mixt actions (1), a release of actions real is a good plea, and so it is of a release of actions personal.

1 Vent. 12 & 13. 2 H. 4. 13. 9 H. 6. 57. Mo. 133. contra.) 30 H. 4. Barre, 59. (2 Roll. Abr. 411. 2 Co. 68. a. Ant. 197. b.)

But if three joyntenants be disseised, and they arraigne an assise, and one of them release to the disseisor all actions personals, this shall barre him, but it shall not barre the other plaintife; for having regard to them the realty shall bee preferred, *et omne majus trahit ad se minus dignum.* [*n*] And in a writ of ward brought by two, the release of the one shall not grieve the other, but shall enure to his benefit, for he shall recover the whole ward, and hold his companion out.

[*n*] 30 H. 6. ubi supra. 45 E. 3. fol. 6. 18 E. 3. fol. 56. 21 H. 6. 18. a. (Doc. Pla. 47. 301.) (W. Jones, 215. contra.)

But here a diversity is to bee ☞ recovered at the common law, as in an assise, &c. and reall actions where damages are not to be recovered by the common law, but are given by the [*o*] statute, for there a release of all actions personals is no barre, as in the writ of dower, *entrie sur disseisin in le per, &c. mord'anc', aiel, &c.*

[285. b.]

[*o*] Merton, cap. 1. in dower. Gloc. cap. 1.

(5 Rep. 97.)

*Sect. 493.

AND in a quare impedit *a release of actions personals is a good plea, and so is a release of actions reals,* per Martin, quod fuit concessum. Hill. 9 H. 6. fol. 57.

9 H. 6. 57. 22 H. 6. 27. b.

THIS is an addition to *Littleton*, which although it be law, and the booke truly cited, yet I passe it over. But yet note by the way, that a release of actions personals is also a good barre in a *quare impedit*, because it is an action mixt.

Sect.

* This Section is not in L. and M. or Roh.

(1) 5 *Car. B. R. Sir John Bodvill's case. Resolved contra*; scilicet, *that it was a mere personal action, and not mixt*; et ideo, *annuity in Wales by bill lies well*; *where, if it had been mixt, the action ought to have been brought by original, per* 34 *H.* 8. *ca.* 26. *upon argument by the court on error brought. Cro.* 170. L. Nott. MSS.—[Note 246.]

Sect. 494.

IN the same manner it is in an assise of novel disseisin, *for that it is mixt in the realtie and in the personaltie. But if such an assise bee arraigned against the disseisor and the tenant, the disseisor may well plead a release of actions personals to barre the assise, but not a release of actions reals, for none shall plead a release of actions reals in an assise but the tenant.*

"*THE disseisor may well plead, &c.*"

Nota, every man shall plead such pleas as are proper for him, and apt for his defence to be pleaded. [*q*] As a disseisor that hath nothing in the land may pleade a release of actions personals, because damages are to be recovered against him, and therefore for his defence hee may plead it; but a release of actions reals he cannot plead (1), because he hath no estate in the land, and none shall plead a release of actions reals in an assise, but the tenant of the land. *Et sic de cæteris.* But the tenant in an assise shall plead a release of actions personals to the disseisor, for that plea proveth that the plaintife hath no cause of action against him.

(Post. 303. b.) (1 Roll. Rep. 36, 37.) (Ant, 180. b.) (Hob. 103.) [*q*] 11 Ass. 9. 18 E. 3. 2. 23, 24. 31 E. 3. Quare imp. 161. 7 E. 3. 5. 9 E. 3. 6. 39 E. 3. 30. 22 E. 3. 2. 13 H. 4. 7. 3 E. 2. Quare imp. 44. 38 E. 3. 30, 31. 5 E. 3. 26. 21 E. 3. 16, 17. 5 H. 7. 34. 8 H. 5. 14. 22 H. 6. 28, 29. 1 H. 7. 34. 27 E. 3. 81. 32 H. 6. 15. b. 17 Ass. 25. 2 H. 7. 14. 13 H. 8. 13, 14. 44 E. 3. 12. 46 E. 3. 13. 16 E. 4. 11. 24 E. 3. 34. 4 E. 4. 18. 7 H. 4. 34. 2 R. 2. Encumbent, 4. 33 E. 3. Quare imp. 194. (8 Rep. 151. b.) (Sect. 278.) 13 H. 4. 2. a. (7 Rep. 26. a.)

If the disseisee release to the disseisor all actions reals, and the disseisor maketh a feoffement in fee, and an assise is brought against them, the feoffee shall not plead the release to the disseisor, for that he is not privie to the release, for a release of actions shall only extend to privies. (Sect. 471.) (10 Rep. 51. b.)

If a disseisor make a lease for life, the remainder in fee, and the disseisee release all actions to the tenant for life, after the death of tenant for life, he in the remainder shall not plead the said release.

If the disseisee release all actions to the disseisor, and die, this doth barre him but for his life, for after his decease his heire shall have an action, [*r*] as some have said. And hereby may appeare a manifest diversity between a release of a right, and a release of actions. [*r*] 19 H. 6. 23. a. (8 Rep. 152.)

Sect.

(1) *Hob.* 163. *accord. whether the action be brought against the disseisor only, or against him and the tenant; but if the same person be disseisor and tenant, then he may plead a release of actions real.* L. Nott. MSS.—[Note 247.]

(8 Rep. 140.)

☞ Sect. 495.

[286. a.]

ALSO, in such actions reals which ought to be sued against the tenant of the freehold, if the tenant hath a release of actions reals from the demandant made unto him before the writ purchased, and he plead this, it is a good plea for the demandant to say, that hee which plead the plea had nothing in the freehold at the time of the release made, for then he had no cause to have an action reall against him.

(8 Rep. 151. b.) THIS is evident enough by that which hath beene said, that a release of all actions reals must bee made to him that is tenant of the land, because a reall action must be brought against such a tenant.

Sect. 496.

ALSO, in such case where a man may enter into lands or tenements, and also may have an action reall for this, which is given by the law against the tenant; if in this case the demandant releaseth to the tenant all manner of actions reals, yet this shall not take the demandant from his entrie, but the demandant may well enter notwithstanding such release, for that nothing is released but the action, &c.*

(8 Rep. 152.) "*MAY enter.*" Here it appeareth, that where a man may enter, a release of all actions doth not barre him of his right, because he hath another remedy, *viz.* to enter. And this is agreeable with the authoritie of our [*s*] bookes. But where his entry is not lawful, there a release of all actions is by consequence a barre of his right, because he hath released the mean whereby he might recover his right. As if the disseisee release all actions to the heire of the disseisor, which is in by discent, he hath no remedy to recover the land; but yet the disseisee hath a right, for that hee hath released his action, and not his right, as shall be said hereafter in the chapter of *Remitter* in his proper place. If the heire of the disseisor make a feoffment in fee to two, and the disseisee releaseth to one of the feoffees all actions, and he dieth, the survivour shall not plead this release for the causes abovesaid. And hereby also again appeareth another diversity between a release of a right, and a release of actions.

[*s*] 18 E. 3. 34. 19 E. 3. Title, 35.

(8 Rep. 150.) 19 Ass. 3. 30 E. 3. 19. 6. 19 H. 6. 4. 6. 21 H. 7. 23. b. 7 H. 6. 6.

☞ It is to be observed, when a man hath severali remedies for one and the selfe same thing, be it reall, personall, or mixt, albeit he releaseth one of his remedies, he may use the other.

[286. b.]

Sect.

* *&c.* added in L. and M. and Roh.

Sect. 497.

(9 Rep. 52.)

IN the same manner is it of things personall; as if a man by wrong take away my goods, if I release to him all actions personals, yet I may by the law take my goods out of his possession.

This of it selfe is evident.

Sect. 498.

*ALSO, if I have * any cause to have a writ of detinue of my goods against another, albeit that I release to him all actions personals, yet I may † by the law take my goods out of his possession, because no right of the goods is released to him, but only the action, &c.*

"*A WRIT of detinue.*" *Breve de detentione dicitur à detinendo,* because *detinet* is the principall word in the writ. And it lyeth where any man comes to goods eyther by delivery, or by finding. In this writ the plaintife shall recover the thing detained, and therefore it must bee so certaine as it may be knowne, and for that cause it lyeth not for money out of a bagge, or chest; and so of corne out of a sacke, and the like, these cannot be knowne from other. [*t*] A man shall have an action of detinue of charters which concern the inheritance of his land if hee know the certainty of them, and what land they concerne, or if they be in bagge sealed, or chest locked, though he knoweth not the certainty of them: and it is good policie (if possibly he can) in that case to declare of one charter in especiall, [*u*] and then the defendant shall not wage his law. [*x*] An action of detinue for charters doth sound in the realty, for therein summons and severance lyeth; and in detinue of goods a *capias* doth lye; but for charters in speciall a *capias* lyeth not, and yet a release of actions personals in a writ of detinue of charters is a good barre.

(Coke's Ent. 170. b.) (10 Rep. 119. b. 2 Cro. 681.) Glanvil. lib. 10. cap. 13. (F.N.B. 138. a.) (1 Roll. Abr. 606.) (2 Roll. Abr. 505.) (Doc. Pla. 124, 125.) 41 E. 3. 2. (1 Roll. Abr. 5. Noy.) [*t*] 41 E. 3. 2. 8 H. 6. 18. 28, 29. 21 E. 3. 28. 3 H. 6. 19. 30 H. 6. 4. 9 H. 6. 18. (9 Rep. 18. 78. b.

F. N. B. 138.) (10 Rep. 51. b.) [*u*] 10 H. 6. 20. 21 H. 6. 1. 14 H. 6. 4. 14 H. 4. 23, 24. 27. (Post. 295.) [*x*] 20 H. 6. 45. 19 E. 3. Severance, 14. 31 E. 3. ib. 32. 42 E. 3. 13. 40 E. 3. 25. (10 Rep. 135.) (Doc. Pla. 125.)

Sect. 499.

ALSO, if a man be disseised, and the disseisor maketh a feoffment to divers persons to his use ‡, and the disseisor continually taketh the profits, &c and the disseisee release to him all actions reals, and after hee sueth

* *any* not in L. and M. or Roh.
† *by the law* not in L. and M. or Roh.
‡ *&c.* added in L. and M. and Roh.

sueth against him a writ of entrie in nature of an assise by reason of the statute, because hee taketh the profits, &c. Quære, *how the disseisor shall bee ayded by the sayd release; for if hee will plead the release generally, then the demandant may say, that hee had nothing in the freehold at the time of the release made; and if hee plead the release specially, then he must acknowledge a disseisin* (donques il covient * constre un disseisin), *and then may the demandant enter into the land, &c. by his acknowledgment of the disseisin, &c. but peradventure by speciall pleading he may barre him of the action* † *which he sueth, &c. though the demandant may enter.*

"*BY reason of the statute.*" That is to say, the statute of 4 *H.* 4. *ca.* 7. and 11 *H.* 6. *ca.* 4.

(5 Rep. 77.) 3 H. 7. 2.

"*For if hee will plead the release generally.*" Here it appeareth, that when the statute had given the action reall ☞ against the pernor of the profits, it enableth him to take and pleade a release of all actions reals, and yet he hath neither *jus in re*, nor *jus ad rem*, which point is worthy of observation for manifestation of the equity of the law. [287. a.]

(8 Rep. 150.) 15 E. 4. 4. b. (Doc. Pla. 343.)

"*Then he must acknowledge a disseisin, &c.*" In a writ of dower the tenant pleaded that before the writ purchased *A.* was seised of the land, &c. untill by the tenant himselfe hee was disseised, and that hanging the writ *A.* recovered against him, &c. judgment of the writ, and adjudged a good plea, in which plea the tenant confessed a disseisin in himselfe.

"*Then may the demandant enter.*" So might hee have done in this case that *Littleton* putteth, albeit the tenant confessed no disseisin. And therefore it is no prejudice to the tenant to confesse a disseisin in himselfe, &c. and then, as *Littleton* here holdeth, the action shall be barred.

28 H. 8. Dier, 32. 27 H. 8. c. 10.

But the reader is to observe, that now by the statute of 27 *H.* 8. *cap.* 10, which executes the possession to the use, all the statutes against *cesty que use*, or pernor of the profits, have lost their force.

Sect. 500.

ALSO, if a man sue an appeale of felony of the death of his ancester against another, though the appellant release to the defendant all manner of actions reall and personall, this shall not aide the defendant, for that this appeale is not an action reall, in as much as the appellant shall not recover any realtie in such appeale: neither is such appeale an action personall, in as much as the wrong was done to his ancestor, and not to him. But if he release to the defendant all manner of actions, then it shal be a good barre in an appeale. And so a man may see that a release of all manner of actions is better than a release of actions reals and personals, &c.

OUR

* de, *added in L. and M. and Roh.*

† *which he sueth, &c.* not in L. and M. or Roh.

OUR author having spoken of common pleas, now treateth of certaine pleas criminall, or pleas of the crowne, whereof it is said, [a] *Item, criminalium alia majora, alia minora, alia maxima, secundum criminum quantitatem; sunt enim crimina majora et dicuntur capitalia eò quòd ultimum inducunt supplicium, &c. Minora verò, quæ fustigationem inducunt, vel pœnam pilloralem, vel tumboralem, vel ☞ carceris inclusionem,* &c.

[a] Bract. lib. 3. fo. 101. b.

[287. b.]

[b] *Criminalium quædam sententialiter mortem inducunt, quædam verò minimè.* [c] *De peche est briefe division, car est mortal ou venial solonque ceo que appiert es paines.* And that crime is called mortall or corporall: mortall, because it deserveth death; and such crimes are called veniall, as may be redeemed or satisfied by some other punishment than by death.

[b] Flet. lib. 1. cap. 15. (A)
[c] Mir. ca. 1. § 4. & ca. 4. des paines en divers manners.

"*Appeale of felonie.*" [x] *Appellum* signifieth *accusatio*, an accusation, and therefore to appeale a man is as much as to accuse him; and in [y] ancient bookes he that doth appeale is called *accusator*, and is peculiarly in legall signification applyed to appeales of three sorts. First, of wrong to his ancestor, whose heire male he is, and that is onely of death, whereof our author here speaketh. The second is of wrong to the husband, and is by the wife only of the death of her husband to be prosecuted. The third is of wrongs done to the appellants themselves, as robbery, rape, and mayhem. The word *appellum* is derived of *appeller*, to call, because *appellans vocat reum in judicium*, he calleth the defendant to judgement, and the plaintife is called the appellant.

[x] Mir. ca. 2. § 7. Bract. li. 3. fo. 137. Brit. ca. 22, 23. Flet. li. 1. ca. 31, 32, 33. (4 Rep. 39.) (3 Inst. 131.)
[y] Glanv. lib. 7. cap. 9. et lib. 14. ca. 1. et 3.

"*Appeale,*" *Appellatio*, is a removing of a cause in any ecclesiastical court to a superior; but of this there needeth no speech in this place.

24 H. 8. ca. 12. 1 El. ca. 1.

"*Of the death.*" Appeale of death is of two sorts, of murder and of homicide. Murder is when one is slaine with a man's will, and with malice prepensed or forethought. Homicide, as it is legally taken, is when one is slaine with a man's will, but not with malice prepensed. Chance-medly, or *per infortunium*, is when one is slaine casually, and by misadventure, without the will of him that doth the act, whereupon death insueth; but of this no appeale doth lye. Murder commeth of the Saxon word *mordreu.*

(4 Rep. 40. 43. 3 Inst. 47.)

Were is an old Saxon word sometime written *wera*, and signifieth the price of the life of a man, *estimatio capitis*, that is, so much as one paid for the killing of a man; by which it appeareth, that such government was in those dayes, as slaughters of men were most rarely committed, as master *Lambard* collecteth. And you shall not reade of any insurrection or rebellion before the Conquest, when the view of frankpledge and other ancient lawes of this realme were in their right use.

Lamb. Expos. verb. Estimatio. Flet. lib. 1. ca. 42. Hoved. fo. 344.

"*But if he release to the defendant all manner of actions, &c.*" And the reason is, for that then all actions, as well criminall as reall, personall and mixt, be released. But a release of all actions reall and personall cannot barre an appeale of death, because that release extendeth to common or civil actions, and not

(4 Rep. 45. 47.) (Doct. Pla. 97.) 21 H. 6. 16.

(A) *The words quoted in the text under [b] are in Fleta, lib. 1. cap. 16.*

not to actions criminall: but releases of all actions criminall or mortall, or concerning pleas of the crowne, are good barres in an appeale of death, and so the *(&c.)* in the end of the Section is well explained.

☞ Sect. 501. [288. a.]

ALSO, in an appeale of robberie, if the defendant will plead a release of the appellant of all actions personals, this seemeth no plea; for an action of appeal where the appellee shall have judgment of death, &c. is higher than an action personall is, and is not properly called an action personall; and there if the defendant will plead a release of the appellant to barre him of the appeale, in this case hee must have a release of all manner of appeales (en cest case il covient d'aver un release de touts manners * d'appeals), *or all manner of actions, as it seemeth, &c.*

22 Ass. 39. W. 1. cap. 20.

"*ROBBERIE.*" *Roboria,* properly is when there is a felonious taking away of a man's goods from his person: and it is called robbery, because the goods are taken as it were *de la robe,* from the robe, that is, from the person; but sometimes it is taken in a larger sense.

(3 Inst. 68. Dy. 39. a. Cro. Car. 531.)

"*Judgement of death, &c.*" By this *(&c.)* is implyed appeales of rape, of arson or burning, of felony or larceny, for therein also is judgment of death, and are within our author's reason.

Vid. Sect. 508. (Post. 291. b.)

"*As it seemeth, &c.*" It is to be understood, that, first, a release of all actions criminall, mortall, or concerning pleas of the crowne; secondly, a release of all actions generally; thirdly, a release of all appeales; and lastly, a release of all demands, are good barres in all these kinds of appeales.

Sect. 502.

BUT in appeale of mayhem a release of all manner of actions personals is a good plea in barre, for that in such an action hee shall recover nothing but damages.

Mir. ca. 1. § 9. Glan. li. 14. ca. 7. Bract. lib. 3. Tract. 2. ca. 24. Brit. fo. 48. ca. 25. Flet. lib. 1. ca. 38. Staunf. Pl. Cor. fo. 38. b. (3 Inst. 118. 4 Rep. 43. 45. Ant. 126.) 28 E. 3. 94. 8 H. 4. 21.

"*MAYHEM,*" *mahemium, membri mutilatio,* or *obtruncatio,* commeth of the French word *mehaigne,* and signifieth a corporall hurt, whereby hee loseth a member, by reason whereof hee is lesse able to fight; as by putting out his eye, beating out his fore-teeth, breaking his skull, striking off his arme, hand, or finger, cutting off his legge or foot, or whereby he loseth the use of any of his said members.

"*Damages,*

* d'actions *added in L. and M.*

"*Damages, &c.*" Vide Sect. 194.

"*A release of all manner of actions personals is a good plea, &c.*" And the reason is, for that every action wherein damages only are recovered by the plaintife, is in law taken for an action personall. 21 H. 6. 16. (Ant. 127. a. 9 Rep. 52.)

[288. b.]

☞ Sect. 503.

ALSO, if a man bee outlawed in an action personall by processe upon the originall, and bringeth a writ of errour, if he at whose suit he was outlawed will pleade against him a release of all manner of actions personals, this seemeth no plea; for by the said action hee shall recover nothing in the personaltie, but only to reverse the outlawrie: but a release of the writ of errour is a good plea.

"*A WRIT of errour.*" This writ lyeth when a man is grieved by an error in the foundation, proceeding, judgment, or execution, and thereupon it is called *breve de errore corrigendo.* But without a judgment, or an award in nature of a judgment, no writ of error doth lie; for the words of the writ be, *si judicium redditum sit:* and that judgement must regularly be given by judges of record, and in a court of record, and not by any other inferiour judges in base courts, for thereupon a writ of false judgment doth lye. In this case of outlawry upon processe, the judgement is given (in the county court, which is no court of record) by the coroners (saving in London judgement is given by the recorder, and not by the maior, who is coroner by the custome of the city): for after the defendant is *quinto exactus*, and maketh default, the judgement is, *ideo utlagetur per judicium coronatorum*; and in London, *per judicium recordatoris:* so as by the outlawry the plaintife recovers nothing, but the king taketh the whole benefit thereof; for the law did intend, that the defendant would rather appeare and answer the plaintife, &c. than to forfeit all his goods and chattels, debts and duties to the king, by his default and contumacie. But *Littleton* is to be intended, that the sherife doe returne the *exigent* whereby the outlawry appeares of record, or that the outlawry be removed by *certiorari*, for before that time that the outlawry appeare of record, the defendant doth not forfeit his goods, nor the plaintife can be disabled, nor any writ of error doth lye in that case. And this is the cause that the goods of outlawes cannot be claimed by prescription, because they are not forfeited untill the outlawry appeare of record. *Vide Sect.* 197, where it appeareth by *Littleton*, that the plaintife cannot be disabled by outlawry, unlesse it appeareth of record.

V. li. 11. fo. 39. 41, in Metcalfe's case upon what judgements and awards a writ of error doth lie. (Cro. Car. 66.) (3 Rep. 1. Cro. Jac. 5.) Li. 5. fo. 111. Foxley's case. Li. 6. fo. 11, 12. Jentleman's case. (Cro. Car. 63. Noy, 68. 1 Roll. 750. 11 Rep. 38. F. N. B. 17. Ant. 117. b. 8 Rep. 141.) 15 Eliz. Dyer, 317. (Ant. 128. b.) Lib. 9. fol. 119. 8 Zanchar's case. (5 Rep. 111.) (Ant. 114.) 28 Ass. 49. 12 E. 3. Utlag. 3. 38 E. 3. 13. Mich. 4 & 5 El. Dyer, fo. 222. Vid. Sect. 197. (6 Rep. 25. F. N. B. 20. b. 22. b.)

"*For by the said action hee shall recover nothing in the personaltie.*" Hereupon is to be observed a diversity, when by the writ of error the plaintife shall recover, or be restored to any personall thing, as debt, damage, or the like; for then by the reason that *Littleton* here yeeldeth, the release of all actions personals is a good plea, for that the plaintife is to recover, or to be restored 1 H. 4. 6.

restored to something in the personalty. And so likewise when land is to be recovered, or to be restored in a writ of error, a release of all actions reals is a good barre. But where by a writ of error the plaintife shall not bee restored to any personall or reall thing, then a release of all actions reall or personall is no barre; and therefore *Littleton* here putteth his case with great caution. If a man (saith he) by processe upon the originall be outlawed, there in deed he shall be restored to nothing in the personalty against the plaintife. But where by the outlawry he forfeited all his goods and chattels to the king, he shall be restored to them; also thereby he shall be restored to the law, and to be of ability to sue, &c. But if the plaintife, in a personall action, recover any debt, &c. or damages, and (A) bee outlawed after judgement, there in a writ of error brought by the defendant upon the principall judgement, a release of all actions personals is a good plea. And so it is where a judgement is given in a reall action, a release of all actions reals is a good barre in a writ of error brought thereupon.

(1 H. 4. 6. 8 Rep. 152. 156. 8 H. 6. c. 12. 32 H. 8. 30. 18 Eliz. 14. Cro. Car. 272. 878.) (5 Rep. 41, 42.)

☞ If the tenant in a reall action release to the demandant after recovery his right in the land, he shall not have a writ of error, for that he cannot be restored to the land. [289. a.]

9 H. 6. 47.

And so it is if debt, &c. or dammages be recovered in a personall action by false verdict, and the defendant bringeth a writ of attaint, a [a] release of all actions personal is a good barre of the attaint; for thereby the plaintife is to be restored to the debt, &c. or damages which he lost: the like law is if a judgement be given upon a false verdict in a reall action, a release of all actions real is a good barre in an attaint. For both the writ of error and the writ of attaint doe insue the nature of the former action, &c.

[a] 26 H. 8. 3. b. 13 E. 4. 1, 2. 34 H. 6. 31. 35 H. 6. 19. 29 Ass. 35.

And so it is if a writ of *audita querela* be brought by the defendant in the former action to discharge himselfe of an execution, a release of all actions personal is a good barre, because he is to discharge himselfe of a personall execution.

47 E. 3. 6. 24 E. 3. 37. (5 Rep. 86.)

(6 Rep. 25.)

"*But a release of the writ of errour is a good plea, &c.*" So as in this speciall case here put by *Littleton*, wherein the plaintife is to recover or be restored to nothing against the party; yet for that the plaintife in the former action is privy to the record, a release of a writ of error to him is sufficient to barre the plaintife in the writ of error of the suit, and vexation by the writ of error. And so note that an action reall or personall doth imply a recovery of something in the realty or personalty, or a restitution to the same, but a writ (1) implyeth neither of them, which is worthy of observation.

Sect.

(A) *It seems, that the text should be read as if the words,* the defendant, *had been inserted in this place. See Mr. Ritso's Intr. p.* 120.

(1) That is, a writ of error.

Sect. 504.

ALSO, if a man recover debt or damages, and he releaseth to the defendant all manner of actions, yet hee may lawfully sue execution by capias ad satisfaciendum, *or by* elegit, *or* fieri facias : *for execution upon such a writ cannot bee said an action.*

HERE appeareth a diversity betweene an action and an execution. For regularly an action is said in its proper sense to continue until judgement bee given, and after judgement then doth processe of execution begin ; and therefore a release of all actions regularly is [*b*] no barre of execution, for the execution doth beginne when the action doth end. And therefore the foundation of the first is an originall writ, and doth determine by the judgement; and writs of execution are called judiciall, because they are grounded upon the judgement.

Vide Sect. 233. (5 Rep. 88, 89. 8 Rep. 153. a.) 8 E. 3. 9. 4 E. 3. Attorney, 18. 33 H. 6. 49. 34 H. 6. 51. [*b*] 13 H. 4. Release, 53. 19 H. 6. 3. 26 H. 6. Execution, 7.

"*By capias ad satisfaciendum.*" This is a judiciall writ for the taking of the body in execution untill hee hath made satisfaction: where a *capias ad satisfaciendum* lyeth at the common law ; and where it is given by statute you may reade at large in my Reports.

Sir William Herbert's case, lib. 3. fo. 11, 12.

I have read two ancient records touching the taking of the body in execution, whereof, to my remembrance, I never read any touch in our bookes, yet will I recite them, and leave them to the judicious reader. *William de Walton* brought an action of trespasse of breaking his close against *John Martin*, and upon not guilty pleaded, hee was found guilty and damages assessed : whereupon judgement was given that the plaintife should recover his damages, *et quòd prædictus Johannes capiatur.* And the record saith, *Quòd prædictus Johannes venit coram domino rege et reddidit se prisonæ, et quia constat curiæ per inspectionem corporis ipsius Johannis, quòd idem Johannes est talis ætatis quòd pœnam imprisonamenti subire non potest, ideo dictum est ei, quòd eat inde sine die.* The other record is, That *Ellen Allot* brought an appeale of robbery against *John Boskiseleke* clerk, *Richard Charta*, and others, who pleaded not guilty, and were not found guilty : whereupon judgement was given that they should goe quite, *et prædicta Elena pro falso appello suo committatur prisonæ, &c.* (for [*b*] by the statute she ought to be imprisoned in that case for a yeare.) But the record saith, *Quia eadem Elena pregnans fuit, et in periculo mortis, ipsa dimittitur per manucaptionem, &c. ad habendum corpus usque quind. Michaelis, &c.* (2).

Pasch. 14 E. 3. Rot. 106. coram Rege in Thesaur. Surrey. (Cro. Jac. 356.)

Mich. 41 E. 3. Rot. 27. coram Rege, Cornub. in Thesaur.

[*b*] W. 2. cap. 12. (Siderf. 236. Hutton, 118.)

[289. b.] ☞ There be certaine maximes in the law concerning executions, as taking some instead of many. *Ea quæ in curiâ nostrâ ritè acta sunt, debitæ executioni demandari debent. Parum est latam esse sententiam nisi mandetur executioni. Executio juris non habet injuriam. Executio est fructus et finis legis. Juris effectus in executione consistit. Prosecutio legis est gravis vexatio, executio legis coronat opus. Boni judicis est judicium sine dilatione mandare executioni. Favorabiliores sunt executiones*

(2) The record at large is stated in 12 Rep. fol. 126.

executiones aliis processibus quibuscunque. But now let us heare what *Littleton* saith.

(5 Rep. 88. a.)

" *By elegit.*" This is also a judiciall writ, and is given by the statute eyther upon a recovery for debt or damages, or upon a recognizance in any court. And it is called a writ of *elegit*, for

[c] W. 2. cap. 18. (Plowd. 178. b.)

that according to the statute that saith, [c] *Sit de cæterò in electione illius, &c. sequi breve quòd vicecomes fieri faciat, &c. vel quòd liberet ei, &c.* the words of the writ bee, *Elegit sibi liberari, &c.* And thereupon it is called an *elegit*. By this writ the sherife shall deliver to the plaintife *omnia catalla debitoris (exceptis bobus & afris carucæ) et medietatem terræ.* And this must be done by an inquest to be taken by the sherife.

[d] 11 E. 1. Stat. de Acton Burnell. 13 E. 1. de mercatoribus. 27 E. 3. cap. 22. Vide Fleta, li. 2. cap. 57. 25 E. 3. 53. (6 Rep. 44.) [*] 23 H. 8. cap. 6.

When *Littleton* wrote, by force of certaine acts [d] of parliament, execution might bee had of lands (besides by force of the *elegit*) upon statutes merchant, statutes staple, and recognizances taken in some court of record; and since he wrote, upon a recognizance or bond taken by force of the statute [*] of 23 *H.* 8, before one of the chief justices, or the maior of the staple, and recorder of London out of terme, which hath the effect of a statute staple. The manner of the executions upon body, lands, and goods, appeareth in the statutes quoted in the margent.

[e] 32 H. 8. cap. 5. (5 Rep. 86. b. 2 Inst. 677.)

Since *Littleton* wrote, a profitable statute hath been made [e] concerning executions of lands, tenements, and hereditaments, whereby it is provided, that if after such lands, &c. be had and delivered in execution upon a just or lawfull title, wherewithall the said lands, &c. were liable, tied, or bound at such time, as they were delivered or taken into execution, shall be recovered, devested, taken, or evicted out of, or from the possession of any such person, &c. before such times, as the said tenants by execution, their executors or assignes, shall have fully levied their debt and damages, for the which the said lands, &c. were taken in execution; then every such recoveror, obligee, and recognizee, shall have a *scire facias* out of the same court from whence the former execution did proceed, against such person or persons as the former execution was pursued, their heires, executors or assignes, to have execution of other lands, &c. liable and to be taken in execution for the residue of the debt or damages. *Sed opus est interprete.*

Lib. 4. fol. 66. Fulwood's case.

Therefore, first, it is to be knowne, that where the tenant by execution hath remedy given to him by law after eviction, there the statute extendeth not to it; for the act saith, by reason

(4 Rep. 81. 2 Inst. 678.)

whereof the said recoverors, obligees, and recognizees, have been cleerly set without remedy, &c. and the body referreth to the preamble, and the party ought not to have double satisfaction, one by the former lawes, and another by this statute.

(Cro. 338.)

And therefore if part of the land, &c. be evicted from the tenant by execution, this statute extendeth not to it; because he should hold the residue, till he be fully satisfied, and he must be contented if all be evicted saving one acre to hold that, though it be but a poore remedy; for no new execution in that case hee can have upon this statute. Therefore if the conusee hath remedy *in præsenti* for part, or *in futuro* for all, or part, this statute extendeth not to it.

Secondly, if a man be bound to *A.* in a statute of a thousand pounds, and by a latter statute to *B.* in a hundred pounds, and *B.* first extendeth, and then *A.* extendeth and taketh the land from

from *B.* yet *B.* shall have no aide of the statute, because after the extent of *A*, *B.* shall re-enjoy the land by force of his former execution.

Thirdly, If the wife of the conusor recover dower against the tenant by execution, he shall hold over, and shall have no aide of this statute.

Fourthly, If a man put out his lessee for yeares, or disseise his lessee for life, and after knowledge a statute and execution is sued against him, and the lessees re-enter, the tenant by execution after the leases ended, shall hold over, and have no aide of this statute.

Fifthly, This statute must not be taken literally, but according to the meaning; therefore where the letter is untill he, &c. or his assignes shall fully and wholly have levied the whole debt or damages; if he hath assigned severall parcels to severall assignees, yet all they shall have the land but till the whole debt be paid.

Sixthly, where the words be, for the which the said lands, &c. were delivered in execution. A disseisor conveys lands to the king, who granteth the same over to *A.* and his heires to hold by fealty, and twenty pound rent, and after granteth the seigniory to *B.* *B.* knowledgeth a ☞ statute, and execution is sued of the seigniory. *A.* dieth without heire, and the conusee entereth, and is evicted by the disseisee; he shall have the aide of this statute; and yet it is out of the letter of the law, for the seigniory was delivered in execution and not the tenancy; but he was tenant by execution of those lands, and therefore within the statute. But the perquisite of a villeine being evicted is out of the statute, for he is tenant in fee simple thereof, and not tenant by execution.

[290. a.]

Seventhly, Where the words be (delivered and taken in execution), yet if after the *liberate*, the conusee entereth (as he may) so as the land is never delivered, yet he is within the remedy of this statute, for he is tenant by execution.

Eighthly, Where the statute saith, then every such recoveror, obligee, and recognizee shall, &c. and saith not, their executors, administrators, or assignes, but they are omitted in this materiall place, yet by a benigne interpretation this statute shall extend to them, because they are mentioned in the next precedent clause of the eviction, and the remedy must by construction be extended to all the persons that appeare by the act to be grieved; a point worthy the observation. (Ant. 268. b.)

Ninthly, Where the statute giveth a *scire fac'* out of the same court, &c. if the record be removed by writ of error into another court, and there affirmed, the tenant by execution that is evicted shall have a *scire fac'* by the equity of this statute out of that court, because the *scire fac'* must be grounded upon the record. *Et sic de similibus.* (F.N.B. 265. d.)

Tenthly, Where the statute giveth the *scire fac'* against such person or persons, &c. that were parties to the first execution, their heires, executors, or assignes, &c. this must not be taken so generally as the letter is; for if the first execution were had against a purchaser, &c. so as nothing was liable in his hands but the land recovered; if this land be evicted from tenant by execution, no *scire fac'* shall be awarded against him, his heires, executors, or assignes. But if he hath other lands subject to the execution, then a *scire fac'* lyeth against him or his assignes,

but not against his executors; neither in that case can he have a *scire fac'* upon this statute against the first debtor or recognizor, because it giveth it onely against him, &c. that was party to the first execution, his heires, executors, or assignes. But if there be severall assignes of severall parcels of lands subject to the execution, one *scire fac'* upon this statute shall lye against all the assignes. *Sed est modus in rebus.* This little taste shall give a light to the diligent reader, not only to see into the secrets of this statute, but to others also of like nature.

And by the statute of 23 *H.* 8. *cap.* 6, it is provided, that the obligee, &c. shall have in every point against such recognisor, &c. like proces, execution, commodity and advantage in every behalfe, as hath been had or made upon the statute staple, and under such manner and forme, as is for the same statute staple provided: by force of which branch, if the tenant by execution by force of the act of 23 *H.* 8, be evicted, he shall have the remedy provided for tenants by execution upon a statute staple by the act of 32 *H.* 8. In like manner by force of that clause of 23 *H.* 8, if the extendors upon a statute staple, &c. doe extend the lands, &c. at too high a rate, the obligee may pray that the extendors themselves may take the lands, &c. at that rate, &c. by force of the said statutes of *Acton Burnel* and *De Mercatoribus.* Also no execution shall be sued against the heire within age.

40 E. 3. 26. b.
44 E. 3. fol. 10.
2 H. 4. 17.
15 H. 7. 15.

But note, that upon a writ of *elegit* the plaintife cannot make any such prayer, because those ancient statutes doe extend to a statute merchant, or a statute staple only, and neither to a recovery of debt or damages, nor to a recognizance in court; and so hath it been resolved [*f*].

[*f*] Mich. 4 & 5 Ph. and Mar. Bendloes, by all the justices of the common pleas. (Plowd. 82. b. 205. b.)

Nota, it appeareth by the preamble of the said act of 32 *H.* 8, and by divers [*g*] bookes, that after a full and perfect execution had by extent returned and of record, there shall never be any re-extent upon any eviction; but if the extent be insufficient in law, there may goe out a new extent.

[*g*] 15 E. 3. Extent, 7. 22 E. 3. Recovery in value, 22. 31 E. 3. Exten. 13. 17 E. 3. 76. 15 E. 3. Scire fac. 115. 7 H. 4. 19. 22 Ass. 44. 22 E. 3. fol. ult. 44 E. 3. 10. 9 H. 7. 9. 15 H. 7. 15. 13 Eliz. Dier, 299. 29 H. 8. Stat. Merchant, Br. 40. (2 Cro. 13.)

[*h*] If a man have a judgement given against him for debt or damages, or be bound in a recognizance, and dieth his heire within age, or having two daughters, and the one within age; no execution shall be sued of the lands by *elegit* during the minority, albeit the heire is not specially bound, but charged as *terre tenant* [*i*]; and so against an heire within age no execution shall be sued upon a statute merchant or staple, nor upon the obligation or recognizance upon the statute of 23 *H.* 8, for it is excepted in the process against the heire. Neither if the heire within age indow his mother shall execution be sued against her during his minority (1).

[*h*] 11 E. 3. Age, 4. 15 E. 3. Age, 95. 24 E. 3. 28. 29 Ass. 37. 29 E. 3. 50. 47 Ass. 4. 47 E. 3. 7. Lib. 3. fol. 13. sir William Herbert's case. Brooke, Age, 33. (2 Cro. 338. 694. Siderf. 184.)

[*i*] Temps E. 1. (1 Cro. 295.) Ass. 402. 417. 16 H. 7. 6. Livre d'entr. 545. Brooke, Age, 33.

Note,

(1) *B. R. Grevill and Bracebridge's case. Nota*, P. 1656, *the point of a special verdict was as follows: The conusor leased for years, and died, his heir within*

Note, that by the statute [k] of 27 *E.* 3. the execution of lands upon a statute staple is referred to the statute merchant, and by the statute *De Mercatoribus* no execution shall be had against the heire so long as he is within age. [k] 27 E. 3. cap. 22.

Also since *Littleton* wrote, there is a right profitable statute [l] made against fraudulent feoffments, gifts, grants, &c. judgements and executions, as well of lands and tenements as of goods and chattels, to delay, hinder, or defraud creditors and others of their just and lawfull actions, suites, debts, damages, penalties, forfeitures, heriots, mortuaries, and releases (A), for the exposition of which and other statutes, see the authorities quoted in the margent (1). [l] 13 Eliz. cap. 5. Lib. 3. fol 80. &c. Twyne's case. Li. 5. fo. 60. Gooche's case. Lib. 6. fo. 18. Pakeman's case, Lib. 10. fo. 56. the Chanc. of Oxford's case. See the Statutes of 3 H. 7. cap. 4. & 50 E. 3. cap. 6. Mich. 12 & 13 Eliz. Dier, 295. 18 Eliz. Dier, 351. (8 Rep. 132.)

[290. b.]

And

(A) "releases" *appears to be here printed by mistake instead of* reliefs.

within age, whether the execution (which was admitted on all sides to be void against the infant), was good to bind the term for years. Glyn, chief justice, and the court, and also Windham, at the bar, denied peremptorily the case of lord Coke to be law, unless it is understood that the marriage was held before the statute; for then it is true that it shall not be extended, sed non quia est privilege *for the infancy of the heir; but because the wife is in by her husband, and therefore has the better possession, and thus comes in paramount to the statute; but if the statute was before the marriage, then clearly the dower of the wife is extendible; for the endowment breaks the descent, and she is in by her husband of a possession charged, and there is no prejudice to the infant heir; so that the freehold is out of him, without any rent being incident to his reversion. Nota, the possibility that the wife might die during the minority, and before the extent was satisfied, was not regarded. And nota, M. 6, 7 Eliz. C. B. in Egerton's Reports (cited by Noy in his lecture in Lincoln's-Inn), a like case was adjudged. Feme tenant in tail confessed a judgment; took husband and died. The baron was tenant by the curtesy, and the statute was extended, and then he surrendered to the heir, and was extended still, and well,* per curiam, *for the reversion was not prejudiced. And afterwards Trin.* 1656, *resolved, that an extent lay well against the lessee, because the infancy of the heir is a personal privilege. (Quære, if the rent is gone. It seems so; but the rent was not regarded.)* Lord Nott. MSS. —[Note 248.]

(1) In a former note, an attempt was made, to give the reader an *Elementary Outline of the Doctrine of Uses*; an attempt will now be made, to give him a like *ELEMENTARY OUTLINE OF SOME LEADING POINTS IN THE DOCTRINE OF TRUSTS AFFECTING REAL PROPERTY.*

I. It may not be disagreeable to the reader, that it should be preceded by a short historical view of the INTRODUCTION OF TRUSTS INTO ENGLISH JURISPRUDENCE.

I. 1. Two circumstances, in particular, gave them rise. The first was, *the want, in many instances, of a judicial process to enforce the performance, or to recover satisfaction for the non-performance, of several obligations arising in cases of trust,* which were supposed, (and certainly in some cases with reason), to be founded on the common rules of natural morality and justice; but which, being unassisted by the common law, often depended for their effect on the conscience or honour only of a person, whose interest it was to leave them unperformed. Thus, in the case of real property, (to which these annotations are naturally confined), the transfer of land, in the simplicity of the common law, commenced

And it is to be observed, that the words of the said act of 13 *Eliz.* are, *Be it therefore declared, ordained and enacted*; and therefore like cases in semblable mischiefe shall be taken within the remedy of this act, by reason of this word *(declared)*; whereby it appeareth what the law was before the making of this act. But let us now returne to *Littleton.*

" *Fieri*

and terminated in the single fact of the transfer. Of the contract to make it, of an agreement to hold the lands, or apply the profits of them, for a particular purpose, the law took no notice. The parties, therefore, beneficially interested in the performance of any such contract or agreement, were either without any, or without an adequate remedy. Yet, in all these cases, a duty was considered to arise, which, though either wholly unnoticed, or, at most, imperfectly noticed, by law, was felt, and admitted by all, to be an honourable, a moral, and a conscientious obligation. Cases of a similar description frequently arose. In all of them a right was thought to exist, for which the courts of law had provided, and for which, the feudal policy could from its nature provide no sufficient remedy.—For this grievance, the courts of common law affording either no redress, or an insufficient redress, a remedy was necessarily sought from another hand, and a resort to the chancellor, was, from the peculiar nature of his office, his character and habits, extremely natural.

I. 2. *This natural resort to chancery for redress in cases of trusts*, may be considered, as the other principal circumstance, to which they owe their rise. —A description of persons, probably in a subordinate rank of life, was known in the Roman law, by the appellation of Cancellarii, as early as the period of the first Cæsars.—In the Byzantine court, the chancellor was an officer of the highest distinction. In the courts of the emperors of the West, and almost in all the sovereignties, into which that empire broke, upon its fall, mention is made of an officer of the same name and character. An officer, of the same description, (but in the early times, often found under the appellation of the Referendary), occurs in the historical monuments of almost every country in Europe, where the feudal polity has prevailed. It was so much considered an appendage of sovereignty, that, after the usurpation of the vassals, every noble who pretended to sovereign power, appears to have had his chancellor. To this, the actual chancellors of bishops and palatines probably owe their origin. See *Gothofred's Notes ad Leg.* 3. *de Assess. of the Codex Theodosianus, and the edition, by the Maurist monks of Du Cange, art. Cancellarius.* With respect to our own country,—in Hob. 63. it is observed, that the court of chancery is as ancient as the kingdom itself. Lord Coke, 4 Inst. 78. maintains, that the British and Saxon kings had their chancellors, and courts of chancery. —Mr. Selden, Off. Can. sect. 1. says, the first authentic mention of a chancellor is of the year 920, and that, many of the Saxon lineage, before the conquest, had their chancellors. With us, as in almost every other country, whose jurisprudence is of feudal extraction, the office of chancellor originally was, to supervise all public instruments, which had the king's signature, to keep them in his custody, and, after the custom of sealing deeds came in use, to have the charge of the king's official seal. 3 Blackst. Com. c. 4. s. 8.—To administer justice has always been an appendage of royalty. This was the case in the feudal system, on principles peculiar to itself. There, the military command, and the administration of justice in the feud, were always united in the same person, and extended over the same territory. But subordination and habits of obedience were often wanting in the feud. From the boisterous spirit of that government, it must frequently have happened, that the judicial sentences of the courts would fail of effect, if they were not actually executed by the military power:—the military power was under the direction of the chief:

"*Fieri facias.*" This is a writ mentioned in the said statute, but is a writ of execution at the common law. And it is called a *fieri facias*, because the words of the writ directed to the sherife be, *quòd fieri facias de bonis & catallis, &c.* and of those words the writ taketh its denomination. W. 2. cap. 18.

But note, that a *capias ad satisfaciendum* is not mentioned in the

chief:—to him, therefore, for his military aid, wherever the party had to contend with a powerful adversary, it was necessary to recur, in order to secure the effect of a judicial sentence. This was actually purchased by fines, and became one of the most splendid and lucrative prerogatives of sovereignty. The crown was always attentive to secure to itself the exclusive use of it. This was principally effected by its assuming an exclusive right of issuing the writ, which, from its being the beginning or foundation of the suit, is called the original writ. This answered the double purpose of showing, that all power of judicature originated with the king, and of securing to him the proper fines. See *Gilbert's Forum Romanum, p.* 10. *and Philips on Fines for Original Writs.* This original writ is a mandatory letter from the king on parchment, sealed with his great seal, directed to the sheriff of the county where the injury is committed or supposed to be committed, requiring him to command the wrong-doer or party accused, either to do justice to the complainant, or else to appear in court, and answer the accusation against him. 3 Blackst. Com. 8th ed. p. 273. In the early period of our law, injuries, which were the subject of judicial process, were few, and being few, were well known. In the course of time, the forms of injuries were multiplied, and new writs, of course, became necessary. Where this was the case, it was usual to petition parliament, and proper remedies were given for the peculiar cases; but these petitions multiplying, it was enacted, by the statute of Westminster 2, 13 Edw. 1. c. 24. that, where, in one case, a writ should be found in the chancery, and in a like case, falling under the same right, and requiring like remedy, no precedent of a writ could be produced, the clerks in chancery should form a new one. This act, undoubtedly, gave the chancellor a great degree of power, and in the exercise of it he usurped such an extent of remedial authority, that, to use Mr. Reeves's expression (*History of the Engl. Law*, 8vo. *edit. fo.* 191.) every sort of relief seemed within his jurisdiction. It must be added, that, as the chancellor was generally an ecclesiastic, every species of injury, arising from a supposed breach of a religious, a moral, or a conscientious obligation, seemed properly to fall within his cognizance.—Such was the office of chancellor, and such the character of the persons, by whom it was generally filled, about that period of time, when the injuries we have been speaking of may be supposed to have become frequent. To the chancellor, therefore, in cases of this description, it was natural to have recourse.

I. 3. Still, however, while he confined himself to the forming of new writs, his proceedings must fail of effect, as the utmost he could do, was to send the parties to the courts of law, where, as those courts could not take cognizance of the supposed injury, it was vain to send them. He did not, therefore, rest here; but introduced *a new judicial power into the jurisprudence of England, by the invention, or rather by a new application, of the writ of subpœna.* This writ compelled the party to appear in court: a petition was, thereupon, lodged in chancery, containing the articles, to which he was obliged to answer upon oath. In the case, therefore, of a trust, the party was obliged to disclose it, and the court then decreed him to carry it into execution. This gave rise, or at least, stability, to equitable estates. Nothing could be more contrary than estates of this description to the genius of the feudal law. Hence they frequently were a subject of complaint; and the statute of uses, evidently, was

the said statute, because no *capias ad satisfac'* did lye at the common law upon a judgement for debt, &c. or damages, but only when the originall action was *quare vi & armis, &c.* But latter statutes have given a *capias ad satisfac'* where debt, &c. or damages are recovered; as it appeareth at large [*m*] in Sir *William Herbert*'s case, whereunto I referre the reader.

[*m*] Lib. 3. fol. 11. Sir William Herbert's case. (Hob. 283.) (F. N. B. 104.)

And

intended to extirpate them entirely. They have, however, been preserved. The consequence has been, that, though they were, originally, a fraud upon tenure; though, in every stage of their progress, they were a subject of alarm and jealousy; though their existence is a direct violation of the statute of uses, and though the courts of law profess, in most cases, (if the expression may be allowed), a legal ignorance even of their existence, still they form a considerable part of the jurisprudence of the country; they affect and regulate, directly or indirectly, almost all the real, and a great proportion of the personal property of the kingdom; they have a judicature, and a form of process, of their own; and these, in many instances, control even the courts of law.

II. The 27 Hen. 8. cap. 10. provided, that the use and possession should always be united; by declaring, that, "When any person shall be *seised* of "lands, &c. to the use, confidence, or trust, of any other person or body "politic, the person or corporation entitled to the use in fee simple, fee tail, "for life, or years, or otherwise, shall from thenceforth stand and be seised "or possessed of the land, &c. of and in the like estates as they have in the "use, trust, or confidence; and that the estate of the person so seised to uses "shall be deemed to be in him or them that have the use, in such quality, "manner, form, and condition, as they had before in the use." But, notwithstanding this statute, there are three ways of creating a use or trust, which still remain as at common law; and this use or trust is a creature of the courts of equity, and subject only to their direction. First, where a man seised in fee, raises a term of years, and limits it in trust for *A.* &c. this the statute cannot execute, the termor not being seised. 2dly, Where lands are limited to the use of *A.* in trust to permit *B.* to receive the rents and profits, for the statute can only execute the first use. 3dly, Where lands are limited to trustees, to receive and pay over the rents and profits to such and such persons, for here the lands must remain in them to answer those purposes; and these points were agreed to in Trinity term 1700, per curiam, in Simson *v.* Turner, 1 Eq. Ca. Abr. 220.

III. The best *definition of a trust in equity* is that which is given by the old writers, of an use at common law; viz. "A confidence which is not "issuing out of the land, but a thing collateral, annexed in privity to the estate "and to the person touching the land, *scil.* that *cestuy que use* shall take the "profits, and that the terre-tenant shall make estates according to his direc-"tion." These are the words used in Chudleigh's case, 1st Rep. 121. a. b. for the definition of an use. Thus he, who hath a trust, hath neither *jus in re* nor *jus ad rem*; but only a confidence and trust, for which he hath no remedy at the common law, but only a remedy by a subpœna in chancery. This is the important distinction between trusts and commons, rents, and such like hereditaments. These follow the lands, into all the hands to which they come; so that, if a person is deforced, still the land in the hands of the deforceor is subject to the rent, or common, with which the land is charged. But, generally speaking, it is otherwise with respect to a trust, unless the estate of the deforceor, from his having notice

And it is to be observed, that these three writs of execution ought to be sued out within the yeare and the day after judgement; but if the plaintife sueth out any of them within the yeare, he may continue the same after the yeare untill he hath execution. And to none of these writs of executions the defendant can pleade: but if he hath any matter since the judgement to discharge

notice of the trust, or upon some other ground, is, in the consideration of a court of equity, considered as charged with the trust.

IV. This doctrine is considered as particularly important, in its influence on limitations to *Trustees for preserving Contingent Remainders*, and as it is the foundation of the doctrines of equity on cases arising from the destruction of those remainders by the trustees. This was discussed at great length in Chudleigh's case, 1 Rep. 120. a. The doctrine laid down in that case, with respect to the destruction of contingent uses at common law, appears to be, that, to the standing seised of an use at common law, two things were necessary; one, that the estate upon which the uses were declared should subsist; this was called privity of estate: the other, that the party so standing seised should have notice of the use; this was called privity to the person. If either of these failed, the use was gone. Whenever, therefore, a person seised of a life estate in possession, in trust for another, conveyed by fine, feoffment, or recovery, the person taking under that conveyance, acquired, in consequence of the forcible nature of those modes of conveyance, a new estate, and thereby the privity of estate was necessarily lost. But, if a person having a fee, conveyed that fee, then the privity of estate remained. Still, if the grantee had not notice of the trust, the privity to the person was gone. In the latter instance, however, this important distinction was made, that, if the grantee was not a purchaser for a valuable consideration, the law implied notice; that is, presumed him to be acquainted with the use; this continued the privity to the person. Thus stood the doctrine of the destruction of contingent remainders at the common law. The statute of uses made no difference, as to the legal consequences of this doctrine, in those cases where the trustee had an estate for life only. If he conveyed by fine, feoffment, or recovery, the grantee necessarily took an estate in fee simple. This, as was observed before, was a new estate. Privity in estate therefore failed. But in those cases, where the whole fee was conveyed to the trustees to several uses in strict settlement, it was executed in the *cestuys que use*; and then, where no use was limited to the trustees themselves, nothing remained in them, so that, in this respect, there was no difference between them and strangers to the deed. An actual estate might, however, be limited to them. Of this practitioners availed themselves, to support contingent remainders, and prevent their being destroyed. This gave rise to the limitation, now so frequently inserted in wills and settlements, of an estate to trustees for preserving contingent remainders.

V. To present this pointedly to the reader's observation, it may be useful to state succinctly *THE GRADUAL PROGRESS OF SETTLEMENTS.*

V. 1. The *first attempt at a settlement* appears to be the creation of an estate in fee simple conditional. This had two effects, that of suspending the absolute power of alienation, till the birth of issue, and that of preserving the inheritance in a particular line of succession, so as to make it devolve through a particular line of heirs, in exclusion of others. Bracton mentions, lib. 18. that, by this mode of limitation, the estate might be settled by a person, on his eldest son and the heirs of his body,—and if he had no heirs, or having heirs, if they afterwards failed, then to his second son and the heirs of his body, with like limitations

discharge him of execution, he may have an *audita querela*, and relieve himselfe that way, but pleade he cannot. As if the plaintife after release unto the defendant all executions, yet in none of these three writs he shall pleade it, but is driven to his *audita querela*, as hath been said.

limitations to his other sons successively and their respective issue; and in default of all these, to the party himself and his heirs. This appears the most extended and complicated plan of settlement, which could be effected through the medium of this mode of limitation.

V. 2. Then came the statute *de donis conditionalibus*. That statute took away the power of alienation of the tenants in fee simple conditional, and thereby preserved the fee to the issue, and the reversion to the donor. This naturally gave rise to the complex modification of property, to which the reversion of an estate, out of which an estate tail is first carved, is now subject. By this mode of settlement land was at once completely taken out of commerce and involved in the intricate fetters of multiplied entails. This may be considered as *the second stage of settlements*.

V. 3. But entails were again subjected to the alienation of the tenant in tail by the introduction of common recoveries, about the reign of Ed. 4. and the introduction of fines by the statute of 4 H. 7. To prevent this, in some measure, women seised of estates tail of the gift of their husbands, were prohibited by the 11 H. 7. c. 20. from alienating these estates. To bring their estates within the protection of this statute, it became usual to limit the husband's estates, to the husband and wife, and the heirs of the body of the wife by the husband. The consequence of this was, that the estate was secured to the parents during their lives, and was secured to the issue against the act of either parent. Nothing short of the concurrent act of both parents could deprive the issue of the estate. A more rational system of settlement, (particularly after the statute of the 32 H. 8. c. 27. had enabled tenants in tail to lease), could not perhaps be devised. The estate might be limited to the male or the female line, at the pleasure of the parties. It was protected against the caprice or extravagance of one of the parties, so long as the other refused to co-operate in unfettering the entail, while there was a provision for unforeseen events, by their co-operation during their joint lives; and, during the life of the surviving parent, the same effects might be produced by the co-operation of that parent and the issue; and after the decease of both parents the estate was restored to the issue, with a complete power of alienating it. It may be a question whether, even now, this mode of settlement be not the most proper for all those cases, where, by reason of the smallness of the property, or any other circumstance, the intricate system of settlement, now in use, is not proper. This may be described as *the third stage of* settlements.

V. 4. A *fourth* was effected by limiting life estates to the parents, with remainders to their unborn children by purchase. This was introduced, soon after it was discovered how completely estates tail of every description were subject to the alienation of the tenant in tail by fine or recovery. But it did not soon become general. It was obvious, that, in every case, where the parent was himself the immediate reversioner, and in every case, where the parent not being the immediate reversioner, could procure the concurrence of the immediate reversioner, the unborn children were at the mercy of the parent. This gave rise to the introduction of trustees for preserving contingent remainders. This limitation is supposed to have been first discovered and introduced into practice by sir Orlando Bridgman, during the time of the Usurpation. Whatever doubts may formerly have been entertained on this head, it is now settled beyond the reach of controversy, that, under a limitation of this description,

description, the trustees take a vested estate of freehold. The interposition of this estate prevents the tenant for life from surrendering to him in the reversion, and if he aliens his estate by any of those modes of conveyance, which would otherwise destroy the contingent remainders, and by a necessary consequence, be a forfeiture of the estate, it authorizes the trustees to enter for the forfeiture. This, to use one of the explanatory expressions inserted in these limitations, "prevents the contingent remainders from being defeated or destroyed."—Such are the circumstances which appear to have given rise to this most frequent and important limitation, and the effects it produced; and thus it stands with respect to the alienation of the tenant for life without the concurrence or co-operation of the trustees. With respect to those cases, where the trustees co-operate in the alienation, it is obvious the estate of these trustees is that which we have before mentioned, of a person seised of a life estate in trust for another; and conformably to what we have before observed upon the alienation of a person so seised, his fine, feoffment, or common recovery acquires him an estate by disseisin, and vests the estate so acquired by him in the purchaser. Here then the privity of estate fails: but courts of equity again interfere. This alienation of the trustees is evidently a breach of their trust. If, therefore, the conveyance be without consideration, and without express notice, the court implies notice. If it be with notice, then, whether with or without consideration, the courts make the purchaser hold the lands upon the trusts to which they were subject in the hands of the trustees. But if the conveyance is for a valuable consideration, and without notice, then the courts punish the breach of trust, by decreeing them to purchase lands of equal value to those, of which, by their breach of trust, they have deprived the parties, and to settle them to the uses and upon the trusts of the lands conveyed. See Mansel *v.* Mansel, 2 Peere Will. 678. Pye *v.* Gorge, 1 P. Wms. 128. Moody *v.* Walters, 16 Ves. 283. and Mr. Fearne's Essay on Contingent Remainders, 6 ed. 326, &c. It only remains to observe, that, though the destruction of contingent remainders by the trustee is punished in the manner we have mentioned; still, where there is a bare tenant for life for his own benefit, with remainders over in contingency, if he destroy the contingent remainders, it is no breach of trust, for where there is no trust there cannot be a breach of trust; there is no ground consequently for a court of equity to interfere in that case. It is therefore left to its legal consequences. Titles however depending on the validity of an act of this nature can never be recommended. The power of tenant for life to destroy contingent remainders is *strictissimi juris*. It certainly therefore can never expect favour,—or any thing beyond mere support. In Roake *v.* Kidd, 5 Ves. 647. lord Eldon appears to have intimated a doubt, whether a court would compel a purchaser to accept a title depending on the destruction of contingent remainders. It is to be observed, that it has not yet been decided, whether a legal estate of freehold created by one deed, will support contingent remainders created by another. The prevailing opinion appears to be, that, if ever this point should come before a court, the decision will be for the affirmative. It sometimes happens that contingent remainders are limited to the sons of a person who has himself no life estate. Where this is done, it is proper to direct in what manner the rent shall be applied, during the suspense of the contingent remainder, and the vacancy of a person beneficially entitled. This may be done by directing the trustees, during that vacancy or suspense, to pay the rents to the persons next entitled for the time being, under the uses or trusts of the instrument, to a vested remainder in the estates, but without prejudice to the estate of the children afterwards coming in existence. If no such direction is given, the settler and his heirs would probably be considered as entitled to the then intermediate profits, as an undisposed part of the inheritance.

V. 5. The *fifth and ultimate* stage of settlements appears to have been effected, by the introduction of powers under the statute of uses. By these, as complete a dominion

dominion over the property which is the subject of the settlement is given, to the party and his trustees, as if it were not the subject of settlement; at the same time that the property or its value is completely secured to the parties, to their issue, and to all other claimants. Considered in this point of view, the plan and effects of a marriage settlement, as such settlements are now usually framed in England, are very striking; and will bear a comparison with the marriage contracts of any other country. These, generally speaking, either fetter the property so much as to take it entirely out of commerce, as is done by the *tailzies of Scotland with irritant and resolutive clauses*, or, like their settlements of what is called, *simple destination*, leave it so much under the control and direction of the parents, as to give little security for its safe transmission to the issue.

VI. *TRUSTEES EITHER ARE SUCH, BY THE EXPRESS OR IMPLIED DECLARATION OF THE PARTY, OR ARE MADE SUCH BY A COURT OF EQUITY.*— In a court of equity it is sufficient that the trust appears; and if the party creating the trust has not appointed his own trustee, the court of equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. See ant. 113, note 2, it being a rule which admits of no exception, that a court of equity never wants a trustee.

VII. *ANOTHER RULE WHICH ADMITS OF NO EXCEPTION IS THAT EQUITY ACTS UPON THE PERSON AND NOT UPON THE THING.* The consequence is, that, if the estate, of which the party is actually seised, is not commensurate to the trust, equity cannot enlarge it. Supposing therefore *A.* to be seised of an estate in fee simple, in trust for *B.* and his heirs, and that *A.* conveys the legal estate to the use of *C.* for life, with remainders over; *C.* and the remaindermen would be trustees for *B.*; and *B.* being entitled to the whole equitable fee, would be entitled to a conveyance of it to him. If, therefore, the modifications of the legal estate be such, as enable parties to convey the fee, a conveyance must be made by the same means as if it were a conveyance for a valuable consideration. Consequently, if any of the parties should be seised in tail, a fine, or recovery, as the case happens, would be necessary; and if the tenant in tail should happen to be an infant, the infant cannot convey without levying a fine or suffering a recovery. The stat. 7 Ann. chap. 19. authorizes infants to convey in the manner therein mentioned, under the direction of the court of chancery. This has been held to extend to their levying fines and suffering recoveries, where the nature of their estates have required these assurances, to perfect the conveyances. See 3 Atkyns, 164. 479. and 559. Com. Rep. 615. Barnes, 217. But sometimes the modifications of the legal estate are such, that even fines and recoveries are not sufficient to convey a fee. In this case application to parliament is necessary. In the case, suggested in the preceding part of this annotation, the whole fee simple, on which the trust was supposed to be ingrafted, is considered to have been originally vested in the trustees, and to have been modified by *them* into uses in strict settlement: but, it sometimes happens, that the land is originally limited to the use of trustees, in tail, or even for life, with remainders over in strict settlement, and trusts are declared of these uses. As where land is limited to the use of *A.* and the heirs of his body, in trust for *I. S.* and the heirs of his body; or, where land is limited to the use of *A.* and *B.* during their joint lives, and after the decease of such one of them as shall first depart this life, to the use of the survivor and his heirs, in trust for *I. S.* and the heirs of his body. Instances of such limitations and trusts have occurred in practice. As, in these cases, the legal estate is not commensurate with the trust charged upon it, practitioners have doubted whether *I. S.* has, in such, that kind of actual equitable estate tail, which enables him to acquire the fee simple of the land by a recovery. The case is evidently near, when the seisin to the uses is more limited, than the

uses

uses declared of it. As, where a feoffment is made to *A.* and the heirs of his body, to the use of *I. S.* and the heirs of his body, or to *A.* and *B.* during their joint lives, and after the decease of such one of them as shall first depart this life, to the survivor of them and the heirs of the survivor, to the use of *I. S.* and the heirs of his body. On all these cases, a judicial determination is wanting.

VIII. It is sometimes doubtful, *WHETHER AN ESTATE BE LEGAL OR EQUITABLE.* The leading authorities upon this point, are, Burchett *v.* Durdant, 2 Vent. 312. Broughton *v.* Langley, 2 Salk. 679. Simson *v.* Turner, 1st Equity Cas. Abr. 383. Lady Jones *v.* Lord Say and Sele, 8 Vin. 262. Silvester d. Law *v.* Wilson, 2 Term Rep. 444. and Thong *v.* Bedford, 1 Bro. Cha. Cases, 313. The result of these cases seems to be, 1st, That a devise to *A.* and his heirs, in trust for *B.* and his heirs, without any ulterior words, is an use executed by the statute in *B.*—2dly, That the construction would be the same, if lands were devised to *A.* and his heirs, in trust to permit *B.* and his heirs to receive the rents and profits.—3dly, That a devise to *A.* and his heirs, with directions to dispose of the estate, or of the rents in such a manner as necessarily requires the legal estate should reside in him, will of course vest the legal estate in him.—4thly, That a mere devise to *A.* and his heirs, upon trust to receive the rents and pay them over to *B.* should give the legal estate to *A.* To this the case of Silvester *v.* Wilson nearly approaches.—5thly, That, where an estate is given to *A.* and his heirs, upon trust to dispose of the rents in a particular manner during the life of *B.* and after the decease of *B.* to stand seised of the lands to the uses therein mentioned; there, as the nature of the trust does not require that the legal estate shall reside in *A.* for a longer term than the life of *B.* the court will not consider the use to be executed in him for a longer term than the life of *B.*; but will consider the use as executed in the trustee during the life of *B.* and afterwards in the *cestuy que use.* Lord Say and Sele *v.* Lady Jones, 3 Bro. Par. Ca. 458. Pincke *v.* Curteis, 4 Bro. Ch. Ca. 329.—6thly, And that, where there is a limitation to one for life, remainder to trustees and their heirs for preserving contingent remainders, and the estate of the trustees is not restrained to the life of the tenant for life: in a deed the trustees would certainly be considered as taking the whole fee: but that, in a will as the nature of their trust requires that they should take the legal estate only during the life of the tenant for life, and the subsequent devise is generally introduced by the words, "and after the death of the "tenant for life," there seems reason to contend, they should be considered as taking the legal estate for the period of his life only; that being evidently the testator's intention, which in wills has so powerful an operation in controlling the legal operation of the words. See Shapland *v.* Smith, 1 Bro. Ch. Ca. 75. and Boteler *v.* Allington, ibid. 72.

IX. There is a *distinction between powers and trusts.* Devises are sometimes framed in such a manner, as to make it uncertain whether the legal estate is vested by them, in the trustees, upon trust to dispose of it according to the directions of the testator, or whether the legal estate is suffered to descend upon the heir at law, or is devised to others, with a power to the persons mentioned for that purpose by the testator, to dispose of it. This is very important, and sometimes not clearly to be ascertained. See ante, fo. 113. a. note 2. on the devise of an estate to be sold by executors where it vests the estate in the executors, and where it merely gives a power to sell it. It is observable that where there is a devise to executors to sell, the statute of 21 H. 8. makes it lawful for one of the executors to sell without the other; and in Bonifaut *v.* Greenfield, Cro. Eliz. 80. it was decided, that, this statute extends equally to those cases, where the legal estate is devised to the executors, as to those, where a mere power is given to sell. But the taking of the conveyance

conveyance from one executor only, is liable to objections. One is, that the other executor may have previously sold; in which case the first vendee would be preferred. The other arises, where the will expressly requires that all the trustees should join in the receipt for the purchase money.

X. By the stat. 29 Cha. 2. cap. 3. sect. 8. it is provided, "*That all declara-* "*tions and creations of trust in lands or hereditaments must be in writing*, signed "by the party, or by his last will in writing, or else void, except trusts arising "by implication of law, and transferred and extinguished by acts of law." A person purchasing land in the name of another, has always been held to be within this description. But it has also been held, that this implied trust may be rebutted by circumstances in evidence; and therefore, where a father has purchased in the name of a son, or a grandfather in the name of a grandson, it has often been held to be intended as an advancement for the son or grandson, and not as a trust for the purchaser. This construction of trusts by a court of equity, is conformable to the construction of uses by the courts of law. There, a feoffment without consideration, when no use was declared, was always held to operate to the use of the feoffor. But when it was to a son or grandson, the consideration of blood intervened, and it was held to operate to the use of the son or grandson. This doctrine is often resorted to in the case of grants of copyholds where the son of a grantee is a nominee. There the implication in favour of the son is not so strong, as there is a necessity of mentioning some life, for the purpose of filling up the estate. Yet in these cases, with some exceptions, (see particularly Lane *v.* Dighton, Amb. 409.) it is considered so far an advancement for the child, that it is incumbent on the person claiming against the child to show that it was not so intended. In the case of Dyer and Dyer, heard in the exchequer, Nov. 20, 21, and 27, 1788, this doctrine was very fully entered into, and explained with the greatest learning and perspicuity, by the then chief baron Eyre. Watkins on Copyholds, 216.

XI. The favour which is shown to old tenants, by granting them a renewal of their leases, preferably to a stranger, has given them, in the eye of the law, an interest beyond their subsisting term; and this interest is generally termed their *tenant right of renewal.* This is particularly applicable to leases from the crown, from the church, from colleges, or from other corporations. In these cases, it often happens, that the situation of the parties is such, that there are successive renewals of the lease, or successive enlargements of it by reversionary grants. On one hand, the property is more valuable to the actual tenant than any other person; he can therefore afford to pay more for the renewal than another. On the other hand, there is a natural partiality in the lessors to the present tenants, particularly if they, or the persons under whom they claim, have long been tenants of the land in question. These circumstances have produced what is called tenant right. Attempts have been made to establish an obligation in landlords to renew, but they have not succeeded. The renewal, therefore, is still a matter of favour and of chance; but is so far valuable, that it enhances the price of the property on sales; provisions for renewal are inserted in mortgages and settlements; and the right of parties to this chance of renewal is guarded by courts of equity. In mortgages of this species of property, where this chance of renewal exists, there should always be inserted in the mortgage deed a covenant from the mortgagor for the renewal of the lease, and for vesting such new lease in the mortgagee; with an agreement, that, if the mortgagor neglects to renew, it shall be lawful for the mortgagee to renew, and that the fine and expenses of renewal shall be a charge upon the premises, and bear interest. In settlements also, there should be a power authorizing the trustees, from time to time, to renew the leases, and for that purpose to raise money by mortgage. But particular care should be taken to insert, in all settlements of this nature, such provisions, as will free the trustees from personal liability,

liability, for an omission to renew, unless it happens by a defined neglect or default; as, without such a provision, the trustees will be considered answerable for it, as for a breach of trust. Lord Montfort *v.* Lord Cadogan, 17 Ves. 485.

Where such provisions are not introduced, an opinion prevailed, in consequence of what was reported to have been said by Lord Hardwicke, in Verney *v.* Verney, Amb. 88. that the tenant for life should pay one third of the fine and the other charges attending the renewal, or keep down the interest of them, and the residue paid by the person in remainder: but it now appears to be settled that the tenant for life must contribute beyond the interest, in the proportion to the benefit he takes. Nightingale *v.* Lawson, 1 Bro. Ch. C. 440. and White *v.* White, 4 Ves. 33. 9 Ves. 554.

As to the protection afforded by the courts of equity to persons entitled to this tenant right, courts of equity have so far recognized the tenant right to be a real benefit, and as such entitled to their protection, as to decree, that, new or reversionary leases, (gained by undue means or suppression of the tenant right of renewal), should be for the benefit of the persons interested in the ancient leases; and consequently, that those, who obtain such new leases, and were thereby legally possessed of them, should be trustees for that purpose. The cases on this head may be divided into three classes. The first,—where the renewal has been obtained by persons having no beneficial interest in the old lease, and no connection with the lessee, and has been obtained by a suggestion of what was false, or a suppression of what was true. The second,—where the parties obtaining the renewal have no beneficial interest, but are connected with the old lessee, as guardians, trustees, or executors. The third,—where the persons renewing have only partial and limited interests, as tenants for life, mortgagors or mortgagees. In all these cases, the parties renewing have been uniformly declared trustees for the persons beneficially interested, in the ancient lease, either wholly or in part, according to the particular circumstances of the case; the court presuming that the new lease was obtained by means of the connection with or reference to the interest in the ancient lease. The cases on the doctrine of the tenant right of renewal are numerous. One of the most important of them is that of Rawe *v.* Chichester, Amb. 715. Another very important case on this learning, is that of Lee *v.* lord Vernon, heard on appeal to the house of lords, 11 May 1776, 7 Bro. Par. Ca. 432.

XII. It frequently happens, that, *where a real estate is limited in strict settlement, and a leasehold for years or other personal estate is intended to be settled upon corresponding trusts*,—the settlement is made by assigning the leasehold estate to trustees, and declaring they shall stand possessed of it, upon such trusts as are previously declared of the real estate, or as near thereto as may be, or as the rules of law and equity will permit. This should never be done. The nature of real and personal estate is so different, as to make it almost impracticable to frame such a set of trusts as will in every possible event, or even in the common contingencies, carry the personal estate in the same course of devolution as that, in which a real estate, proposed to be strictly entailed, is usually settled; and the modes of doing it are so various, that hardly two professional men would agree upon the same plan. The best method, therefore, is, to insert a complete set of limitations for the personal estate. If, however, from the smallness of the property, it is thought advisable to do it by way of reference to the limitations of the real estate, a declaration may be inserted, expressing that the leasehold or personal estate shall not vest absolutely in any tenant in tail taking by purchase, who shall not attain the age of 21 years; with a proviso, that, after the decease of the preceding tenant for life, such infant tenant in tail for the time being shall during his minority be entitled to the rents and interest. The nature of leasehold for lives is much more analogous to that of estates of inheritance; and therefore, generally speaking, may be settled by reference to

previous

previous limitations of the fee simple estate. The short mode of reference may be used in the power of sale usually inserted in settlements, where the parties are authorized by it to purchase leaseholds for years. See Foley *v.* Burnell, 1 Bro. Cha. Cases, 274;—and D. of Newcastle *v.* Lady Lincoln, 3 Ves. jun. 387.

XIII. It was observed before, that one of the principal objects of the legislature, in passing the statute of uses, was to restore, in some measure, the notoriety of the old common law conveyances; but that their views, in this respect, were almost totally defeated, by the introduction of conveyances by lease and release, and by the preservation of uses, under the appellation of trusts. The legislature has, at different times, made *attempts to remedy the mischief arising from the secret transfer of property to which this statute has given rise.*

Among these attempts may be reckoned the *statutes against fraudulent conveyances and devises*, 13 Eliz. c. 5. 27 Eliz. c. 4. and 3 W. & M. c. 14. but particularly the statute of 29 Car. 2. c. 3. commonly called the Statute of Frauds and Perjuries, which provides against conveying any lands or hereditaments for more than three years, or declaring trusts of them, otherwise than by writing. See ant. 48. a. note 3.

With the same views have been passed the *acts for registering deeds respecting lands in the West, East, and North Ridings of the county of York, and in the county of Middlesex.*—2 & 3 Ann. c. 4. 6 Ann. c. 35. 7 Ann. c. 20. and 8 Geo. 2. c. 6.

In the construction of the 29 Cha. 2. c. 9. the courts have decided, that it was made with a design to prevent, either in marriage or in any other treaties, uncertainty, perjury, and contrariety of evidence; the cases not liable to these inconveniencies are not within it. See 1 Eq. Ca. Ab. 19. The courts seem to have favoured a like equitable construction of the statutes for the registration of deeds. Thus in the case of Le Neve *v.* Le Neve, 1 Ves. 64. lord Hardwicke decreed, that, if a deed respecting lands in any of the register counties is not registered, and afterwards the same lands are sold or mortgaged, by a deed properly registered; if the person claiming under the second deed has notice of the first deed, the person claiming under the first deed, though it is not registered, shall be preferred to him.

The general doctrine of these decisions is founded on principles both just and equitable, when applied to particular cases; yet it may be doubted, whether a more rigid adherence to the letter of these statutes, particularly that of the 29 Car. 2. c. 3. would not have been more beneficial to the public. The French showed a much more rigid and pertinacious adherence to the letter of their laws respecting the registration of deeds and wills. By laws of that kingdom, as ancient as the 16th century, particularly an ordonnance of Henry II. of the year 1553, it was ordered, that all wills and deeds, containing substitutions of estates, should be registered within a particular period of time. If they were not registered within that time, the courts seem to have doubted whether they were binding even on the parties, in whose favour the substitutions were made; but, it was always settled, that the substitutions were of no force against creditors or purchasers. Several points of the laws respecting substitutions being unsettled, and the laws respecting them being different in different parts of the kingdom, they were all reduced into one law, by the celebrated ordonnance of August 1747. That ordonnance was framed by the chancellor D'Aguesseau, after taking the sentiments of every parliament in the kingdom upon forty-five different questions proposed to them upon the subject. The thirty-ninth question is, "Whether a creditor or purchaser, having notice of the substitution "before his contract or purchase, is to be admitted to plead the want of "registration?" All the parliaments, except the parliament of Flanders, agreed, that he was; that, to admit the contrary doctrine would make it always

open

open to argument, whether the party had or had not notice of the substitution; that this would lead to endless uncertainty, confusion and perjury; and that it was much better that the right of the subject should depend upon certain and fixed principles of law, than upon rules and constructions of equity, which must be arbitrary, and consequently uncertain. The ordonnance of August 1747 was framed accordingly. Those who have commented upon that ordonnance lay it down as a fixed and undeniable principle, that nothing, not even the most actual and direct notice, countervails the want of registration; so that if a person be a witness, or even a party to the deed of substitution, still, if it be not registered, he may safely purchase the property substituted, or lend money upon a mortgage of it. See *Questions concernant les Substitutions, Toulouse*, 1770; and *Commentaire de l'Ordonnance de Louis XV. sur les Substitutions par Mr. Furgole, à Paris*, 1767.—The same principle has been received into the *Code Civil Napoleon*. The article 1069 provides that "dispositions by gift or "will, under charge of restitution,"—(that is, dispositions by way of mortgage or pledge)—"shall, at the instance, either of the party charged, or of the "trustee appointed for their execution, be made public; viz. as to immovables, "by transcription of the instrument on the register of the office of mortgages, "of the place where they are situate; and as to sums placed out, with privi- "leges over immovables,"—certain legal liens on land to which the law of France allows a privilege of priority—"by inscription upon the property, "charged with the security."—The article 1071, provides that "the want of "transcription on the register of any such instrument, cannot be supplied, or "excused, by any notice, which creditors or subsequent purchasers may have "of its contents by other means than that of transcription:" and the article 1072 provides, that "neither donees, or legatees, or even the lawful heirs of "him, who makes the disposition contained in the instrument, neglected to be "transcribed, nor the donees, legatees, or heirs of these, can enforce their "titles against the persons entitled in default of transcription."

XIV. The courts have in part *remedied the mischief arising from the admission of trusts, with respect to the cestuy que trust, by making persons paying money to trustees, with notice of the trust, answerable, in some cases, for the proper application of it.* Lord Mansfield, in his very distinguished argument in the great case of Burgess *v.* Wheate, 1 Black. Rep. 123. observes, "that the *cestuy que* "*trust* is actually and absolutely seised of the freehold, in the consideration of "a court of equity; that the trust is the land, in that court; and that the "declaration of the trust is the disposition of the land." It is, perhaps, to be wished, that the operation and consequences of trusts had been confined to the trustee and *cestuy que trust*. There is no doubt but the doctrine in question is, in many instances, of great service to the *cestuy que trust*, as it preserves his property from the peculations and other disasters to which, if it were left solely to the discretion of the trustee, it would necessarily be subject; yet it may be questioned, whether the admission of it be not, in general, productive of more inconvenience than real good. To prevent this inconvenience, it is become usual to insert a clause in deeds or wills, that the receipts of the trustees shall of themselves discharge the persons to whom they are given, from the obligation of seeing to the application of the money paid by them. In some instances, without any clause of this nature, a person paying money to a trustee is not answerable for the misapplication of it, though he has notice of the trust. Perhaps the following distinctions and observations will be found of use towards obtaining an accurate knowledge of the rules of equity upon this complex subject.

XIV. 1. *With regard to personal estate*, it is every where admitted, that if a testator, possessed of personal estate, dies indebted, having by his will directed his estates to be sold for the payment of his debts, whether he specifies them or not, the mortgagee or purchaser of any part of his personal assets is not bound to see to the application of his mortgage, or purchase money. See Elliott and

and Merryman, Barnardiston's Rep. in Cha. page 78. But if he *charges a specific part of his personalty* with the payment of a specific debt or legacy, it seems to have been a matter of doubt how far the purchaser of that specific part was answerable. In the case of Humble *v.* Bill, 2 Vern. 444. the master of the rolls decreed that a mortgagee of a term of years from an executor (which term of years was specifically bequeathed) was not answerable for the misapplication of his mortgage-money.—This decree was reversed in the house of lords in 1703–4, 1 Bro. Par. Cas. 71; but from the account given in Viner, 7 vol. 43. pl. 13. and 18 Vin. 121. pl. 11. there is reason to suppose the reversal was founded on particular proof of fraud. Two cases in Peere Williams, Ewer *v.* Corbett, and Burting *v.* Stonard, vol. 2. p. 148. and 150. coincide with the master of the Rolls against the house of lords: and see Gilbert's Reports, 113. Mead *v.* lord Orrery, 3 Atk. 235. Ithell *v.* Beane, 1 Ves. 215. It should, however, be observed, that the principle on which the courts have founded their opinion, that the purchaser or mortgagee of any part of the testator's assets specifically bequeathed is not answerable for the misapplication of his purchase or mortgage money, is, that the whole of the personal estate being bound to pay the debts of the testator, that specific part, (though specifically bequeathed,) is liable with the rest: it has therefore been held, that the purchaser must *not* have notice that there are no debts, or that the debts are paid. With the latter doctrine the modern practice of the profession accords. The reason of these cases is, that, the property of the testator vests absolutely in the executor, both at law and in equity; so that the demand of the creditors and legatees are personal upon the executor; they are no lien upon the property in his hands, or in the hands of the assignees, from him; the executor is intrusted with the disposition of the property; and no third person, therefore, should be implicated in it. It seems clear from Ewer *v.* Corbett, that though, by such notice of there being no debts, or of the debts being paid, the purchaser makes himself answerable for his purchase or mortgage-money: yet he is not bound, previously, to inquire and satisfy himself, that there are debts unpaid, or that the parts of the assets not specifically bequeathed are sufficient to pay the debts and legacies.

XIV. 2. With respect to *the devise of a real estate for the payment of debts:* It must first be observed, on the authority of the cases of Cutler and Coxeter, 2 Vern. 302. French and Chichester, 2 Vern. 568. and 2 Ves. 590. that if a person charges both his real and personal estates with the payment of his debts, the personal estate must be first applied: and that it is therefore immaterial whether the testator charges the personal estate in the first instance, or not.—Now, if a person devises a real estate to trustees to sell for the payment of his debts, all the books agree, (see particularly the case above cited of Elliott *v.* Merryman, Spalding and Shalmer, 1 Vern. 301. Culpepper *v.* Aston, 2 Chan. Cases, 115. 221. 1 Ves. 173. and 215. Cotterel *v.* Hampson, 2 Vern. 5. Smith *v.* Guyon, 1 Bro. Ca. in Cha. 186.) that if the debts are specified or scheduled, the purchaser or mortgagee *is* bound to see to the application of his money; but that, if they are not specified or scheduled, he is *not* bound to see to such application.

XIV. 3. *As to legacies*—these, from their nature, must be considered as specified or scheduled debts; how far, in those cases, where the trust does not extend to the payment of debts, the purchaser of a real estate is bound to see the money applied in discharge of the legacies, is often a subject of discussion and doubt, even with the most experienced practitioners. But, if the trust is, to sell for the payment both of debts and legacies, then, the trust to pay the debts, intercepts the trust to pay the legacies, and, as the purchaser is not bound to see to the payment of the former, he necessarily is not bound to see to the payment of the latter. Thus in Jebb *v.* Abbott, heard in chancery on the 9th February 1782, lord chancellor Thurlow said, that, where debts and legacies are charged on lands, the purchaser will hold free from the claims of the legatees; for not being bound to see to the discharge of debts, he cannot be expected

expected to see to the discharge of legacies, which cannot be paid till after the debts. Lord Kenyon, chief justice of the king's bench, who was counsel in the cause, assented to this position, and said it had been so determined by lord Hardwicke. Probably the case alluded to by him was that of Rogers v. Skillicorne, since reported by Mr. Ambler; see his Rep. fol. 188.—In Beynon v. Gollins, in the sittings after Hilary term 1788, the testator had charged his estate with the payment of his just debts generally, and with a legacy of 800 *l.* for his daughter for life, and after her death for her children. The trustee had joined in a conveyance of part of the estate to a purchaser, and permitted the 800 *l.* to come into the hands of the daughter's husband, and it was wasted. The bill was brought by the wife and children, to have the legacy made good by the purchasers of the estate, and against the trustee. It was dismissed against the purchasers. Upon the hearing for further directions, it was pressed by Mr. Ambler, that the trustee should pay the costs of the purchasers. But lord Thurlow refused this, saying, that, as there was a general charge of debts, the purchasers were not liable to see to the application of the purchase money in payment of the 800 *l.* and that, if the plaintiff thought fit to make unnecessary parties, the trustees ought not to pay the costs of such parties, but that they must receive them from the plaintiff.

XIV. 4. *Lands are sometimes devised to trustees, upon trust to raise as much money as the personal estate shall fall deficient, in paying the testator's debts and legacies.*—It seems to be the general opinion, that a purchaser or mortgagee is not bound, in this case, to inquire whether the real estate is wanted or not. It is a nicer case where the lands are not devised to the trustees, but a mere power is given them to sell for the purpose of raising as much money as the personal estate shall fall short in paying. To the valid execution of such a power, the deficiency of the personal estate seems to be a requisite circumstance. It may, therefore, be contended, that, if there be not the deficiency in question, the power is not well executed, and a necessary consequence of this appears to be, that, if the purchaser cannot give legal evidence of this deficiency, he cannot make out his title under the power. To prevent questions of this nature from arising, it is usual to insert in all instruments declaring trusts of personal estate, and in all instruments by which real or personal estates are vested in trustees, upon trust to raise money by sale or mortgage, or a power to raise money for any purposes is given them, a clause expressly discharging the purchasers or mortgagees, from the obligation of ascertaining that the money advanced by them is wanted for the purposes of the trust or power. A clause of this nature should seldom be omitted. Where the trust or power is to raise, by sale or mortgage of the real estate, so much money as the personal estate is deficient in producing, it seems advisable to extend this clause a degree farther, by expressly discharging the purchaser or mortgagee from the obligation of inquiring whether the personal estate has been got in and applied, and by expressly authorizing the trustees to raise any money they think proper by sale or mortgage, though the personal estate be not actually got in or applied. For it frequently happens, that, the getting in of the personal estate is attended with great delay and difficulty: during which the real estate cannot, perhaps, be resorted to. This will be obviated effectually by inserting a clause to the above effect. It should, however, be accompanied, with a further direction, that so much of the personal estate, and of the money raised under the trust or power as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates.

XIV. 5. It frequently happens, *that money secured upon mortgages is made the subject of marriage settlements, and assigned upon various trusts.* In this case, there should always be a separate deed, by which the mortgage money and the estate in mortgage should be assigned to the trustees of the settlement, with a declaration that their receipt for the mortgage money shall be a discharge to the

parties paying it. In making the assignment by a separate deed, an advantage is given to the mortgagor, by his being kept from being implicated with the trusts of the settlement, and by having that deed in his custody, which preserves the chain of the title, and which he probably otherwise would not have: an advantage also is given to the persons interested in the settlement, from having the contents and operation of the settlement kept from the knowledge of the mortgagor and those claiming under him.—In all these cases it should be observed, that the doctrines of equity, with respect to the obligation of seeing to the application of money, are involved in many nice distinctions. Great care therefore should be taken to prevent any questions arising upon them, by inserting the clauses above mentioned, and by such other precautions as the circumstances of the case require. On the general doctrine of seeing to the application of purchase money, see Mr. Sugden's chapter on that subject, in his Practical Treatise of the Law of Vendors and Purchasers.

XV. *As to the manner in which courts of equity have attempted to prevent the mischiefs arising from the admission of trusts, with respect to the public at large.*—This has been effected in some measure, by its having been laid down as a general rule, that in any competition of claims, where the equity of the parties is equal, he who has the law shall prevail. See Francis's Maxims of Equity, 61. If a person has the legal estate or interest of the subject matter in contest, he must necessarily prevail at law over him whose right is only equitable, and therefore not even noticed by the courts of law. This advantage he carries with him, so far, even into a court of equity, that if the equitable claims of the parties are of equal force, equity will leave him who has the legal right in full possession of it, and not do any thing to reduce him to an equality with the other, who has the equitable right only. Perhaps the following illustration of this very important rule of equity, by an inquiry into the doctrines of courts of equity respecting *terms of years attendant upon the inheritance*, will not be unacceptable to the reader.——At common law, leases for years were not supposed to transfer any property to the lessee, and were generally of very short duration; for, as they tended to deprive the crown of forfeitures, and the lord of the fruits of his tenures, they were viewed with a very jealous eye. Besides, the possession of the lessee was considered as the possession of the freeholder; and if his lease was defeated or disturbed, though he could recover for damages, he had no means to recover the possession. Moreover, leases for years were subject to be absolutely defeated, either by a real or fictitious recovery against the freeholder; but in the reign of Henry IV. or, at least, in that of Henry VII. the courts resolved, that the lessee should not only recover damages, as a recompense for the loss of the possession, but should also recover the possession itself. Afterwards the 21st Hen. 8. c. 15, protected the lessee against the effect of fictitious recoveries. These alterations of the common law gave the lessee for years an interest and stability which he had not before. Still, in the eye of the law, particularly before the demolition of the military tenures, terms of years were in every respect, except pecuniary emolument, far inferior to estates of freehold. This stability on the one hand, and subordinate state of property on the other, made them very proper and convenient modifications of property, for securing money or any other charges upon the fee, or for giving a partial or temporary right to the profits or beneficial property of the land, in those cases, where the owner wished to have not only the remainder or reversion, but the actual freehold. Hence we find mortgages for long terms of years very frequent in the reign of queen Elizabeth. Now, according to our notions of mortgages, if the mortgage debt is not paid at the time appointed, the estate mortgaged is absolutely forfeited to, and becomes the property of, the mortgagee, at law; but courts of equity permit the mortgagor to redeem, on payment to the mortgagee of his principal, interest, and costs. Still, this is merely a right in equity, the legal estate continuing in the mortgagee.

mortgagee. Thus, if an estate be demised for a term of years, with a proviso making the term void on payment of a sum of money with interest, before or upon a certain day, the condition is not considered, at law, as complied with, unless the money is paid on or before that very day; if it is not then paid, the estate belongs at law to the mortgagee, for the remainder of the term. A court of equity allows the mortgagor to redeem it, by paying the principal, interest, and costs, after that time. But this subsequent payment, though it give the mortgagor the equitable right to the estate, does not affect the legal continuance of the term. In this respect, our law differs from the civil law: in which a mortgage is considered only as an accessary of the debt; and payment at any time, by annulling the debt, extinguishes the mortgage. To apply this doctrine to terms of years. After payment of the mortgage debt, the term of years, for which the mortgage is made, is, at law, in the mortgagee: but, in equity, the mortgagor is entitled to the benefit of it. By an analogy to the case of mortgages, when terms of years are created for securing the payment of jointures, portions for children, or for any other purpose, they do not determine, without a special provision for this purpose, by the performance of the trusts for which they are raised. Thus, in all these cases, the legal interest during the continuance of the term, is in the trustee; but the owner of the fee is entitled to the equitable interest, or rather to all the benefit or advantage, which can be made of the term during its continuance. As the courts of common law held, that the possession of the lessee for years was the possession of the owner of the freehold, courts of equity held, that where the tenant for years was but a trustee for the owner of the inheritance, he should not oust his *cestuy que trust*, or obstruct him in doing any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance. It follows the descent to the heir, and all the alienations made of the inheritance, or of any partial estate or interest carved out of it by deed, by will, or by act of law. Whitchurch *v.* Whitchurch, 2 P. W. 236. 9 Mod. 124. Gilb. Rep. 168. Villiers & Villiers, 2 Atk. 71. Hoole *v.* Sales, 2 Wils. 329. Goodtitle on the demises of Norris and others *v.* Morgan and David, 1 Term Rep. 755. Still, though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law, and the whole benefit and advantage to be made of the term arises from this separation. For, if two persons, or more, have claims upon the inheritance under different titles, a term of years attendant upon it is still so distinct from it, that, if any one of them obtains an assignment of it, then, (unless he is affected by any of the circumstances which equity considers as fraudulent), he will be entitled, both at law and in equity, to the estate for the whole continuance of the term, to the utter exclusion of all the other claimants. This, if the term is of long duration, absolutely deprives all the other claimants of every kind of benefit in the land. Supposing, therefore, *A.* purchases an estate, which, previous to his purchase, had been sold, mortgaged, leased, and charged with every kind of incumbrance to which real property is subject; in this case *A.* and the other purchasers, and all the incumbrancers, have equal claims upon the estate. This is the meaning of the expression, that their equity is equal. But, if there is a term of years subsisting in the estate, which was created prior to the purchases, mortgages, or other incumbrances, and *A.* procures an assignment of it in trust for himself, this gives him the legal interest in the lands during the continuance of the term, absolutely discharged from, and unaffected by, any of the purchases, mortgages, and other incumbrances, subsequent to the creation of the term, but prior to his purchase. This is the meaning of the expression in assignments of terms, that they are to protect the purchaser from all mesne incumbrances. But it is to be observed, that *A.* to be entitled in equity to the benefit of the term, must have all the following requisites: he must be a purchaser for a valuable consideration; his purchase must in all

respects be a fair purchase, and free from every kind of fraud; and, at the time of his purchase he must have no notice of the prior conveyance, mortgage, charge, or other incumbrance. It is to be observed, that mortgagees, lessees, &c. are purchasers in this sense, to the amount of their several charges, interests, or rights. If any person of this description, unaffected by notice or fraud, takes a defective conveyance or assignment of the fee, or of any estate carved out of it, defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also takes an assignment of a term to a trustee for himself, or to himself, where he takes the conveyance of the inheritance to his trustee; in each of these cases he is entitled to the full benefit of the term; that is, he may use the legal estate of the term to defend his possession during the continuance of the term, or, if he has lost the possession, to recover it at common law, in preference to all claimants prior to his purchase, but subsequent to his term. All this was laid down and explained by lord Hardwicke, in the case of Willoughby and Willoughby, in Cha. Trin. 30 Geo. 2. 1756. 1 Term Rep. 763. Upon the same principles was decided the case of Stanhope *v.* earl Verney, before lord Northington, in chancery, July 27, 1761. The case there was, that Henry Sayer, being seised in fee of certain estates subject to an outstanding term of years, in Rigby and Eyre, by indentures of lease and release, bearing date the 4th and 5th days of June 1732, conveyed them to lady Dysart and her heirs, for securing the payment of 1,000 *l.* and interest, and covenanted to produce the deeds respecting the term of years. Afterwards Rigby and Eyre assigned the term to Cunningham and Clayton in trust for Sayer, his heirs and assigns; and then Sayer, by indenture dated the 19th day of Dec. 1732, conveyed the same estates to Mrs. Nash (under whom lord Verney claimed) by way of mortgage, for securing to her 3,000 *l.* and interest, with a declaration that Cunningham and Clayton should stand possessed of the term in trust for her, and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to lady Dysart. Lady Dysart brought an ejectment; lord Verney defended, and set up the term, with a declaration of the trust of it in favour of Mrs. Nash, under whom he claimed. Upon this lady Dysart brought her bill in equity. The question was, which should be preferred? Lady Dysart, who had the first declaration of the trust of the term, or lord Verney, who had the subsequent declaration of the trust, but had the custody of the deed.— Lord Northington held, that a declaration of trust in favour of an incumbrancer, was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide*, and without notice, procured an assignment; and that the custody of the deeds respecting the term, with a declaration of the trust of it in favour of a second incumbrancer, was *equivalent to an actual* assignment; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him.— The protection afforded by terms of years, against what are called mesne incumbrances, makes it safe, in some cases, to dispense with *a search for judgments*. But this is seldom prudent; and never practised where there is the slightest reason to apprehend that notice of them will be proved, or attempted to be proved, on the party or any of his agents in the business. Besides, no term or other outstanding estate should be relied on, unless proof can be obtained easily and at a small expense, of the instruments and acts in law, which must be proved to establish the creation and deduction of the term. It must be added, that, since the case of the King *v.* Smith, Exc. 2d March 1804, *Sugden's Law of Vendors and Purchasers, Appendix, No.* 15, no outstanding estate or interest can be considered a protection against debts due to the crown.

When in the acceptance of a title an outstanding estate or interest is relied on for its security, it should be ascertained that the estate or interest is such as will enable the party to enforce or support his title by it, in ejectment. This does not always appear sufficiently attended to. Generally speaking, it is

true

true, that the possession of the *cestuy que trust* is the possession of the trustee. But it is equally true, that the extent and application of this rule are by no means settled. Great care, therefore, should be taken, in these cases, where the outstanding estate is relied on as a protection against mesne incumbrances, that the possession of the actual terre-tenants has not been such as to deprive the persons, in whom the outstanding estate or interest is vested, of their entry. —Great care also should be taken to ascertain, that the party seeking the benefit of the outstanding estate or interest is furnished with satisfactory evidence to show that it comprises the property for the defence of which he wants it.

The advantages to be derived from terms of years, being so considerable, it is an object of great consequence to ascertain, *when it is safe for the purchaser to leave them in the trustee* in whom he finds them, and when it is necessary or prudential to require them to be assigned to a trustee of his own.—But it is more easy to say where it is unsafe, than to say where it is safe, for him to be satisfied without such an assignment of it.—1*st*, It may be laid down, as a general rule, that whenever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive, to a trustee for the person obliged to pay, the money, is the best possible evidence of the payment of the money, it may be reasonably required as such.—2*dly*, In case a term of years has been assigned to attend the inheritance, if, upon a purchase (taking it in the above extensive sense) *all* the deeds (as well originals as counterparts) by which the term was created or assigned, are delivered to the purchaser, and he is satisfied, that the trustee, in whom it is then said to be vested, has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance; it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate.—3*dly*, But if any of the deeds respecting the term are not delivered to the purchaser, or if he is not satisfied of the trustee's not having previously assigned it, or of the vendor's having made no intermediate incumbrance; it seems prudent to require an actual assignment of it to a trustee for him.—Few general rules, besides these, can be laid down upon this subject:—and these must from their nature be subject to an endless variety of modifications. In all cases of this description, it is infinitely better to err by an excess of care, than to trust any thing to hazard. There is no doubt but the precautions used for the security of purchasers appear sometimes to be excessive, and satisfactory reasons cannot always be given for requiring some of them: yet the more a person's experience increases, the more he feels the reason and real utility of them; and the more he will be convinced that very few of the precautions required by the general practice of the Profession are without their use, or can be safely dispensed with.—On the protections afforded to purchasers by terms for years and other outstanding estates, see 16th chapter of Mr. Sugden's Treatise of the Law of Vendors and Purchasers.

XVI. It is to be observed, that, in most cases, particularly those, which relate to real property, courts of equity have generally endeavoured, that their decisions should bear the strictest possible *analogy to the decisions of courts of law*, in cases of a similar or corresponding impression. All the canons of law respecting the descent or inheritance of legal estates in lands, have been applied to trust or equitable estates. Some of these, as the exclusion of the half blood, of the ascending line, of the paternal line from the maternal inheritance, and the maternal line from the paternal inheritance, are, evidently, of feudal extraction, and are generally supposed to be contrary to reason and equity: yet they have been admitted, without any limitation, into the equitable

code of England. There is the same division in equity, as there it at law, of estates of freehold and inheritance, of estates of freehold only, and of estates less than freehold; of estates in possession, remainder or reversion, and of estates several and estates undivided. It has been observed before, that every species of property is in substance equally capable of being settled in the way of entail; and that the utmost term allowed for the suspense either of real or personal property from vesting absolutely, is that of a life or lives in being, and twenty-one years after, and perhaps in the case of a posthumous child a few months more. The analogy between law and equity is, in this instance, complete. It may be laid down, without any qualification, that, no nearer approach to a perpetuity, can be made through the medium of a trust, or will be supported by a court of equity, than can be made by legal conveyances of legal estates or interests, or will be admitted in a court of law.—In these leading rules, we find the analogy holds. In some instances, it fails. Curtesy has been admitted,—Dower, though a more favoured claim, has been refused, in equitable estates. An equitable estate is, by its nature, incapable of livery of seisin, and of every form of conveyance which operates by the statutes of uses. In the transfer, therefore, of equitable estates, these forms of conveyance have been dispensed with, and a mere declaration of trust in favour of another, has been held sufficient to transfer to him the equitable fee.—On the other hand, trust estates, are, by their nature, equally incapable of the process of fines or recoveries. Yet fines are levied and recoveries are suffered of them; and fines and recoveries are as necessary to bar entails of equitable estates, as they are to bar entails of legal estates. In the case of a feme inheretrix, law and equity agree in vesting the fee in the husband in her right, during their joint lives, and subject to that, in preserving it to the wife: where the feme is possessed of personal property, the law, speaking generally, vests it absolutely in the husband, or, at least, gives him the power of acquiring the absolute property of it. Courts of equity have, in many cases, abridged the right of the husband to the personal property of the wife, and qualified his power over it.—In fixing the term for the redemption of mortgages, and in many other cases, an analogy to the term for bringing ejectments, has frequently influenced the decisions of the courts; in other cases, an analogy to the term for bringing ejectments, or the terms for bringing other writs, has not been attended to; and in some instances, the courts have not considered themselves bound, even by the statutes of limitation. Smith *v.* Clay, Ambl. 645. 3 Bro. Cha. Rep. 639. note.—But the cases, where the analogy fails, are not numerous; and there scarcely is a rule of law or equity, of a more ancient origin, or which admits of fewer exceptions, than the rule, that equity followeth the law.

XVII. In one instance, however, and that of a remarkable nature, this analogy has been altogether abandoned. In the English law of tenure, it is a fundamental rule, and a rule which admits of no exception, that the freehold shall never be in abeyance. In all the innovations, introduced into the law of real property by the statute of uses, this rule has been retained: so that, at this day, it still is an invariable rule, that, under every legal modification of landed property, an actual legal estate of freehold must subsist in some person. By the introduction of *trusts of accumulation*, this rule, in respect to trust or equitable estates, has been wholly rejected. When such a trust came first under the consideration of courts of equity, it might perhaps have been thought to deserve consideration, whether, both in theory and practice, it would not be advisable to apply this rule to equitable estates; and, on this ground, to consider it essential to a modification of equitable property, that there should always be some person actually entitled, either during his own life, or the life of another, or for a larger estate, to the rents and income, or enjoyment of the estate, for his own benefit. A contrary rule was admitted into the equitable code; and, in consequence of it, the courts held, that, during the term, which

Sect. 505.

BUT if after the yeare and day the plaintife will sue a scire facias, *to know if the defendant can say any thing why the plaintife should not have execution* (Mes si apres l'an et jour le plaintife voit suer un *scire facias*, * a sacher si le defendant poit rien dire pur que le plaintife n'avera execution), *then it seemeth that such release of all actions shall be a good plea in barre. But to some seemes the contrary, in as much as the writ of* scire facias *is a writ of execution, and is to have execution, &c. But yet in as much as upon the same writ the defendant may plead divers matters after judgement given to oust him of execution, as outlawry, &c. and divers other matters, this may bee well said an action* (Mes uncore entant que sur mesme le briefe le defendant poit pleader divers matters puis le judgement rendue de luy ouster d'execution, come utlagary, † &c. et divers auters matters, ‡ ceo bien poit estre dit action), *&c.*

"*SCIRE facias.*" This is a judiciall writ, and properly lyeth after the yeare and day after judgement given, and is so called, because the words of the writ to the sherife bee, *quòd scire facias præfat' T.* (being the defendant) *quod sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat, quare, &c.* So as by the writ it appeareth, that the defendant is to be warned to plead any matter in barre of execution; and therefore albeit it be a judiciall writ, yet because the defendant may thereupon pleade, this *scire facias* is accounted in law to bee in nature of an action; and therefore [*n*] a release of all actions is a good barre of the same, and likewise a release of executions is a good barre in a *scire facias*. This writ was ☞ given in this case by the statute of W. 2, for at the common law, if the plaintife had surceased to sue execution by *fieri facias*, or *levari facias*, a yeare and a day, hee had been driven to his new originall.

(Cro. Car. 240. 255. 328.)

[n] 19 H. 6. 3. 18 E. 4. 7. (8 Rep. 152.) (Doc. Pla. 330.) (Cro. Jac. 364.) W. 2. ca. 45. 8 E. 3. 297, 298. 18 E. 3. 33. Lib. 3. fol. 12. sir William Herbert's case. Fleta, li. 2. cap. 12.

[291. a.]

"*This*

* a sacher si le defendant poit rien dire pur que le plaintife n'avera,—d'aver, *L. and M. and Roh.*

† &c. *not in L. and M. or Roh.*

‡ et pur *added in L. and M. and Roh.*

which the law allows for the estate to be suspended from vesting absolutely, in some person, a dry accumulation might be carried on, either for the benefit of the person, in whom the estate is to vest at the expiration of the term of suspense, or for the benefit of some person, answering, at that time, a particular description. The discussions on the will of the late Mr. Thellusson showed the inconvenience of the rule, and the enormous lengths to which it might be carried. They gave rise to the 39 and 40 of his late majesty, "for restraining all trusts and directions in deeds or wills, whereby the profits "or produce of real or personal estate shall be accumulated, and the bene-"ficial enjoyment of it protracted beyond the time therein limited." See Mr. Fearne's Essay on Contingent Remainders, p. 434, note 2; p. 537, n. 1.—[Note 249.]

"*This may bee well said an action.*" Here is to be observed, that every writ whereunto the defendant may plead, be it originall or judiciall, is in law an action.

Sect. 506.

AND I take it that, in a scire facias *upon a fine, a release of all manner of actions is a good plea in barre.*

This upon that which hath been said, is evident of it selfe.

Sect. 507.

BUT where a man recovereth debt or damages, and it is agreed betweene them that the plaintife shall not sue execution (et est accorde perenter eux que le plaintife † ne suera execution), *then it behoveth that the plaintife make a release to him of all manner of executions* ‡.

"*IT behoveth.*" Albeit *Littleton* here saith, hee ought or must, &c. yet there bee other words which will release an execution without expresse words of a release of execution.

19 H. 6. 4. 26 H. 6. Execution, 7. Li. 8. fo. 153. Ed. Altham's case. Vid. Brooke, tit. Releases, 87.

As if a man release all suites, the execution is gone; for no man can have execution without prayer and suit, but the king only; and therefore if the king releaseth all suites, it is no barre of his execution, because in the king's case the judges ought to award execution *ex officio* without any suite; but a release of executions doth barre the king in that case. And so note a diversity between a release of all actions, and a release of all suites.

26 H. 6. tit. Execution, 7.

So if the body of a man be taken in execution, and the plaintife releaseth all actions, yet shall he remaine in execution; but if he release all debts or duties, he is to be discharged of the execution, because the debt or duty it selfe is discharged.

20 Ass. p. 7. (6 Rep. 13. b.) (10 Rep. 47.)

In the same manner if execution be sued upon a recognizance by *elegit*, and the conusee by deed make a defeasance, that if the conusor doth such an act, that then the recognizance shall be voide; by this the execution is discharged.

26 H. 6. ubi supra.

So it is if judgement be given in an action of debt, and the body of the defendant is taken in execution by a *capias ad satisfaciendum*, and after the plaintife releaseth the judgement, by this the body shall be discharged of the execution.

If the plaintife after judgement release all demands, the execution is discharged, as shall appeare by that which next hereafter shall be said.

20 H. 6. 6. per Pastor.

If *A.* be accountable to *B.* and *B.* releaseth him all his duties, this is no barre in an action of account, for duties extend to things

† ne suera execution—serroit ouste d'action, *L. and M. and Roh.*

‡ *&c.* added in L. and M.

things certaine, and what shall fall out upon the account is incertaine; and albeit the Latine word is *debita*, yet duties doe extend to all things due that are certaine, and therefore dischargeth judgements in personall actions, and executions also.

[291. b.]

☞ Sect. 508.

ALSO, if a man release to another all maner of demands, this is the best release to him to whom the release is made, that he can have, and shall enure most to his advantage (si home relessa a un auter touts manners * de demands, ceo est le plus melior release † a luy a que le release est fait, ‡ que il poet aver, et plus urera a son avantage). *For by such release of all manner of demands* (per tiel release de touts manners § de demands), *all maner of actions reals, personals, and actions of appeale, are taken away and extinct, and all manner of executions are taken away and extinct.*

"*ALL manner of demands.*"

(5 Rep. 56. a.) (Cro. Jac. 623.) (Sid. 141.)

"*Demand*," *Demandum*, is a word of art, and in the understanding of the common law is of so large an extent, as no other one word in the law is, unlesse it be *clameum*, whereof *Littleton* maketh mention, *Sect.* 445. And here is to be observed, that there bee two kinde of demands or claimes, viz. a demand or claime in deed, and a demand or claime in law: or an expresse, and an implied demand or claime. *Littleton* here putteth examples of both: and first he speaketh of reall actions, wherein hee that bringeth his action maketh his demand, and therefore hee is properly called a demandant; and hee that defendeth is called tenant, because hee is tenant of the freehold of the land.

Lit. Sect. 445. Bract. li. 1. cap. 10. Pl. Com. Steill's case, 359. &c. (8 Rep. Altham's case, fol. 151.)

Of demands implied, or in law, *Littleton* putteth examples: First, of all actions personals: Secondly, of appeales: for in both those cases he that bringeth the suit is called plaintife, and not demandant, and he that defendeth is called defendant. Thirdly, of executions. Fourthly, of title or right of entry, eyther by force of a condition, or by any former right, which meerely is a demand or claime in law; but otherwise it is in the king's case. Fifthly, of a rent service, rent charge, common of pasture, &c. which also are meere demands or claimes in law (1). All which

(2 Cro. 487.) 38 H. 8. tit. Releas. Br. 9. 6 H. 7. 15. 19 H. 6. 3, 4. 20 Ass. Pl. 5. 40 E. 3. 22. 49 E. 3. 7. b. 50 Ass. Pl. 6. 14 H. 4. 8. 13 R. 2. tit. Dyer, 5 El. 217.

Avow. 89. Lib. 8. fo. 153. Ed. Altham's case. Lit. 170. Sect. 748. (Yelv. 214.) (Cro. Jac. 170, 171.) (10 Rep. 51. b.)

Littleton

* de *not in L. and M. or Roh.*
† a luy—que celuy, *L. and M. and Roh.*
‡ que il *not in L. and M. or Roh.*
§ de *not in L. and M. or Roh.*

(1) Nota *the diversity. If* A. *releases to* B. *all his demands generally, or all his demands out of the manor of* D. *there, rent and common is released, whether present or future: but if he releases to* B. *all demands which he has upon him, there, no rent or common, present or future, is released,* quia release est tantum personel. *Trin.* 5 *Ja. Hancock* v. *Field.—Adjudged* contra, *that a release of all demands is not a bar to a covenant before breach;—but it is agreed, that it bars*

Littleton here, and in the two next Sections following, putteth but for examples; for by the release of all demands, other things also be released, as rents seck, all mixt actions, a warranty which is a covenant reall, and all other covenants reall and personall, estovers, all manner of commons and profits apprender, conditions before they be broken or performed, or after, annuities, recognizances, statutes merchant or of the staple, obligations, contracts, &c. are released and discharged (2).

(10 Rep 47.)
(1 Lev. 99.)
(3 Lev. 274.)

Sect. 509.

AND if a man hath title of entry into any lands or tenements, by such a release his title is taken away.

‖ Sed quære de hòc; *for* Fitz-James *chiefe justice of England holdeth the contrary, because an entrie cannot bee properly said a demand,* P. 19 H. 8.

34 H. 8. tit. Releas. B. 9. Chauncey's case. Lib. 8. fo. 153 Ed. Altham's case.

"☞ *TITLE.*" Here title is taken in the largest sense, including right also. [292. a.]

"Sed quære, &c." This is an addition, and no part of *Littleton*, and the opinion here cited cleerely against law.

Sect. 510.

AND if a man hath a rent service or rent charge, or common of pasture, &c. by such a release of all manner of demands made to the tenants of the land out of which the service or the rent is issuing, or in which the common is (per tiel release de touts manners de demaunds fait al tenaunts de la terre dont le service ou le rent est issuant, ou en † que le common est), *the service, the rent, and the common, is taken away and extinct, &c.*

This upon that which hath been said, needeth no further explication.

Sect.

‖ This paragraph not in L. and M. or Roh.

† que—quelle terre, *L. and M. and Roh.*

bars warranty, for that lies properly on demand, because he may have warrantia chartæ. *So also reservation of rent, by indenture, is a covenant in law, viz. covenant real; for it runs with the land, and does not lie, after a duration, but against the tenant of the land: and it is agreed that by a release of all demands a covenant real is released; for the rent itself, upon which the covenant in law rises, is released. So* 14 *H.* 8, 9. *But however the law may be of covenants real, it seems to be contrary of covenants personal;—and so there is good difference.* Sed forsan, *these passages are not to be understood of covenants before the breach, though covenants before the breach are expressive.* Ld. Nott. MSS.—[Note 250.]

(2) But a release of all demands does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent at the time was not only not due, but the consideration, viz. the future enjoyment of the lands, for which the rent was to be given, was not executed. 1 Sid. 141. 1 Lev. 99. 3 Lev. 274. Note to the 12th edition.—[Note 251.]

Sect. 511.

ALSO, if a man releaseth to another all manner of quarrels, or all controversies or debates betweene them, &c. quære, *to what matter and to what effect such words shall extend themselves, &c.*

"*QUARRELS,*" *Querela, à querendo.* This properly concerneth personall actions, or mixt, at the highest; for the plaintife in them is called *querens*, and in most of the writs it is said, *queritur*. And yet if a man release all *quarrels* (a man's deed being taken most strongly against himself) it is as beneficiall as all actions; for by it all actions, reall and personall, are released. And by the release of all quarrels, all causes of actions are released thereby, albeit no action be then depending for the same. 40 E. 3. 47. b. Ed. Altham's case, ubi supra. 35 H. 8. Dier, 57. 9 E. 4. 44. (9 Rep. 52.) 39 H. 6. 9.

"*Quarrels.*" Controversies and debates are *synonima*, and of one signification. *Litis nomen omnem actionem significat, sive in rem, sive in personam sit.* If a man release *omnes loquelas*, it is as large as *omnes actiones*; for *omnis actio est loquela*, and it extendeth as well to actions in courts of record, as base courts; for the writ of error saith, *in recordo et processu, &c. loquela quæ fuit inter, &c.* And so the writ of false judgement saith, *recordari facias loquelam*, where the judgement was given in the county court. *Omnes exactiones* seeme to be large words; for *exactio derivatur ab exigendo*, and *exigere* signifieth to enquire or demand. Lib. 8. fol. 153. Altham's case. 21 H. 6. 16. a. F. N. B. 23. 18. 50 Ass. 6. 40 E. 3. 22. 13 R. 2. Avowrie, 89.

Sect. 512.

ALSO, if a man by his deede bee bound to another in a certaine summe of money, to pay at the feast of Saint Michael *next ensuing,* if the obligee before the said feast release to the obligor all actions, he shall be barred of the duety for ever, and yet hee could not have an action at the time of the release made.*

[292. b.] "*RELEASE to the obligor all actions, &c.*" The reason ☞ of this case is, for that the debt is a thing consisting meerely in action; and therefore albeit no action lyeth for the debt, because it is *debitum in præsenti, quamvis sit solvendum in futuro*, yet because the right of action is in him, the release of all actions is a discharge of the debt it selfe. [o] And so may an executor before probate release an action; and yet before probate he can have no action, because the right of the action is in him, and so it was adjudged. And some say, that an ordinary may release an action, and yet he can have none. But if a man by deed doth covenant to build an house or make an estate, and before the covenant broken, the (Dyer, 307. a.) Cro. Car. 426. (2 Roll. 410. 412.) 11 H. 4. 41. 43. (9 Rep. 37, 38. 2 Inst. 398.) [o] Trin. 2 Ja. in Com. Banco, inter Middleton & Rinnot. 18 H. 6. 23. b. Pl. Com. 277, 278, in Greasbroke's case, per Weston. 5 Eliz. Dier, 217. Altham's case, ubi supra. (10 Rep. 51. b.) 1 Rep. 112. b. (2 Cro. 222. 571. Sid. 85. Hob. 216.)

covenantee

* *&c.* added in L. and M. and Roh.

covenantee releaseth to him all actions, suits, and quarrels, this doth not discharge the covenant it selfe, because at the time of the release, *nihil fuit debitum*, there was no debt, or duty, or cause of action in being. But in that case a release of all covenants is a good discharge of the covenant before it be broken.

Sect. 513.

BUT if a man letteth land to another for a yeare, to yeeld to him at the feast of S. Mich. *next insuing* 40 s. *and afterwards before the same feast hee releaseth to the lessee all actions, yet after the same feast hee shall have an action of debt for the non payment of the* 40 s. *notwithstanding the said release.* Stude causam diversitatis *betweene these two cases.*

9 H. 7. 5. a. (8 Rep. 153.) 45 E. 3. 8. 17 H. 6. 26. 13 H. 4. Avowrie, 240. (Ant. 47. b. Yelv. 67. F. N. B. 131. a. Cro. Jac. 505.) 30 E. 3. 13. b. 47 E. 3. 24. 10 H. 2. Execution, 137. 16 E. 2. ib. 138. 16 E. 3. Scire fac. 4. F. N. B. 267. 9 E. 3. 7. (5 Rep. 18.) 5 Mar. Action sur le case. Br. 108. 3 Mar. Dier, 113. Lib. 4. fol. 94. Slade's case. Lib. 5. fo. 81. b. Forde's case. 39 H. 6. 28. b. 5 E. 4. 45. 2 H. 4. 13.

"*RELEASETH all actions.*" This release shall not barre the lessor of his rent, because it was neither *debitum* nor *solvendum* at the time of the release made; for if the land be evicted from the lessee before the rent become due, the rent is avoyded; for it is to be paid out of the profits of the land, and it is a thing not meerely in action, because it may be granted over. But the lessor before the day may acquite or release the rent. But if a man be bound in a bond or by contract to another to pay a hundred pounds at five several daies, he shall not have an action of debt before the last day be past; and so note a diversity betweene duties which touch the realty, and the meere personalty. But if a man be bound in a recognizance to pay a hundred pound at five severall dayes, presently after the first day of payment he shall have execution upon the recognizance for that summe, and shall not tarry till the last bee past, for that it is in the nature of severall judgements. And so note a diversity between a debt due by recognizance, and a debt due by bond or contract. And so it is of a covenant or promise, after the first default an action of covenant, or an action upon the case doth lie, for they are severall in their nature. Lastly, note a diversity between debts and covenants, or promises.

If a man hath an annuity for terme of yeares, or for life, or in fee, and he before it be behind doth release all actions, this shall not release the annuity, for it is not meerely in action, because it may be granted over.

12 R. 2. Release, 29. See Mo. 13. Bend. 57. Cro. Eliz. 807. Cro. Car. 241. Cro. El. 118. 2 Leo. 107. 2 Cro. 504. Cro. El. 776. 4 Rep. 94. Litt. Rep. 61. S. C. 2 Saund. 337. 3 Mod. 153. S. C. Salk. 65.

☞ Sect. 514. [293. a.]

ALSO, where a man will sue a writ of right, it behoveth that he counteth of the seisin of himselfe, or of his ancestors, and also that the seisin was in the same king's time, as he pleadeth in his plea. For this is an ancient law used, as appeareth by the report of a plea in the eire of Nottingham, * tit. Droit in Fitzherbert, cap. 26, *in this forme following.* John

* tit. Droit in Fitzherbert, cap. 26, *not in L. and M. or Roh.*

John Barre *brought his writ of right against* Reynold *of* Assington, *and demanded certaine lands, &c.* † *where the mise is joyned in banke, and the originall and the processe were sent before the justices errants, where the parties came, and the* ‡ *twelve knights were sworne without challenge of the parties, to be allowed, because that choice was made by assent of the parties, with the foure knights, and the oath was this: That I shall say the truth, &c. whether* R. *of* A. *hath more meere right to hold the tenements which* John Barre *demandeth against him by his writ of right, or* John *to have them, as he demandeth, and for nothing to let to say the truth* (et pur rien dirra que le verity ‖ ne dirra), *so helpe mee God, &c. without saying to their knowledge. And the like oath shall bee made in an attaint, and in battaile, and in wager of law.* (Et tiel serement serra fait en attaint, et en battaile, et § en ley gager), *for these doe bring every thing to an end. But* John Barre *counted of the seisin of one* Ralfe *his ancestor in the time of king* Henry, *and* Reynold *upon the mise joyned tendred halfe a marke for the time, &c. And hereupon* Herle, *justice, said to the grand assise after that they were charged upon the meere right, You good men,* Reynold *gave halfe a marke to the king for the time, to the intent that if you find that the ancestor of* John *was not seised in the time that the demandant hath pleaded, you shall enquire no further upon the right* (Vous gentes, Reynold donast demy marke al roy pur le temps, ¶ al entent que si ⸸ vous troves que l'auncester ** John ne fuit pas seisie en le temps que le demaundant ad count, ⸸⸸ vous n'enquires plus avant del droit); *and for this, you shal tell us, whether the ancestor of* John (Ralfe *by name) were seised in king* Henries *time, as he hath pleaded, or not. And if you find that he was not seised in this time, you shall enquire no more; and if you find that he was seised, then you shall enquire further of the writ* (donques enquires ouster del ‡‡ briefe). *And after the grand assise came in with their verdict, and said, that* Ralfe *was not seised* (que Rafe §§ ne fuit pas seisie) *in the time of king* Henry, *whereby it was awarded that* Reynold *should hold the tenements demanded against him, to him and his heires quite of* John Barre *and his heires to the remnant. And* John *in mercy* (A), *&c. And the reason why I have shewed to thee, my son, this plea, is, to prove the matter precedent which is said in a writ of right; for it seemeth by this plea, that if* Reynold *had not tendered the halfe marke to enquire of the time, &c. then the grand assise ought to be charged onely to enquire of the meere right, and not of the possession, &c.* ‖‖ *And so alwayes in a writ of right, if the possession whereof the demandant counteth bee in the king's time, as hee hath pleaded, then the charge of the grand assise shall be only upon the meere right, although that the possession were against the law, as it is said before in this chapter, &c.*

"IT

(A) *Part of the* **** *judgment in this case was, that the demandant should be in mercy, &c. i. e. that he should be at the king's mercy, with regard to the pecuniary fine to be imposed on him as a punishment for his having made a false or groundless complaint. By the old law, the plaintiff was liable to amercement in every suit or action at law, in case he failed in it. The amercement is now disused, but the form still continues. See* 3 Black. Comm. p. 375. *and the Appendix there, p.* vi. & xxv. *Archbold's ed.*

† *where* not in L. and M. or Roh.
‡ *twelve* not in L. and M. or Roh.
‖ ne—jeo, *L. and M. and Roh.*
§ en—le, *L. and M. and Roh.*
¶ al entent—et ceo sert, *L. and M. and Roh. and in MSS.*
⸸ vous—home, *L. and M. and Roh.*
** John *not in L. and M. or Roh.*
⸸⸸ vous—home, *L. and M. and Roh. and in MSS.*
‡‡ briefe—droit, *L. and M. and Roh.*
§§ ne *not in L. and M. or Roh. And* not in L. and M. or Roh.

(Ant. 279. a.) For the time of limitation, see the statute of 32 H. 8. cap. 2. Vide Sect. 170. (8 Rep. 65. Hob. 240.) F. N. B. 30. a. 2 E. 3. 27. Littl. 112. a.

"*IT behoveth that he counteth of the seisin of himselfe, or of his ancestors.*" For if neyther hee nor any of his ancestors were seised of the land, &c. within the time of limitation, he cannot maintaine a writ of right: for the seisin of him of whom the demaundant himselfe purchased the land, &c. availeth not.

And so it is in a writ of right of advowson.

"*Also that the seisin was in the same king's time, as he pleadeth.*" Hereby it appeareth, that not onely a seisin (as hath beene said) is requisite, but also that the seisin be had in the time of the same king, according to his count.

"*Report,*" commeth of the Latine word *Reportare, à re et porto, id est, referre, à re et fero.* And in the common law it signifieth a publike relation, or a bringing againe to memory cases judicially argued, debated, resolved, or adjudged in any of the king's courts of justice, together with such causes and reasons as were delivered by the judges of the same; and in this sense *Littleton* useth the word in this place.

(4 Inst. 184.) "*In the eire of Nottingham.*" *Eire, Iter.* And it signifieth the court of the justices in *eire*, and thereupon they were called *justitiarii itinerantes*, in respect that the justices residing at ☞ Westminster were called *justiciarii residentes*, and were much like in this respect to the justices of assise at this day, although for authority and manner of proceeding (whereof you shall reade [*p*] in the ancient authors of the law) farre different. And as the power of the justices of assises by many acts of parliament and other commissions increased, so these justices itinerant by little and little vanished away. And it is certaine, that the authority of justices of assises itinerant through the whole realme, and the institution of justices of peace in every county being duely performed, are the most excellent meanes for the preservation of the king's peace, and quiet of the realme, of any other in the Christian world.

[293. b.]

[*p*] Mirror, cap. 2. sect. 3, and sect. 15, and ca. 4, le office des Justices in Eire. Glanv. li. 9. cap. 11. Li. 8. cap. primo. Britt. fol. 1. b. 7, 8, &c. Bract. lib. 3. f. 115, &c. Flet. li. 1. ca. 15, &c. 4 E. 3. 32. 6 E. 3. 35. 23 E. 3. 21. 15 H. 7. 5. Vide Sect. 442. 233, 234.

"*Of Nottingham.*" This should bee *Northampton*, according to the originall.

This report whereof *Littleton* here maketh mention, you shall finde an abstract of it in 3 *E.* 3, since *Littleton's* time, put in print by *Fitzherbert* when he was serjant in 11 *H.* 8, and is not in the Reports or bookes at large. And yet here it appeareth, that they be of great authority, and vouched by *Littleton* himselfe for the proofe of a maine point in law. And hereby it also appeareth how necessary it is to reade records and pleas reported or recorded, though they were never printed. For those and the like records are *veritatis et vetustatis vestigia.*

3 E. 3. tit. Droit. F. 26.

"*Tit. Droit in* Fitzherbert, 26," is ☞ of a new addition, and therefore though it bee true, yet not to bee allowed.

[294. a.]

4 E. 3. 41. Peverel's case. Mirror, Glanvil, Bracton, Britton, Flota, ubi supra.

"*And the originall and the processe were sent before the justices errants.*" For it is to be understood that all pleas either in the realty or personalty that were begunne and not determined before

before justices in eire, were adjourned by them into the court of common pleas.

" *The twelve knights were sworne without challenge, &c. because that choice was made by assent of the parties, with the foure knights.*"

Here are foure things to be observed.

First, that *omnis consensus tollit errorem*, and against his owne consent he cannot challenge the twelve. 30 E. 1. tit. Challenge, 172. 21 E. 4. 77. 39 E. 3. 1. 44 E. 3. 6. 11 H. 6. 13. (Cro. El. 664.)

Secondly, that the foure knights electors of the grand assise are not to be challenged, for that in law they bee judges to that purpose, and judges or justices cannot bee challenged. And that is the reason that noblemen, that in case of high treason are to passe upon a peere of the realme, cannot be challenged, because they are judges of the fact, and the *Magna Charta* saith, *per judicium parium suorum*. 4 E. 3. 13. Magna Charta, cap. 29.

Thirdly, that the twelve before any assent may be challenged before the foure knights electors, but after assent or return of the pannell before the justices, there shall be no challenge to the pannell nor to the pollee. 39 E. 3. 2. 7 H. 4. 20.

Fourthly, if there be not foure knights for electors in that county, the next to them in that county shall be taken; *ne curia regis deficeret in justitiâ exhibendâ*. 7 H. 4. 20.

" *Without saying to their knowledge.*" And here it appeareth, that where the judgment is finall, there the oath of the grand assise or jury is absolute, and not to their knowledge, as ☞ here in the writ of right, in the attaint, and in wager of law, for the judgement in every of these three is finall.

[294. b.]

" *The mise is joyned.*" *Mise* is a word of art appropriated only to a writ of right, so called because both parties have put themselves upon the meere right to be tryed by grand assise or by battaile; so as that which in all other actions is called an issue, in a writ of right in that case is called a mise. And in this sense *Littleton* taketh it here. But in a writ of right if a collaterall point is to be tryed, there it is called an issue; and is derived of this word *(missum)*, because the whole cause is put upon this point. It is also taken for expences, as *misæ & custagia*. And sometime it signifieth a customary grant to the king, or lords marchers of Wales by their tenants at their first comming to their lands. Vide Sect. 193. Registrum. 33 H. 8. ca. 13. 3 E. 6. ca. 36.

" *Tendred halfe a marke for the time.*" Master *Lambard* saith, that *mancusa & marca Saxonicè Mancup. 7. Mearc' Nummus 30 valens denarios*. And this *mearc*, now called a marke, being an old Saxon word, is the cause that England most commonly reckoned by markes. *Libra Saxonicè* is a *pund, à pondo*, which is called so untill this day. *Solidus, qui apud nos est pars libræ vicesima, denarios per id temporis continebat quinque, nunc duodecim*; and *scilling* is a Saxon word, and with us used to this day. Pennye, *Saxonicè pennig, Latinè denarius*; but the value of these have not been alwayes one. 10 E. 3. 20. 31 E. 3. Droit, 11. 22 E. 3. 17. 18 H. 3. Droit, 62. 33 E. 3. ib. 39. Lamb. explicat. verborum verbo Mancusa.

In a writ of right of advowson brought by the king, the tenant shall not tender the *di*-marke, because *nullum tempus occurrit regi* F. N. B. 31. c. 3. 1 E. 3. Droit, 15. 6 E. 3. ibid. 24.

regi (A); and therefore the king shall alledge, that he or his progenitor was seised, without shewing any time.

Mirror, ca. 1. § 17. ca. 3. de Attaint. ca. 5. § 1. Bract. fo. 288, 289, &c. 292. Brit. fol. 241. 245, 246, &c. Flet. li. 5. ca. 21 & 34. Fortescue, ca. 26. (3 Inst. 163. 222.)

"*In an attaint.*" *Attincta* is a writ that lyeth where a false verdict in court of record upon an issue joyned by the parties is given. And of ancient writers it is called *breve de convictione*; and is derived of the participle *tinctus*, or *attinctus*, for that if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever; for the judgement at the common law in the attaint importeth eight great and grievous punishments. 1. *Quòd amittant liberam legem in perpetuum*, that is, he shall be so infamous as he shall never be received to be a witnesse, or of any jury. 2. *Quòd foris faciant omnia bona & catalla sua.* 3. *Quòd terræ et tenementa in manus domini regis capiantur.* 4. *Quòd uxores & liberi extra domus suas ejicerentur.* 5. *Quòd domus suæ prostrentur.* 6. *Quòd arbores suæ extirpentur.* 7. *Quòd prata sua arentur.* *Et* 8. *Quòd corpora sua carceri mancipentur.* So odious is perjury in this case in the eye of the common law, and the severity of this punishment is to this end, *ut pœna ad paucos, metus ad omnes perveniat*; for there is *misericordia puniens*, and there is *crudelitas parcens.* And seeing all tryals of reall, personall, and mixt actions depend upon the oath of 12 men, prudent antiquity inflicted a strange and severe punishment upon them, if they were attainted of perjury.

But since *Littleton* wrote, a statute hath beene made in mitigation of the severity of the common law, in case when the petite jury is attainted, and therefore it is taken by equity. For where the statute saith, that the party grieved shall have an attaint against the party which shall have judgement upon the verdict, yet an attaint shall be maintained upon that statute against the executors of the party. *Et sic de similibus.* [a] But see the statutes and authorities quoted in the margent. Only I thought good to observe three things.

[a] 23 H. 8. ca. 3. 3 Eliz. Dyer, 201. 7 E. 6. ibidem, 81. 3 Mar. ibidem, 129. 7 Eliz. ibidem, 235. 24 H. 8. Br. Attaint. 96. 4 Mar. ib. 127. 20 H. 7. 5. 42 E. 3. 26. F. N. B. 107. D. Mirror, ca. 1. § 3. ca. 3. § . ca. 5. § 1.

First, that no attaint can be maintained upon this statute but between party and party.

Secondly, that no conusance can be granted upon any attaint, because all attaints are to be taken either before the king in his bench, or before the justices of the common place, and in no other courts, &c.

Thirdly, consider what pleas may bee pleaded in an attaint by force of this act, and what not.

Bracton, lib. 3. 141. b. & fo. 320. 331. Glanvil. lib. 2. cap. 3, 4, 5. Lib. 8. ca. 9. Lib. 4. ca. 1. Brit. fo. 40. 42, 43. 81. 175. 190. Fleta, lib. 1. ca. 32. and lib. 2. cap. 48.

"*In battaile.*" *Duellum, monomachia*, and it signifieth in the common law a tryall by single fight, by battaile or combate, *monomachia* (1). [b] And in the writ of right neither the tenant

[b] 4 E. 3. 41. 17 E. 3. 19 H. 6. 35. 1 H. 4. 3. 30 E. 3. 20. 29 E. 3. 12. 13 H. 4. 4. Staundf. 174. 178. 17 Eliz. Dier. 9 E. 4. 35. 1 H. 6. 6. 3 H. 6. 55. Vid. li. 9. fo. 32. b. & 33. b. Mirror, ca. 4. del office des justices, &c. Glanvil. li. 1. cap. 9. Lib. 8. cap. 8. Lib. 10. cap. 5. Bract. li. 3. tract. 2. ca. 37. & li. 5. fol. 410. Britton, fol. 56. Fleta, lib. 2. ca. 56. 63.

or

(A) *This rule is, however, subject to various exceptions. See ante* 119. *a. note* 1.

(1) Upon this subject, see 3 Black. ch. 22. sect. 5 and 6. and the notes to the

or demandant shall fight for themselves, but finde a champion to fight for them: because if either the demandant or tenant should be slaine, no judgement could be given for the lands or tenements in question. But in an appeale the defendant shall fight for himselfe, and so shall the plaintife also; for there if the defendant be slaine, the plaintife hath the effect of his suite, that is, the death of the defendant; the order and solemnity whereof you may reade in our ancient and latter bookes. And this the law did institute when the tenant failed of his witnesses, or evidences, or other proofes; and the presumption of law is, that Godwill give victory to him that hath right.

"*Wager of law*," *Vadiare legem*; and there is also *facere legem*, by making of his law. That is, to take an oath (for example) that hee oweth not the debt demanded of him upon a simple contract, nor any penny thereof. And it is [295. a.] called wager of law, because of ancient ☞ time he put in surety to make his law at such a day; and it is called making of his law, because the law doth give such a speciall benefit to the defendant to barre the plaintife for ever in that case. [r] But he ought to bring with him eleven persons of his neighbours that will avow upon their oath, that in their consciences he saith truth, so as he himselfe must bee sworne *de fidelitate*, and the eleven *de credulitate*.

[r] Magna Carta, ca. 28. Bracton, lib. 5. fol. 410. Fleta, lib. 2. ca. 63. Diversities des Courts. 33 H. 6. 8. (4 Rep. Slade's case, 93.)

And wager of law lieth not when there is a specialty, or deed to charge the defendant, but when it groweth by word, so as he may pay or satisfie the party in secret, whereof the defendant having no testimony of witnesses may wage his law, and thereby the plaintife is perpetually barred, as *Littleton* here saith; for the law presumeth that no man will forsweare himselfe for any worldly thing; but mens consciences doe grow so large (specially in this case passing with impunity) as they choose rather to bring an action upon the case upon his promise, wherein (because it is *trespasse sur le case)* hee cannot wage his law, than an action of debt.

A man outlawed or attainted in an attaint, or upon an inditement of conspiracy, or of perjury, or otherwise, whereby he become infamous, shall not wage his law. 33 H. 6. 32.

A man under the age of 21 yeares shall not wage his law; but a feme covert, together with her husband, shall wage her law. 11 H. 6. 40. 15 E. 4. 2. (Cro. Eliz. 161.)

When the suite is for the king, or for his benefit, as in a *quo minus*, the defendant shall not wage his law. 32 H. 6. 24. 8 H. 5. Ley, 66. 35 H. 8. Ley, Br. 102.

If an infant be plaintife, the defendant shall not wage his law. 26 E. 3. 63. b.

An alien shall wage his law in that language he can speake. 21 H. 6. 42.

In no case where a contempt, trespasse, deceit, or injury is supposed in the defendant, he shall wage his law, because the law will not trust him with an oath to discharge himselfe in those cases; only in some cases in dett, detinue, accompt, the defendant is allowed by law to wage his law. 44 E. 3. 32. 18 E. 3. 4. 24 E. 3. 39. (4 Rep. 95. b.)

In

the 1st vol. of Dr. Robertson's History of Charles the Vth.—The reader will also find some curious and interesting particulars upon this head, in *Père le Brun, Traité de quelques pratiques superstitieuses qui ont seduit le peuple, et embarrassé les sçavants.*

15 E. 4. 16.
10 E. 4. 5.
(3 Cro. 790. 919.)

In an action of account against a receiver, upon a receipt of money by the hand of another person for account render (unlesse it be by the hands of his wife, or of his commoigne) the defendant shall not wage his law, because the receipt is the ground of the action, which lyeth not in privity betweene the plaintife and defendant, but in the notice of a third person, and such a receipt is traversable. [*d*] But in an action of debt upon an arbitrament, or in an action of detinue by the bailement of another's hand, the defendant shall wage his law, because the *debet* and the *detinet* is the ground of those actions, and the contract or bailement, though it be by another hand, is but the conveyance, and not traversable. In an action of account against a bailife of a mannor, the defendant cannot wage his law, because it soundeth in the realty. In an action of debt which concerns the realty, as for debt for a rent upon a lease for yeares, or an action of detinue for detaining an indenture of a lease for yeares, the defendant shall not wage his law, much lesse for charters or deedes which concerne inheritance.

[*d*] 33 H. 6. 24.
13 H. 7. 3. a.
22 H. 6. 41.
1 H. 6. 1. b.
8 H. 6. 11.
18 H. 8. 3.
3 E. 3. 28.
11 H. 4. 54.
5 H. 5. 13.
21 H. 6. 30.
24 E. 3. Ley 63.
30 E. 3. 19.
9 E. 4. 1.
34 H. 8. Ley, Gager, Br. 97.

10 H. 6. 7.
1 H. 7. 25.
6 Eliz. Bendloes.

In an action of debt for a fine or amerciament in a leete, the defendant shall not wage his law, because the leete is a court of record; but in an action of debt for an amerciament in a court baron the defendant shall wage his law, for that it is no court of record.

9 H. 5. 3.
8 H. 6. 15.
22 H. 6. 35.
38 H. 6. 6.

In debt upon an account, before auditors, the defendant shall not wage his law, and this by construction of the statute of *W.* 2. *cap.* 11. which giveth them great authority, and saith, *coram auditoribus*, and therefore of an account before one auditor the law lyeth. So if the lord before auditors be found in surplusage, in an action of debt brought by the accomptant, the lord shall not wage his law by construction also upon this statute, as an incident arising upon the account.

14 H. 6. 62.
38 H. 6. 6.

28 H. 6. 4.
19 H. 6. 20.
22 H. 6. 13.
39 H. 6. 12.

In an action of debt by a gaoler against the prisoner for his victuals, the defendant shall not wage his law, for he cannot refuse the prisoner, and ought not to suffer him to die for default of sustenance; otherwise it is for tabling of a man at large.

21 H. 6. 4.

In an action of debt brought by an attorney for his fees, the defendant shall not wage his law, because he is compellable to be his attorney. And so if a servant be retained according to the statute of labourers in an action of debt for his salary, his master shall not wage his law, because he was compellable to serve; otherwise it is, if he be not retained according to the statute (1).

38 H. 6. 22.
39 H. 6. 18.

Wheresoever

(1) *Otherwise of a counsellor at law, for he cannot bring any action; for he is not compellable to be counsellor, and his fee is* honorarium, *not a debt. Ammianus, lib.* 3.—Lord Nott. MSS.——At Rome the functions of the bar were divided between, I. The Patrons, or Orators; II. The Advocates, who attended to inform or instruct the patrons upon the points of law, which arose in the cause; III. The Procurators: And, IV. the Cognitors. The two last nearly resembled the Attornies of our courts. Besides these, were the *Juris consulti*, who gave their opinions and advice upon matters of law. Till the time of Augustus every person had this liberty; but he confined it to some particular individuals selected by him, and made a regulation, that in future no one should enjoy that privilege but under the authority of the prince. The opinions of the *Juris consulti*, called the *Responsa Prudentum*, were of great weight;

Wheresoever a man is charged as executor or administrator, he shall not wage his law, for no man shall wage his law of another man's deed, but in case of a successor of an abbot, for that the house never dyeth. 5 H. 6. 38. 1 H. 7. 25. 13 H. 7.

In

weight; and a considerable part of the Roman law is founded upon them. See Gravina *de Ortu et Progressu Juris Civilis*, lib. 1, sect. 42, 43, 44. In the summary of the Roman Law, taken from Dr. Taylor's Elements of the Civil Law, page 26, it is observed, that the *Responsa Prudentum* seem to amount to what we call Precedents, or Reports; that it is common to them both to be the determinations of lawyers to explain law: but that there is this difference between them, that our precedents owe their authority to their being the judgment of the court; but the *Responsa Prudentum*, though admitted as law, were nothing more than the private opinions of lawyers. See Cod. lib. 1. tit. 17. and the Cod. Theo. lib. 1. tit. 4. with the notes of Gothofred. It is supposed, that, in the early days of the Roman Empire, the practice of the law was merely honorary; but it soon became an object of gain. The Cincian law, which was passed about the time of the second Punic war, was intended to revive the primitive custom of honorary advocation. But it was so often evaded, that the emperor Claudius thought it more advisable to moderate, than to attempt to destroy entirely, the salaries or emoluments of advocates. He accordingly inhibited them from taking a larger fee than ten sesterces, about 80*l.* 14*s.* 7*d.* English. The advocates, however, thought it an indignity, that their fees should be considered as wages, and therefore dignified them by the honourable title of presents, or gratuities; but as they might demand, and even maintain an action for their fees, this distinction was merely nominal. See Gothofred *de Salario*, and Dr. Beevor's History of the Civil Law, page 444. In England the fees of counsel are honorary, in the strict acceptation of the word. Thus in Moor *v.* Row, Cha. Rep. 38. a counsellor brought a bill for fees due to him from the defendant, a solicitor. The defendant demurred; the demurrer was allowed, and the bill dismissed. Sir John Davies thus expresses himself upon this subject, in his preface to his Reports, page 22, 23. "*The fees to counsellors are not in nature of wages, or pay, or* that which we call "*salary, or hire*, which are duties certain, and grow due by contract, for "labour or service, but *what is given him is honorarium, not merces*; being a "gift which gives honour as well to the taker as the giver: nor is it certain or "contracted; for no price, or rate, can be set upon counsel, which is invalu- "able and inestimable, so as it is more or less, according to the circum- "stances, namely, the ability of the client, the worthiness of the counsellor, "the weightiness of the cause, and the custom of the country. It is a gift of "such a nature, that the able client may not neglect to give it without ingra- "titude, for it is but a gratuity, or taking of thankfulness; yet the worthy "*counsellor may not demand it without doing wrong to his reputation*, according "to that moral rule, *multa honesta accipi possunt quæ tamen peti non possunt.*" In France the Roman law respecting the fees of advocates formerly prevailed. Many instances are found in their law books, of advocates bringing actions for their fees, and recovering upon them: but this has long fallen into disuse. In the contest, in 1775, between Mr. Linguet and the Order of Advocates, one of the charges against him was, that he had written to the duke d'Aiguillon, to demand his fees; and threatened him with an action for them; and that his demands upon the duke had been referred to arbitration. See *Journal Historique du Retablissement de la Magistrature*, tom. 7. p. 190. Ordonnances have been made at different times enjoining the advocates to subscribe, at the foot of their pleadings, a receipt for their fees; but the advocates never

10 H. 7. 18. In debt upon a penalty given by statute, the defendant shall not wage his law. There is another kinde of wager of law in a reall action, of *non summons*, but thereof *Littleton* speaketh not.

"*And hereupon* Herle *justice, said, &c.*" Hereby it appeareth, that it is the office ☞ of the judges to instruct the grand assise or jury in points of law; for as the grand assise or other jurors are triers of the matters of fact, *ad questionem facti non respondent judices*, so *ad questionem juris non respondent juratores*. And accordingly the judge in this case directed the grand assise, viz. if they found that, &c. [295. b.]

Glanv. li. 12. cap. 1, &c. Bracton, li. 5. fo. 328. "*Whereby it was awarded.*" Here are two things to be observed. First, the form of a judgement finall. Secondly, that a judgement finall is to beé given in this particular case. For the forme of the finall judgement for the tenant is here expressed, that the tenant shall hold the tenements demanded against him, to him and his heirs quite of the demandant and his heires for ever, and the demandant in the mercy. *Quòd tenens teneat terram illam sibi et hæredibus suis in pace versus petentem, & hæredes suos in perpetuum.*

Lib. 5. fol. 85. Penrin's case.

34 E. 3. Judgm. 256. adjudge accord. 13 H. 4. Judgm. 245. 10 H. 6. 8. 20 H. 6. 38. b. 21 H. 6. 34. b. 26 H. 8. 8. b. 1 Mar. Dy. 98. Li. 5. fo. 85. Penrin's case. F.N.B. 5. 11. 31. For the second point, seeing the mise is joyned upon the meer right, albeit the verdict of the grand assise be given upon another point, yet judgement finall shall be given. And so it is if the tenant after the mise joyned make default, or confesse the action, or if the demandant be non-suite; and yet in none of these cases they of the grand assise gave their verdict upon the meere right.

"*As it is said before.*" Vid. Sect. 478.

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would obey them. The leading ordonnance upon this head is that of Blois. In 1602, the parliament of Paris gave an arret, enforcing the observance of that ordonnance. This gave the advocates so much offence, that three hundred of them renounced their profession upon it, with the usual formalities. This put an entire stop to the proceedings of the courts of justice. The matter was afterwards settled; and the ordonnance of Blois, in this respect, and the subsequent ordonnances enforcing it, are now considered as virtually repealed. See Loysel, *Dialogue des Avocats*; and *Menagii Juris Civilis Amœnitates*, cap. 18.—[Note 252.]

Chap. 9. Of Confirmation. Sect. 515.

A DEEDE of confirmation is commonly in this forme, or to this effect: *Know all men, &c. that I A. of B. have ratified, approved, and confirmed to C. of D. the estate and possession which* (A) *I have, of, and in one messuage, &c. with the appurtenances in F. &c.* (Noverint universi, &c. me A. de B. ratificâsse, approbâsse, et confirmâsse C. de D. statum & possessionem, quos habeo, de, & in uno messuagio, &c. cum pertinentibus in F. &c.)

HERE first our author shewes what a confirmation is:

Bract. li. 2. fol. 32. b. & 58, 59. Brit. 235.

"*Confirmation.*" *Confirmatio* commeth of the verbe [*] *confirmare, quod est firmum facere:* and therefore it is said, that *confirmatio omnes supplet defectus, licèt id quod actum est ab initio, non valuit.* A confirmation is a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is encreased.

[*] Lit. pag. sequen. Bract. li. 2. 58.

A confirmation doth not strengthen a voide estate. *Confirmatio est nulla ubi donum præcedens est invalidum, & ubi donatio nulla omnino nec valebit confirmatio:* for a confirmation may make a voidable or defeasible estate good, but it cannot worke upon an estate that is voide in law. *Non valet confirmatio nisi ille qui confirmat sit in possessione rei, vel juris unde fieri debet confirmatio, & eodem modo nisi ille cui confirmatio sit, sit in possessione.* And another saith, [c] *Confirmare est id quod prius infirmum fuit firmare. Et donationum alia incepta, & defectiva, & post tempus confirmata, confirmatio enim omnem supplet defectum, poterit enim esse in pendenti donec per ratihabitionem hæredis cùm ad ætatem pervenerit roboretur* (1).

Bract. li. 2. fol. 27. 58. 38 H. 6. 34. 37. Pl. Com. Count de Leicester's case. (3 Rep. 64. b.) 10 E. 2. Confirm. 24. 32 E. 3. 9. [c] Fleta, lib. 3. cap. 14. & lib. 3. cap. 3.

"*Ratificâsse.*" *Ratificare est ratum facere*, and is *æquipollent* to *confirmare*, which, as hath been said, is *firmum facere.*

44 Ass. 3.

"*Approbâsse*" commeth of *ad* and *probo*, which is to make perfect and good.

"*Confirmâsse.*" Here it is to be observed, that there bee two kindes of confirmations, *viz.* confirmations expresse or in deed, whereof

(A) *It seems, that the text should be read as if Littleton had in this place used the words* "he hath," *instead of* "I have." *See Mr. Ritso's Intr. p.* 112.

(1) A *confirmation* is an approbation of, or assent to, an estate already created; by which the confirmor strengthens and gives validity to it, as far as it is in his power. It has this operation only, with respect to estates *voidable* or defeasible: but it has no operation upon estates which are absolutely *void*. Such words may be used in a confirmation as may increase or enlarge the estate; but that, as lord chief baron Gilbert observes, is by the force of those words, and, strictly speaking, is foreign to the confirmation. Gilb. Ten. 75. —[Note 253.]

whereof *Littleton* hath here put these three examples, and confirmations implied, or in law, whereof *Littleton* hereafter speaketh in this chapter. *Quælibet confirmatio, aut est perficiens, crescens, aut diminuens*; and of all these *Littleton* putteth examples in this chapter. And hereof *Fleta* saith, *carta autem de confirmatione est illa quæ alterius factum consolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit* (2).

Li. 9. fo. 142. Beaumond's case.

Flet. li. 3. cap. 14.

☞ Sect. 516. [296. a.]

*AND in some case a deede of confirmation is good and available, where in the same case a deede of release is not good nor availeable. As if I let land to a man for terme of his life, who letteth the same to another for terme of forty yeares, by force of which he is in possession; if I by my deed confirme the estate of the tenant for yeares, and after the tenant for life dieth during the terme of * yeares, I cannot enter into the land during the said terme.*

49 E. 3. 32.

LITTLETON in this chapter putteth eight diversities betweene a confirmation and a release (1); and thereof for illustration here hee putteth two cases in this and the next Section, which upon that which hath beene said in the precedent chapters, is sufficiently explained. Onely in both these cases this is to bee observed, that where a confirmation shall enlarge an estate, there privity is required, as well as in the case of the release, as by many examples which *Littleton* puts in this chapter appeareth. And note, here is the first case wherein a release and a confirmation doe differ:

(1 Roll. Abr. 482.)

9 H. 6. 22. tit. Release, 44.

(Cro. Car. 284. 1 Roll. Abr. 483. 500. Mo. 67. Dyer 218. b. Hob. 165. Post. 310. a.) [d] Inter Unwel & Lodge, temp. Reg. Eliz. (Hob. 7.)

Lessee for life made a lease for thirty yeares, and after the lessor and lessee for life made a lease for sixty yeares to another, which lease for sixty yeares the lessor did first confirme, and after the lessor confirmed the lease for thirty yeares, and after tenant for life dyed within the thirty yeares; and it was adjudged [d], that the lease for thirty yeares was determined by the death of lessee for life, and that the lessee for sixty yeares might enter; for that albeit the lease for sixty yeares was the latter in time, yet was it of greater force in law, for that the lessor who had power to confirme which of them he would, did first confirme the second lease.

In this chapter is also to be observed eight cases, wherein a release and a confirmation have the like operation in law.

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* *forty* added in L. and M. and Roh.

(2) See 9 Rep. 142. where sir Edward Coke brings examples of these different operations of a confirmation.

(1) He also mentions eight instances in which they agree.

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YET if I by my deed of release had released to the tenant for yeares in the lifetime of the tenant for life, this release shall be voide, for that then there was not any privity between me and the tenant for years (pur ceo que adonques ne fuit ascun privity perenter † moy et le tenant a terme d'ans): *for a release is not available to the tenant for yeares, but where there is a privitie between him and him that releaseth* (2).

This belongeth to the first diversity between a release and a confirmation.

[296. b.]

☞ Sect. 518.

IN the same manner it is if I be disseised, and the disseisor make a lease to another for term of yeares, if I release to the termor, this is void: but if I confirme ‡ the estate of the termor, this is good and effectuall.

HERE is the second diversitie betweene a release and a confirmation. But if the disseisor make a lease for yeares to begin at Michaelmasse, and the disseisee confirme his estate, this is voide, because he hath but *interesse termini*, and no estate in him, whereupon a confirmation may enure. 4 H. 7. 10. by Read. 22 E. 4. 36.

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(5 Rep. 81.)

ALSO, if I be disseised, and I confirme the estate of the disseisor, hee hath a good and rightful estate in fee simple, albeit in the deede of confirmation no mention be made of his heires, because hee had fee simple at

† moy et le tenant a terme d'ans,— luy et moy, *L. and M. and Roh.*

‡ *the estate of the termor,—his estate,* L. and M. and Roh.

(2) For in this case, if the lessor released to the lessee for years, without using any further words, the operation of the release would be to enlarge the estate of the lessee by giving him an estate of freehold for his life. Now to make releases operate in this manner, it is necessary, not only that the releasee, at the time the release is made, should be in the actual possession of, or have a vested interest in, the lands intended to be released, but that there should be a privity between him and the releasor. In the case mentioned by Littleton, there is no privity between the donor and the lessee of the donee for life. A release therefore from the donor to the lessee would be void. But a confirmation by the donor is good, and gives a stability and permanency to the estate of the lessee during the whole term, which would otherwise determine by the decease of the donee. Ant. 272. a. 273. b.—[Note 254.]

at the time of the confirmation. For in such case if the disseisee confirme the state of the disseisor, to have and to hold to him and his heires of his body engendred, or to have and to hold to him for term of his life, yet the disseisor hath a fee simple, and is seised in his demesne as of fee, because when his estate was confirmed, he had then a fee simple, and such deed cannot change his estate, without entry || *made upon him, &c.*

HERE is the first case wherein the release and confirmation doth agree, viz. a confirmation to a disseisor in taile, or for any particular estate, is of the like force as a release to a disseisor, during such estate, which in both cases is good for ever. In the same manner it is, if the disseisor make a gift in taile, and the disseisee confirme the estate of the donee for the life of the donee, this confirmation enures to the whole estate taile; for a confirmation can make no fraction of any estate, to extend but to part of the estate only. *Et sic de cæteris* (1).

19 H. 6. 22.
6 E. 3. Confirm 4.

☞ Sect. 520. [297. a.]

IN the same manner it is, if his estate bee confirmed for terme of a day, or for terme of an houre, hee hath a good estate in fee simple, for this, that his estate in fee simple was once confirmed (pur ceo que * son estate en fee simple fuits un foits confirme). Quia confirmare idem est, quòd firmum facere, &c.

HERE is the second case wherein the release and confirmation doe agree. The reason of this is, for that the disseisor hath a fee simple; and therefore if his estate be confirmed but for an houre, it is good for ever, because (saith *Littleton*) *confirmare idem est, quòd firmum facere.*

Nota, a diversity betweene a bare assent without any right or interest, and an assent coupled with a right or interest; and therefore an attornement cannot be made for a time nor upon condition; but if the person make a lease for a hundred yeares, the patron and the ordinary may confirme fifty of the yeares, for they have an interest, and may charge in time of vacation. And so if a disseisor make a lease for an hundred yeares, the disseisee may confirme parcel of those yeares; but then it must be by apt words, for he must not confirme the lease, or demise, or the estate of the lessee, for then the addition for parcell of the terme should be repugnant when the whole was confirmed before, but the confirmation must be of the land for part of the terme. So may the confirmation be of part of the land; as if it be of forty

Lib. 5. fol. 81. Forde's case. (Ant. 274. a.) (Post. 300. b.)

(1 Roll. Abr. 412.)

|| *made* not in L. and M. or Roh. * son *not in L. and M. or Roh.*

(1) It is to be observed, that a disseisor acquires by the disseisin a tortious fee simple, notwithstanding at the time he makes the disseisin he claims a less estate; it being a rule, that a disseisor cannot qualify his own wrong.—[Note 255.]

forty acres, he may confirme twenty, &c. So if tenant for life make a lease for an hundred yeares, the lessor may confirme eyther for part of the terme, or for part of the land. But an estate of free-hold cannot bee confirmed for part of the estate, for that the estate is intire, and not severall, as yeares be (1).

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ALSO, if my disseisor maketh a lease for life, the remainder over in fee, if I release to the tenant for life, this shall enure to him in the remainder. But if I confirme the estate of the tenant for tearme of life, yet after his decease I may well enter, because nothing is confirmed but the estate of the tenant for life (pur ceo que* riens est confirme forsque l'estate le tenant a terme de vie), *so that after his decease I may enter. But when I release all my right to the tenant for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release. But in this case, if the disseisee confirme the estate and title of him in the remainder without any confirmation made to tenant for life, the disseisee cannot enter upon the tenant for terme of life, for that the remainder is depending upon the state for life; and if his estate should be defeated, the remainder should be defeated by the entry of the disseisee, and it is no reason that he by his entry should defeat the remainder against his confirmation, &c.*

HERE is the third case wherein the release and confirmation differ, for the confirmation to the tenant for life doth not enure to him in the remainder.

And so it is when the severall estates be in one person; as if the disseisor make a gift in taile, the remaynder to the right heires of tenant in taile, if the disseisee confirme the estate in taile,

* nul *added in L. and M. and Roh.*

(1) The distinctions taken here by sir Edw. Coke are, that a confirmation to a tenant of freehold or inheritance, cannot be so worded as to have a less operation than that of confirming his whole estate; consequently a confirmation to such a tenant, either of the lands, or of his estate in them, for any term or period, is a confirmation of his whole fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of his whole fee. It is otherwise in the case of a term of years. A confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold or of inheritance is considered as integral and indivisible. But as years are several, the term which is composed of them is necessarily fractional and divisible, and may consequently be confirmed in part only, by using proper expressions for this purpose. If a person confirms *the estate* of the tenant for years for part of the term, as the word estate signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary.—[Note 256.]

taile, it shall not extend to the fee simple, no more than if the disseisor had made a gift in taile, the remainder for life, the remainder to the right heires of tenant in taile; this extendeth onely to the estate taile, and not ☞ to the [297. b.] remainder for life, nor to the remainder in fee. But if the disseisor make a lease for life to *A.* and *B.* and the disseisee confirme the estate of *A.*, *B.* shall take advantage thereof; for the estate of *A.* which was confirmed was joynt with *B.* and in that case the disseisee shall not enter into the land, and divest the moity of *B.*

(Ant. 52. a.) (Post. 310. a. 315. a. 319. a.) (1 Roll. Abr. 302.)

(Sid. 83.)

If the disseisor infeoffs *A.* and *B.* and the heires of *B.* if the disseisee confirme the estate of *B.* for his life, this shall not only extend to his companion, as hath beene said, but to his whole fee simple, because to many purposes hee had the whole fee simple in him, and the confirmation shall bee taken most strong against him that made it.

(1 Cro. 321.) (Ant. 182.)

Tenant in tayle discontinueth in fee and dyeth, the discontinuee make a lease for life, and granteth the reversion to the issue, he shall not have a formedon against tenant for life; for by his formedon he must recover the estate of inheritance, and the lessee for life hath not the inheritance, but the issue in taile himselfe hath it.

(Ant. 202. a.)

If feoffee upon condition make a lease for life, or a gift in taile, and the feoffor release the condition to the feoffee, he shall not enter upon the lessee or donee, because he cannot regaine his ancient estate.

If the feoffee upon condition make a lease for life, the remainder in fee, if the feoffor release the condition to the lessee for life, it shall enure to him in the remainder; as well as in the case of the right, or of a rent, &c.

If a feme disseisoresse make a feoffment in fee to the use of *A.* for life, and after to the use of herselfe in taile, and the remainder to the use of *B.* in fee, and then taketh husband the disseisee, and he releaseth to *A.* all his right, this shall enure to *B.* and to his own wife also; for by the rule of *Littleton* it must enure to all in the remainder (1).

But if *A.* letteth to *B.* for life, and *B.* maketh a lease to *C.* for his life, the remainder to *A.* in fee, *A.* releaseth to *C.* all his right, this is good to perfect the estate of *C.* for his life. But when *C.* dyeth, *A.* shall be in of his old estate, for his release could not enure to himselfe to perfect his defeasible remainder, but his ancient right remaineth. And note, that in these two cases the fee is divested and vested all at one instant; in the same manner as if tenant in taile make a lease for life, at the same instant the estate taile is devested out of the donee, and the reversion in fee out of the donor, and a new fee vested in tenant in taile. And so if the husband make a lease for life of his wife's land, he devesteth his owne estate, that he hath in her right, and the inheritance of his wife, and at the same instant vesteth a new reversion in fee in himselfe.

"*But*

(1) For though a man cannot contract with his wife, or transfer any interest to her, yet she may, by construction of law, take benefit of a release made by him to a third person, and enuring by way of extinguishment. Hawk. Abr.—[Note 257.]

" *But in this case, if the disseisee confirme the estate and title of him in the remainder.*" Here is the third case where in the release and confirmation doe agree, for the confirmation made to him in the remainder shall availe the tenant for life, as much as the release shall.

[298. a.]

Vid. 29 Ass. 17. 30 8. Recov. en value. Br. 30. 13 E. 3. Entr. cong. Br. 127. Vid. Sect. 374.

Pl. Com. Delamere's case.

" *For that the remainder is depending, &c.*" By this some have gathered, that if a disseisor make a lease for life, reserving the reversion to himselfe, and the disseisee confirmeth the state of the disseisor, that he may enter upon the lessee, because the estate of him in the reversion dependeth not upon the state for life as the remainder: but all is one, for by the confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder; and he cannot by his entry avoide the estate of the lessee for life, but hee must avoide the state of the lessor, which against his owne confirmation he cannot doe; and it hath been adjudged, that if a disseisor make a lease for life, and after levie a fine of the reversion with proclamations, and the five years passe, so as the disseisee is for the reversion barred, he shall not enter upon the lessee for life.

(Mo. 91.)

Reported by sir John Popham, chiefe justice. (Post. 302. a.) (6 Rep. 40.) (Sid. 360.) (1 Saun. 149, 150. Ant. 224. a.)

" *The remainder should be defeated.*" It is regularly true, that when the particular estate is defeated, that the remainder thereby shall be also defeated, but it faileth in divers cases.

For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible, and the remainder by good title, there though the particular estate be defeated, the remainder is good. As if the lessor disseise *A.* lessee for life, and make a lease to *B.* for the life of *A.* the remainder to *C.* in fee, albeit *A.* re-enter, and defeate the estate for life, yet the remainder to *C.* being once vested by good title shall not be avoided; for it were against reason that the lessor should have the remainder againe, against his owne liverie; and this is well warranted by the reason of *Littleton* in this case. So it is if a lease be made to an infant for life, the remainder in fee, the infant at his full age disagree to the estate for life, yet the remainder is good, for that it was once vested by good title; for in both these cases there was a particular estate at the time of the remainder created.

Vid. Pl. Com. Colthirst's case. (Post. 333. a. b.)

If a lease be made to *A.* for the life of *B.* the remainder to *C.* in fee, *A.* dyeth (A) before an occupant entreth, here is a remainder without a particular estate, and yet the remainder continueth good (1).

17 E. 3. 48.

A rent is granted to the tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular

3 E. 3. Abb. Ass. (Plo. 35. a. Vaugh. 200. Moore, 664. Yelv. 9. 2 Roll. Abr. 415. 7 H. 4. 6. 1 Rep. 66. Nos, 47.) 7 H. 4. 6.

estate

(A.) *Here the sense of the text appears to require a semicolon. See Mr. Ritso's Intr. p. 116, 117.*

(1) But since the stat. 29 Car. 2. c. 3. § 12. and 14 Geo. 2. c. 20. § 9. no such vacancy can happen. Vid. ante n. 5. 41. b, and Atkinson v. Baker, 4 T. R. 230.

estate continued not; for *eo instante* that he tooke the particular estate, *eo instante* the remainder vested, and the suspension in judgement of law grew after the taking of the particular estate (2).

If

(2) A rent is an incorporeal hereditament, and susceptible of the same limitations as other hereditaments. Hence it may be granted, or devised, for life, or in tail, with remainders or limitations over. But there is this difference between an entail of lands and an entail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, may, by a common recovery, bar the entail and the reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquires, by a common recovery, only a base fee, determinable upon his decease, and failure of the issues in tail; but if there is a limitation of it in fee, after the limitation in tail, the recovery of the tenant in tail gives him the fee simple. This was resolved in the cases of Smith *v.* Farnaby, Carter, 52. Sid. 285. and 2 Keb. 29. 55. 84. Weekes *v.* Peach, 2 Lutw. 1218. 1224. and Chaplin *v.* Chaplin, 3 P. Wms. 229. The reason of this difference is, that it would be unjust that the conveyance of a grantee of a rent should give a longer duration or existence to the rent, than it had in its original creation. It is true, that the barring of an estate tail in land is equally contrary to the intention of the grantor. But a rent differs materially from land. The old principles of the feudal law looked upon every modification of landed property, which was considered to be against common right, with a very jealous eye. Now, a rent-charge was supposed to be against common right, the grantee of the rent-charge being subject to no feudal services, and being a burthen upon the tenant who was to perform them. Upon this principle, the law, in every instance, avoided giving by implication a continuation to the rent beyond the period expressly fixed for its continuance. Thus if a tenant in tail of land die without issue, his wife is entitled to dower for her life out of the land, notwithstanding the failure of the issue; but the widow of a tenant in tail of rent is not entitled to her dower against the donor. So if a rent is granted to a man and his heirs generally, and he dies without an heir, the rent does not escheat, but sinks into the land. It is upon this principle, that when there is not a limitation over in fee, a tenant in tail of rent acquires, by his recovery, no more than a base fee. But if there is a limitation in fee, after the particular limitation in tail, the grantor has substantially limited the rent in fee; and therefore, it is doing him no injustice that the recovery should give the donee, who suffers it, an estate in fee simple. The case of Chaplin *v.* Chaplin was, that lady Hanby, the grandmother of Porter Chaplin, being seised in fee, conveyed divers lands to the use and intent that the trustees named in the deed, should receive and enjoy a rent-charge of 30 *l.* per ann. to them and their heirs, with power to distrain for it, and to enter and hold the land on non-payment for forty days; and then the rent was declared to be to the use of Porter Chaplin in tail; remainder to the use of the same person who had the land in fee. It is stated to have been afterwards disclosed to the court, that the legal estate of the rent in fee was in the trustees. But it is worthy of the attention of the reader, that it was not necessary that any new matter should be adduced to disclose this to the court, as it appears on the face of the deed: for a conveyance to *A.* and his heirs to the use and intent that *B.* and his heirs may receive a rent out of the estate, gives *B.* the legal fee of the rent; so that if it is afterwards declared, that *B.* and his heirs are to stand seised of the rent to uses, the intended *cestuys que use* take only trust or equitable estates. If, therefore, it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law, to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere

seisin

If a man grant a rent to *B.* for the life of *Alice*, the remainder to the heires of the body of *Alice*, this is a good remainder, and yet it must vest upon an instant (3).

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ALSO, if there bee two disseisors, and the disseisee releaseth to one of them, hee shall hold his companion out of the land. But if the disseisee confirme the estate of the one, without more saying in the deede (sans pluis * dire en le fait), *some say that hee shall not hold his companion out, but shall hold joyntly with him, for that nothing was confirmed but his estate which was joynt* (pur ceo que † riens fuit confirme forsque son estate que fuit joynt), *&c.*

THIS is the fourth case wherein the release and the confirmation seeme to differ, being made unto one of the disseisors.

"*Confirmed but his estate, &c.*" Hereby it appeareth, that if the disseisee confirme the estate of the one disseisor in the lands, to have and to hold the lands or tenements, or the right of the disseisee, to him and his heires, hee shall hold out the other disseisor; and that appeareth by *Littleton*, first, upon these words (*confirme*

* dire—parlance *L. and M. and Roh.* † nul *added in L. and M. and Roh.*

seisin to the uses, and the uses declared upon it will be executed by the statute. See note on Uses, 272. a. VII. 3.—[Note 258.]

(3) Formerly the doctrine of the necessity that the remainder should vest at the very instant of the determination of the particular estate at farthest, was extended to the case of a posthumous son. In the case of Reeve *v.* Long, 1 Salk. 227. an estate was limited to *A.* for life, remainder to his eldest son in tail; *A.* died, leaving his wife *enseint*. She afterwards had a son. It was adjudged that the son, not being *in esse* at the time of the determination of the particular estate, could not take under the limitation. This judgment was afterwards affirmed in the court of king's bench; but it was reversed in the house of lords, against the opinion of all the judges. To obviate all doubts respecting the law in this case, the statute of 10 Will. III. c. 16. was passed, by which it was enacted, that where any estate is, by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's life-time. It is singular that this statute does not expressly mention limitations or devises made by wills. There is a tradition, that, as the case of Reeve *v.* Long arose upon a will, the lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of Reeve *v.* Long, the words of the act may be construed, without much violence, to comprise settlements of estates made by will, as well as settlements of estates made by deed. —[Note 259.]

(confirme the state of one) without more saying in the ☞ deede, viz. to have and to hold the lands, &c. Secondly, the reason of *Littleton* in expresse words is, for that nothing was confirmed but his estate which was joynt. Thirdly, the next two Sections make it plaine where the *habendum* is added. [298. b.]

Hereby also it appeareth, that a release is more forcible in law than a confirmation. If the disseisee and a stranger disseise the heire of the disseisor, and the disseisee confirme the estate of his companion, this shall not dextinguish his right that was suspended: so as if the heire (B) or the disseisor re-enter, the right of the disseisee is revived. And so it is if the grantee of a rent-charge and an estranger disseise the tenant of the land, and the grantee confirme the estate of his companion, the tenant of the land re-enter, the rent is revived; for the confirmation extended not to the rent suspended, otherwise it is of a release in both cases.

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AND for this some have said, that if two joyntenants bee, and the one confirme the estate of the other, that he hath but a joynt estate, as he had before. But if hee hath such words in the deede of confirmation, to have and to hold to him and to his heires all the tenements whereof mention is made in the confirmation, then he hath a sole estate in the tenements, &c. And therefore it is a good and sure thing in every confirmation to have these words; to have and to hold the tenements, &c. in fee, or in fee taile, or for terme of life, or for terme of yeares, according as the case is or the matter lyeth* (solonque ceo que le cas † est, ou le matter gist).

AND this confirmation leaveth the state as it was, and doth not amount to any severance of the joynture, as some have said.

34 E. 3. tit. Confirm. pl. 15.

"*But if hee hath such words in the deede, &c.*" This is plaine and evident enough.

"*And therefore it is a good and sure thing, &c.*" This is good counsell, and worthy to be observed.

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* *&c.* not in L. and M. or Roh. † est *not in L. and M. or Roh.*

(B) *Here, it seems, the text should be read as if lord Coke had said,* "so as if the heir of the disseisor re-enter," *instead of,* "so as if the heir or the disseisor re-enter." *See acc. the 7th & 12th editions.*

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FOR to the intent of some, if a man letteth land to another for life, and after confirme his estate which hee hath in the same land, to have and to hold his estate to him and to his heires, this confirmation as to his heires is voide, for his heires cannot have his estate, which was not but for terme of his life (car ses heires ne poient aver son estate, que * ne fuit forsque pur terme de son vie). *But if he confirme his estate by these words, to have the same land to him and to his heires, this confirmation maketh a fee simple in this case to him in the land, for that the words to have and to hold, &c. goeth to the land, and not to the estate which hee hath* (pur ceo que † les parolx a aver et tener, &c. va a le terre, et nemy al estate que il ad), *&c.*

HERE the diversity is apparent betweene a confirmation of the estate for life in the land to have and to hold the said state in the land to him and his heires this cannot ☞ enlarge his estate, for his estate being but for life, that estate cannot bee extended to his heires. But in that case if he confirme the state for life in the land in the premisses of the deed, and the *habendum* is in this sort, to have and to hold the land to him and his heires, this shall enlarge his estate, and create in him a fee simple.

[299. a.]

(1 Roll. Abr. 482.) 18 E. 3. 40. (Plo. 158. a.)

Wherein is to bee noted, [*e*] that the *habendum* and the premisses doe in substance well agree together, and that the *habendum* may enlarge the premisses, but not abridge the same (1).

[*e*] Vid. Pl. Com. in Throgmorton's case, fol. 147. a. Wrottesleye's case, 197. (2 Rep. 23.)

And seeing that in conveyances, limitations of remainders are usuall and common assurances, it is dangerous by conceipts or nice distinctions to bring them in question, as have in latter time beene attempted.

"*His estate.*" Vide Sect. 650.

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ALSO, if I let certaine land to a feme sole for terme of her life, who taketh husband, and after I confirme the estate of the husband and wife, to have and to hold ‡ for terme of their two lives; in this case the husband doth not hold joyntly with his wife, but holdeth in right of his wife for term of her life. But this confirmation shall enure to the husband by way of remainder for terme of his life, if hee surviveth his wife.

HERE

* ne *not in L. and M. or Roh.*
† les parolx—le, *L. and M. and Roh.*
‡ *the land* added in L. and M. and Roh.

(1) On the operation of an habendum in a deed, see ant. 21. a. Vin. Abr. Grant, J. K. L. and M.

Vide Sect. 573. (Sid. 83. 361.) (2 Roll. Abr. 829.)

HERE is the fourth case wherein the release and confirmation doe agree; and in this case it is to be observed, that the baron hath such an estate in the land in the right of his wife as hee is capable of a confirmation to enlarge his estate; and therefore if the confirmation had been made of his estate to him alone, to have and to hold the land to him and to his heires, this had been good to have conveyed the fee simple to him after the decease of his wife: for if in this case a release be made to the husband and his heires, this is sufficient to convey the inheritance of the land to the husband (2).

(Ant. 273. b.) 16 H. 6. tit. Release, 45. 22 E. 3. tit. Release. Statham.

"*Doth not hold joyntly with his wife.*" For two causes. First, because ☞ the wife hath the whole for her life. Secondly, joyntenants must (as hath beene before said in the chapter of Joyntenants) come in by one title. [299. b.]

(4 Rep. 29.)

18 E. 3. 20. (1 Roll. Rep. 230. 317. 438. 3 Leo. 4. a. Ant. 184. a. 187. a. Post. 351. a.

But in this case if the confirmation had been made to the husband and wife, to have and to hold the land to them two and to their heires, they had been joyntenants of the fee simple, and the husband seised in the right of his wife for her life; for the husband and the wife cannot take by moities during the coverture.

If a man letteth land to the husband and wife, to have and to hold the one moity to the husband for terme of his life, and the other moity to the wife for her life, and the lessor confirme the estate of them both in the land, to have and to hold to them and to their heires; by this confirmation as to the moity of the husband, it enureth only to the husband and his heires, for the wife had nothing in that moity; but as to the moity of the wife, they are joyntenants, as hath bin said; for the husband hath such an estate in his wife's moity, in her right, as is capable of a confirmation. But if such a lease for life be made to two men by severall moities, and the lessor confirme their estates in the land, to have and to hold to them and to their heires, they are tenants in common of the inheritance; for regularly the confirmation shall enure according to the quality and nature of the estate which it doth enlarge and increase.

18 Ass. p. 3. 18 E. 3. Confir. 17. 17 E. 3. 68. 28 E. 3. 94. 40 E. 3. 8 Ass. 20.

If a lease for life be made to *A.* the remainder to *B.* for life, and the lessor confirme their estates in the land, to have and to hold to them and their heires, *A.* taketh one moity to him and his heires, and therefore of the one moity he is seised for life, the remainder to *B.* for life, and then to him and his heires: of the other moity *A.* is seised for life, the immediate inheritance to *B.* and his heires: because as to the moity which *B.* takes, the same is executed: as if the reversion be granted to tenant for life, and to a stranger, it is executed for one moity, (as hath been

39 H. 6. 9. Ant. 182. b.)

(2) The nature of the estate which the husband acquires by marriage in his wife's real property, will be explained in a note to fol. 325. b. With respect to his interest in her chattels real and choses in action, an accurate, and, so far as it goes, a masterly explanation of it is given in Bacon's Abridgment, Baron and Feme, (B). It is much to be lamented, that the author did not go more fully into the subject. Mr. Viner has collected most of the cases respecting it with his usual industry.—But since the publication of that useful compilation, several cases have been determined, by which the law upon it has been greatly illustrated and explained, and, in some instances, altered. An attempt will be made to give a succinct view of it, in a note to fol. 351. —[Note 260.]

been said before) and therefore in this case they are tenants in common.

If lands be given to two men, and to the heires of their two bodies begotten, and the donor confirmeth their two estates in the land, to have and to hold the land to them two and to their heires; in this case some are of opinion, that they shall be joyntenants of the fee simple, because the donees were joyntenants for life, and (say they) the confirmation must enure according to the estate which they have in possession, and that was joynt. But others hold the contrary. For, first, they say, that the donees have to some purposes severall inheritances executed, though between the donees survivor shall hold for their lives. Secondly, they say, that when the whole estate, which comprehendeth severall inheritances, is confirmed, the confirmation must enure according to the severall inheritances, which is the greater and most perdurable estate, and therefore that the donees shall be tenants in common of the inheritance in this case. Vid. Sect. 573.

"*By way of remainder, &c.*" Here some question hath been made of this terme remainder, without any cause at all, because in law it is in nature of a remainder. For in case of a fine, when a reversion expectant upon an estate for life in *A.* is granted to *B. et quæ ad ipsum reverti debent post mortem A. præfato B. & hæredibus suis remaneant, &c.* and a more colourable exception might be taken against this word *remaneant* there, than in the case of *Littleton*. Pl. Com. Colthirst's case. Doct. & Stud. ca. 21.

It is true, that in * 16 *H.* 6. it is called a reversion: in [*o*] 9 *E.* 4. it is called a remainder: in [*p*] 6 *E.* 3. it is said, that by the confirmation an estate accrued to the husband for terme of his life. In [*q*] 17 *E.* 3. the husband, living the wife, shall have nothing but in abeyance after the death of his wife. But lest there should bee *pugna verborum*, which learned and wise men ever avoide, all do resolve, that the estate of the husband is good, and that it doth enure by way of increase and inlargement of his estate. And albeit in this case of *Littleton*, the husband by the confirmation gaineth an estate for life in remainder, (as *Littleton* termeth it) yet if the husband doth waste, an action of waste shall lie against him and his wife, notwithstanding the meane remainder, because the husband himselfe committeth the waste, and doth the wrong; and therefore shall not excuse himselfe for his committing of waste, in respect he himselfe hath the remainder; no more than if a man lesseth to *A.* during the life of *B.* the remainder to him during the life of *C.* if he commit waste, an action of waste shall lie against him (1).

[*] 16 H. 6. tit. Release, 45.
[*o*] 9 E. 4. 18.
[*p*] 6 E. 3. 9.
[*q*] 17 E. 3. 68. b.

17 E. 3. 68. b. Vi. Paget's case, lib. 5. fo. 76. b. (Ant. 54. a.)

Sect.

(1) It is necessary to distinguish between the cases mentioned by Littleton and sir Edward Coke, in this and the preceding chapter, where an estate for life is enlarged to an estate in fee, by the *release, or confirmation* of the reversioner, or remainder-man, and those cases where a person, being seised of an estate for life, the inheritance is afterwards conveyed or devised to his right heirs, by a subsequent deed, or will. It appears by the case of Moore v. Parker, 1 Lord Raym. 37. 4 Mod. 316. Skin. 558. and Fonnereau v. Fonnereau, Doug. Rep. 1 vol. 470. that the estate of the ancestor is not affected by the

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BUT if I let land to a feme sole for terme of yeares, who taketh husband, and after I confirm the estate of the husband and his wife, to have and to hold the land for term of their two lives: in this case they have a joynt estate in the freehold of the land, for that the wife had no freehold before, &c.

THIS

the subsequent conveyance or devise to his right heirs. For though it is a rule that, where the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift, or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee, or in tail, "*the heirs*," in such cases, are words of limitation of the estate, and not words of purchase; yet this applies only to those cases where both the limitations are by the same instrument. In some cases, the freehold of the ancestor has resulted to him by implication; but still the deed from which that implication resulted was the deed in which the limitation to his heirs was expressed; so that the implied estate of freehold, and the expressed estate of inheritance, arose at the same time, and under the same deed, which brings it within the general rule. But suppose an estate is limited to *A.* for life; remainder to such uses as *B.* shall appoint, and afterwards *B.* in the life-time of *A.* appoints the estate to *A.*'s right heirs; it is difficult to say whether, in that case, the estates will unite or not. This case has sometimes occurred in practice, but has not yet been the subject of any judicial determination. To prove the union of the two estates, it may be contended, that the deed by which the power is executed, must be considered as a part of the deed by which the power is given; that the use limited by the execution of the power derives its effect, and is fed, by the seisin of the releasees or feoffees of the deed containing the power; that the uses limited in the original deed, to take effect in default of an execution of the power, are subject to that power; that the uses limited under, or by virtue of the power, precede and take place of them, in the same manner as if in the original deed, not the power, but the use executed by virtue of the power, had been inserted; and that though the uses vest at different times, yet they may be considered as virtually created at the same time. On these grounds, the proposed case may be contended to resemble the case put, post. 378. b. that if lands be given to two, during their joint lives, with the immediate remainder to the right heirs of him who shall die first, there, both the estates are created at the same time, but the inheritance does not vest till a subsequent period; yet sir Edward Coke expressly says, that the heir, in that case, takes by descent. Between the cases, however, there is this difference, and it may be thought important, that in the case put by lord Coke, the limitation of the inheritance was confined to the heirs of the predeceasing tenant for life, so that there never was an instant when it was not certain that the remainder in fee would, in the contemplation of law, attach in one or other of them so far as to make his heir take by descent; and thus each tenant for life had a contingent remainder or possibility in fee. But, in the case proposed in this annotation, no such contingent remainder or possibility existed in *A.* the tenant for life.—See ant. 271. b. note 1. VII. 2.——Since the publication of this note in the former editions of this work, the subject has received a masterly investigation by Mr. Fearne. See his Essay on Contingent Remainders, 6th edit. page 74.—[Note 261.]

THIS is the fifth case wherein the release and confirmation doe agree: and it is to be observed, that chattels reals, as leases for yeares, wardships, and the like, are not given to the husband absolutely (as all chattels personals are), by the intermarriage, but conditionally if the husband happen to survive her, and he hath power to alien them, at his pleasure: but in the mean time the husband is possessed of the chattels reall in her right. [300. a.]

5 E. 3. 17. b. Pl. Com. 418. b. 38 H. 6. 23. 14 H. 4. 12. 38 E. 3. 35. Pl. Com. Dame Hale's case. 50 Ass. p. 15. 4 H. 6. 5. 7 H. 6. 1.

9 H. 6. 52. 37 Li. Ass. 21 H. 7. 29. 21 E. 4. 40. 26 H. 8. 7. (Ant. 46. b. Post. 351. a.)

Secondly, that the husband hath such a possession in her right of the chattell, as is capable of a confirmation or of a release. (Ant. 273. b. Ant. 276. a. Ant. 299. a.)

Thirdly, that the confirmation in this case to the husband and wife for their lives, maketh them joyntenants for life, because a chattell of a feme covert may be drowned; and so note a diversity betweene a lease for life and a lease for yeares made to a feme covert; for her estate of freehold cannot be altered by the confirmation made to her husband and her, as the terme for yeares may, whereof her husband may make disposition at his pleasure (1).

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ALSO, if my disseisor granteth to one a rent charge out of the land whereof he disseised mee, and I rehearsing the sayde grant confirme the same grant, and all that which is comprised within the same grant, and after I enter upon the disseisor; quære, *in this case, if the land be discharged of the rent or no**.

THIS is the fifth case wherein the release and confirmation doe differ; for a release to the grantee in this case [*a*] were voide. It is holden by some authority since *Littleton* wrote, that the disseisee after his re-entry shall not avoide the rent charge against his own confirmation: and there a generall rule is taken, that such a thing as I may defeate by my entry, I may make good by my confirmation.

[*a*] 11 H. 7. 28. Lib. 1. fol. 147. Anne Mayow's case. 3 H. 4. 10.

If the feoffee upon condition grant a rent charge in fee, and the feoffor confirmeth it, and after the condition is broken, and the feoffor enter, he shall not avoide the rent charge. And so it is if the heire of the disseisor grant a rent charge, and the disseisee confirmeth it, and after recover the land, he shall not avoide the rent; and yet in neither of these cases his entry was congeable at the time of the confirmation (2).

Li. 1. fo. 147. 148. Anne Mayow's case. (Post. Sect. 529.)

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* *&c.* added in L. and M. and Roh.

(1) If a man seised of a rent-charge in fee grants it over to a feme sole for a term of years, and the tenant attorns, and she marries during the term, and the grantor confirms the rent to the husband and wife for their lives, or in fee, they become joint tenants for life or in fee of the rent, and need no new attornment. Vaugh. 46.—[Note 262.]

(2) Tenant in tail makes a lease for life, now he hath gained a new fee by wrong, and afterwards he grants a rent-charge, or makes a lease for years, and afterwards tenant for life dies, he shall not avoid his charge or lease, although he

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ALSO, if a parson of a church charge the glebe land of his church by his deed (si un parson d'un esglise charge * le glebe de son esglise per son fait), *and after the patron and ordinary confirme the same grant,* † *and all that is comprised in the same grant, then the grant shall stand in his force, according to the purport of the same graunt. But in this case it behoveth that the patron hath a fee simple in the advowson; for if he hath but an estate for life, or in taile, in the advowson, then the graunt shall not stand, but during his life, and the life of the parson which granted* (Car s'il ‡ n'ad estate en l'avowson forsque pur terme de vie, ou en le taile, donque le grant ‡ ne estoyera forsque durant sa vie, et la vie le parson que grantast), *&c.*

Glanv. li. 13. ca. 23, 24, 25. Bract. li. 4. ca. 285, &c. Brit. fo. 234. b. &c. Fleta, li. 5. ca. 19, 20. & lib. 6. ca. 18. Reg. F. N. B. 48, 49. Brit. ubi supra.

"PARSON," *Persona.* In the legall signification it is taken for the rector of a church parochiall, and is called *persona ecclesiæ*, because he assumeth and taketh upon him the parson of the church, and is ☞ said to be seised *in jure ecclesiæ*, and the law had an excellent end therein, viz. that in his person the church might sue for and defend her right; and also be sued by any that had an elder and better right; and when the church is full, it is said to be *plena & consulta* of such a one parson thereof, that is, full and provided of a parson, that may *vicem seu personam ejus gerere.* [300. b.]

8 E. 3. 26. 43. 38 E. 3. 4. 3 Mar. Dy. 123.

Persona impersonata, parson impersonee, is the rector, that is in possession of the church parochiall, be it presentative, or impropriate, and of whom the church is full.

Here are divers things to bee noted. First, that the confirmation is of the grant, which in deed is but a meere assent by deed to the grant; and therefore it is holden, that if there be a parson, patron, and ordinary, and the patron and ordinary give licence by deede to the parson to grant a rent charge out of the glebe, and the parson granteth the rent charge accordingly, this is good, and shall binde the successor; and yet here is no confirmation subsequent, but a licence precedent.

7 H. 4. 15. (Mo. 67.)

Secondly, the ordinary alone, without the deane and chapter, may agree thereunto, either by licence precedent, or confirmation subsequent; for that the deane and chapter hath nothing to doe with that which the bishop doth as ordinary, in the life-time of the bishop.

(1 Roll. Abr. 479. 481.)

Thirdly, [*b*] but if the bishop be patron, there the bishop cannot confirme alone, but the deane and chapter must confirme also; for the advowson or patronage is parcell of the possession of the bishopricke; and therefore the bishop, without the deane and

[*b*] 19 El. Dy. 356, 357. 11 H. 6. 9. 33 H. 8. tit. Charge, Br. 58. (Post. 329. a.)

* le—un, *L. and M. and Roh.*

† *and all that is comprised in the same grant*, not in L. and M. or Roh.

‡ n'ad—ads, *L. and M. and Roh.*

‡ ne *not in L. and M. or Roh.*

he be in of another estate, because he had a defeasible possession and ancient right, the which, if they be in several hands, should be good, as the lease of one, and the confirmation of the other; and being in one hand, shall be as much in judgment of law. 7 Rep. 14. a. in Englefield's case.—[Note 263.]

and chapter, cannot make the grant good, but only during his owne life, after the decease of the incumbent, either by licence precedent, or confirmation subsequent.

A. parson of *D.* is patron of the church of *S.* as belonging to his church, and presents *B.* who by consent of *A.* and of the ordinary, grants a rent charge out of the glebe; this is not good to make the rent charge perpetuall, without the assent of the patron of *A.* no more than the assent of the bishop who is patron, without the deane and chapter, or no more than the assent of the patron, being tenant in taile or for life, as *Littleton* saith. And *Littleton* here saith, that the patron that confirmes must have a fee simple, meaning to make the charge perpetuall (1). And *Littleton* after saith, that in the case of the parson the fee is in abeyance, and seeing the consent of the patron is in respect of his interest (B) as heire, it appeareth by *Littleton*, he may consent upon condition; otherwise it is of an attornement, because that is a bare assent. Also if the estate of the patron be conditionall, and he confirmeth, and after the condition is broken, his confirmation is voide.

See more of these kinds of confirmations in my Reports. (Li. 2. 24 & 39. Li. 1. 153. Lib. 4. 23. 24. Lib. 5 fol. 31 81. Lib. 10. 6. Lib. 11. 19. Lib. 6. 34.) (Ant. 274. b. 297. a. Sid. 75.)

Fourthly, he that is patron must be patron in fee simple; for if hee be tenant in taile, or tenant for life, his confirmation or agreement is not good to bind any successor, but such as come into the church during his life. But if the patron be tenant in taile, and discontinue the estate in taile, the lease shall stand good during the discontinuance; or if the estate taile be barred, it shall stand good for ever.

31 E. 3. Grant, 61. 26 Ass. 38. 8 Eliz. Dy. 252. Vid. lib. 3. fol. 73. Le case de deane & chapter de Norwich. (1 Lev. 112. 1 Roll. Ab. 482. 2 Roll. Abr. 339.)

But here is to be observed a diversity betweene a sole corporation, as parson, prebend, vicar, and the like, that have not the absolute fee in them, for to their grants the patron must give his consent. But if there be a corporation aggregate of many, as dean and chapter, master, fellowes, and schollars of a colledge, abbot or prior, and covent, and the like, or any sole corporation that hath the absolute fee, as a bishop with consent of the dean and chapter, they may by the common law make any grant of or out of their possessions, without their founder or patron, albeit the abbot or prior, &c. were presentable: and so it is of a bishop, because the whole estate and right of the land was in them, and they may respectively maintaine a writ of right.

12 H. 4. 11. 19 E. 3. 7. 7 Eliz. Dy. 238. 11 H. 6. 9. 10 Eliz. Dy. 6 E. 3. 10. 2 E 3. 29. 9 E. 4. 6. 2 H. 4. 11. 38 E. 3. 19. 25 E. 3. 54.

[301. a.] ☞ If a bishop hath two chapters, and he maketh a grant, both chapters must confirme it, or else the successor shall avoide it. But if one of the chapters be dissolved, then the confirmation of the other sufficeth; but it needeth not the confirmation of the king, who is founder and patron of all bishopricks (1*).

Temps. R. 2. tit. Grant, 104. 50 E. 3. tit. Assise, Statham. 11 Eliz. Dyer, 282.

And

(B) *Here the sense of the text seems to require a comma, rather than after "heire," which word appears to be printed by mistake instead of "here;" for, the consent of the patron was in respect of his interest simply, and it was immaterial whether he had acquired such interest by descent or purchase.*

(1) A prebendary after admission and institution, and before induction, or instalment, granted an annuity for him and his successors, and the bishop confirmed it; it was resolved, that a writ of annuity lay not in that case, because the confirmation being made before the induction, was void. Plow. 528. a. —[Note 264.]

(1*) For the confirmation of leases made by ecclesiastical persons, see Bacon's Abr. tit. Leases.

And note a diversity between a confirmation of an estate, and a confirmation of a deed; for if the disseisor make a charter of feoffment to *A.* with a letter of attorney, and before livery the disseisee confirme the estate of *A.* or the deed made to *A.* this is cleerely voide, though livery be made after. But if a bishop had made a charter of feoffment with a letter of attorney, and the deane and chapter before livery confirme the deed, this is a good confirmation, and livery made afterwards is good. And so it hath been adjudged.

The like law is of a confirmation of a deed of grant of a reversion before attornment.

In the same manner it is if a bishop at the common law had granted lands to the king in fee by deed, and the deane and chapter by their deed confirme the deed of the bishop, and after the deed of the bishop is inrolled, this is good, albeit the confirmation of the deane and chapter be not inrolled; for the assent upon the matter is made to the bishop.

33 E. 3. Confirm. 22. 31 E. 3. Abb. 10. 21 H. 7. 1. Vid. Sect. 393, & 643.

But this confirmation that *Littleton* here speaketh of must be made in the life, and during the incumbency of the person; and so in the life of the bishop, or of any other sole corporation. But it is to be knowne that grants made by parsons, prebends, vicars, bishops, master and fellowes of any colledge, deane and chapter, master or gardeine of any hospitall, or any having any spirituall or ecclesiasticall living, are restrained by [*e*] divers acts of parliament, so as they cannot grant any rent charge, or to make any alienation, or to make any leases other than such as are mentioned in those acts, which you may reade at large, and the expositions upon the same, in my [*] Commentaries.

[*e*] 13 Eliz. cap. 10. 1 Eliz. cap. 19. 18 Eliz. ca. 11. 1 Jac. cap. 3. Vid. Sect. 593, & 648.

[*] Li. 2. fo. 46. lib. 4. 76 & 120. li. 5. 9. 6. 14. li. 6. 37. lib. 7, 8. lib. 11. 67.

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ALSO, if a man letteth land for term of life, the which tenant for life charge the land with a rent in fee, and he in the reversion confirme the same grant, the charge is good enough and effectuall.

26 Ass. pl. 38. 45 Ass. pl. 13. Lib. 1. fol. 147. Anne Mayowe's case. (1 Roll. Abr. 483.) 14 Ass. pl. 14.

HERE is a diversity to bee observed, where the determination of the rent is expressed in the deed, and when it is implyed in law. For when tenant for life granteth a rent in fee, this by law is determined by his death; and yet a confirmation of the grant by him in the reversion makes that grant good for ever, without words of inlargement, or clause of distresse, which would amount to a new grant. And yet if the tenant for life had granted a rent to another and his heires by expresse words, during the life of the grantor, and the lessor had confirmed that grant, that grant should determine by the death of tenant for life.

Tenant for life upon a condition grant a rent in fee, the lessor confirme the grant, and after the condition is broken, the lessor re-enter, he shall not avoide the grant.

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ALSO if there bee a perpetuall chanterie, wherewith the ordinary hath nothing to doe or meddle; quære, *if the patron of the chantery, and the chapleine of the same chantery may charge the chantery with a rent charge in perpetuitie.*

THIS is meant of a chauntery donative wherewith the ordinary hath not to deale, and by this grant, when *Littleton* wrote, the chauntery should have been charged for ever, because no other had any interest in this chantery [301. b.] ☞ save only the patron and chauntry priest, and the grant is made *concurrentibus hiis quæ in jure requiruntur*. But since *Littleton* wrote, all, and all manner of free chappels and chaunteries perpetuall, whereof *Littleton* here speakes, are by [a] acts of parliament given to the crowne, and the bodies politike thereof dissolved. See hereafter, *Section* 648, more at large of all this present *Section*.

Vid Sect. 648. (Cro. Jac. 63.) (10 Rep. Lampet's case.) (Post. 344.)

[a] 37 H. 8. ca. 4. 1 E. 6. c. 14.

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ALSO, in some case this verbe dedi, * *or this verbe* concessi, *hath the same effect in substance, and shall enure to the same intent, as this verbe* confirmavi. *As if I bee disseised of a carue of land, and I make such a deed* (sicome jeo sue disseisie d'un carue de terre, et † jeo face tiel fait); Sciant præsentes, &c. quòd dedi *to the disseisor*, ‡ *&c. or* quòd concessi *to the said disseisor, the said carue, &c. and I deliver onely the deed to him without any liverie of seisin of the land, this is a good confirmation, and as strong in law, as if there had beene in the deede this verbe* confirmavi, &c.

HERE *Littleton* proceedeth, according to the former division, to shew words that in law do amount to a confirmation. And here is to bee observed, that some words are large, and have a generall extent, and some have a proper and particular application. The former sort may contain the latter; as *dedi* or *concessi* may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender, &c. and it is in the election of the party to use which of these purposes he will.

Bra. li. 2. fo. 59. b. 21 H. 6. Feoffments & faits, 103. 22 H. 6. 42.

14 H. 4. 36. 19 H. 6. 44. 7 H. 7. 16. 32 E. 3. Briefe, 291. Brooke, tit. Confirm. 20. 14 H. 7. 2. 37 H. 6. 17. Dyer, 8 Eliz. 4 H. 7. 10. 22 E. 4. 36. 40 E. 3. 41. (Sid. 452. Plo. 196. 5 Rep. 17. a. 1 Roll. Abr. 482. Noy, 66.)

Est autem confirmatio quasi quædam ratihabitio, sufficit tamen quandoque per se, si etiam in se contineat donationem, ut si dicat quis,

Bracton, lib. 2. fol. 59. b.

* *or—and*, L. and M. and Roh.
† puis *added in L. and M. and Roh.*
‡ *&c. or* quòd concessi *to the disseisor, &c.* not in L. and M. or Roh.

quis, dedi et confirmavi, licèt juvari possit ex aliquâ donatione præcedente.

But a release, confirmation, or surrender, &c. cannot amount to a grant, &c. nor a surrender to a confirmation, or to a release, &c. because these bee proper and peculiar manner of conveyances, and are destined to a speciall end (1).

(4 Rep. 80. b. 2 Cro. 169. Mo. 34. Plo. 397, 398.)

"*Dedi et concessi, &c.*" Here is implyed that there be more words than *dedi* and *concessi*, that will amount to a confirmation, as *dimisi*. [*e*] In ancient statutes and in originall writs, as in the writ of entry *in casû proviso, in consimili casû ad communem legem*, and many others, this word *dimisi* is not applied only to a lease for life, but to a gift in taile, and to a state in fee. [*f*] Also if a man make a lease to *A.* for yeares, and after by his deed the lessor *voluit quòd haberet et teneret terram pro termino vitæ suæ*; this is adjudged by this verbe *(volo)* to bee a good confirmation for terme of his life. *Benignè enim faciendæ sunt interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quàm pereat.*

[*e*] 32 E. 3. Briefe, 291. Brooke, tit. Confirm. 20. Vid. le stat. de Gloc. ca. 4.

[*f*] 7 E. 3. 9. Bracton. (Plo. 159.)

And he to whom such a deed comprehending *dedi, &c.* is made, may plead it as a grant, as a release, or as a confirmation, at his election (2).

14 H. 4. 36. Lib. 5. fol. 15. in Newcomen's case.

If a parson and ordinary make a lease for yeares of the glebe to the patron, and the ☞ patron by his deede granteth it over, or if the disseisor granteth a rent to the disseisee, and he by his deed granteth it over, and after re-enter; in both these cases one and the same words doe amount both to a grant, and to a confirmation in judgement of law of one and the same thing, *ne res pereat*. And so it is if a disseisor make a lease for life, or a gift in taile, the remainder to the disseisee in fee, the disseisee by his deed granteth over the remainder, the particular tenant attorneth, the disseisee shall not enter upon the tenant for life, or in taile, for then he should avoide his owne grant, which amounted to a grant of the estate, and a confirmation also.

[302. a.]

(Ant. 280. 298. 5 Rep. 15, 16.)

(Sid. 453.)

Sect. 532.

ALSO if I let land to a man for terme of yeares, by force whereof he is in possession, &c. (si jeo lessa terre a un home pur terme d'ans, per force de quel il est * en possession), *and after I make a deede to him, &c.* quòd dedi & concessi, &c. *the said land, to have for terme of his life, and I deliver to him the deed, &c. then presently he hath an estate in the land for terme of † his life.*

HERE

* en possession, &c.—possessione, *L. and M. and Roh.*

† *his* not in L. and M. or Roh.

(1) The effect of the word grant, in implying a warranty, will be considered in a note on the chapter of Warranty.

(2) But a lease and release cannot be pleaded as a grant of the reversion. Noy, 66.—[Note 265.]

HERE is the sixth case wherein the confirmation and the release doe agree, and is evident, and needeth no explication.

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AND if I say in the deede, to have and to hold to him, and to his heires of his body engendred, hee hath an estate in fee taile. And if I say in the deed, to have and to hold to him and to his heires, he hath an estate in fee simple. For this shall enure to him by force of the confirmation (per force de * confirmation) *to inlarge his estate.*

THIS also is evident, and needeth no explication, saving that whensoever a confirmation doth inlarge and give an estate of inheritance, there ought to be apt words (as *Littleton* here expresseth them) used for the same.

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ALSO if a man be disseised, and the disseisor die seised, and his heire is in by discent, and after the disseisee and the heire of the disseisor make joyntly a deede to another in fee (et puis le disseisee et l'heire ‡ le disseisor font jointment un fait a un auter en fee), *and livery of seisin is made upon this, (as to the heire of the disseisor that sealed the deed) the tenements doe passe* + *and enure by the same deed by way of feoffment; and as to the disseisee who sealed the same deed, this shall enure but by way of confirmation* (ceo ne urera § sinon per voy de confirmation). *But if the disseisee in this case brings a writ of entrie in the* per *and* cui *against the alienee of the heire of the disseisor* (envers l'alienee ‖ del heire le disseisor); quære, *how he shall pleade this deede against the demandant by way of confirmation,* ** *&c. And know, my son, that it is one of the most honorable, laudable, and profitable things in our law, to have the science of well pleading in actions reals and personals; and therefore I counsaile thee especially to imploy* † *thy courage and care to learne this* ‡‡.

[302. b.] "*AS to the heire of the disseisor, &c. the tenements doe passe by way of feoffment.*" For ☞ the land shall ever passe from him that hath the state of the land in him. As if *cestuy que use* and his feoffees after the statute of 1 *R.* 3. and before the statute of 27 *H.* 8. *cap.* 10. had joyned

21 H. 7. 34. b. Pl. Com. 59. a. in Wimbishe's case. (6 Rep. 15. a.)

* confirmation—confirmament, *L. and M. and Roh.*

‡ le disseisor, *not in L. and M. or Roh.*

+ *and enure*, not in L. and M. or Roh.

§ sinon—mes, *L. and M. and Roh.*

‖ del—le, *L. and M. and Roh.*

** *&c.* not in L. and M. or Roh.

† *all* added in L. and M. and Roh.

‡‡ *&c.* added in L. and M. and Roh.

joyned in a feoffment, it shall be the feoffment of the feoffees, because the state of the land was in (A) him.

Pl. Com. 59. a. Pl. Com. 140. in Browning's case. 2 H. 5. 7. 13 H. 7. 14. 13 E. 4. 4. a. 27 H. 8. 13. M. 16 & 17 El. 339.

So it is if the tenant for life, and hee in the remainder or reversion in fee, joyne in a feoffment by deede. The livery of the freehold shall move from the lessee, and the inheritance from him in the reversion or remainder, from each of them according to his estate. For it cannot bee adjudged by law, that the feoffment of tenant for life doth draw the reversion or remainder out of the lessor or him in remainder, or doth worke a wrong because they joyned together (1).

(Sid. 83.) (1 Roll. Abr. 633.) (Ant. 45. a.) (1 Rep. 76, 77.)

Lib. 1. fo. 76. Bredon's case. (Ant. 251. b.)

If there bee tenant for life, the remaynder in tayle, &c. and tenant for life and he in the remainder in tayle levie a fine, this is no discontinuance or devesting of any estate in remainder, but each of them passe that which they have power and authority to passe.

17 Eliz. Dyer, 339. (1 Leo. 31.)

A. tenant for life, the remainder to *B.* for life, the remainder in tayle, the remainder to the right heires of *B.* *A.* and *B.* joyne in a feoffment by deede, albeit it may be said that this is the feoffment of *A.* and the confirmation of *B.* and consequently hee

(1 Leo. 37. 262.)

in the remainder in tayle cannot enter for the forfeiture during the life of *B.* but because *B.* joyned in the feoffment, which was torcious to him in the remainder in taile, and is *particeps criminis*, therefore they forfeited both their estates, and he in the remainder in tayle might enter for the forfeiture. But if he in the reversion in fee and tenant for life joyne in a feoffment by paroll, this shall be (as some hold) first, a surrender of the estate of tenant for life, and then the feoffment of him in the reversion: for, otherwise, if the whole should passe from the lessee, then he in the reversion might enter for the forfeiture, and every man's act *(ut res magis valeat)* shall be construed most strongly against himselfe.

And it is to be observed that *Littleton* here putteth a discent, so as the entry of the disseisee is not lawfull; for if the disseisor and disseisee joyne in a charter of feoffment, and enter into the land, and make livery, it shall be accounted the feoffment of the disseisee, and the confirmation of the disseisor.

Lib. 1. fo. 146, 147. Mayowe's case.

☞ "*Quære, how he shall plead this deede, &c.*" Hee made pleade the feoffment of the heire of the disseisor, and the confirmation of the disseisee as it hath been pleaded and allowed. [303. a.]

"*And*

(A) *Here the word* "him," *seems to be printed by mistake instead of* "them." *See Mr. Ritso's Intr. p.* 120.

(1) Tenant for life, and he in the remainder in fee, make a lease for years by deed indented; the lessee, being ejected, declared upon the demise made by the tenant for life, and the remainder-man; and adjudged against the plaintiff; for, living the tenant for life, it is only the lease of the tenant for life, and the confirmation of the remainder-man; and he ought to have so declared, 1 Inst. 45. a. So if two joint-tenants, two tenants in common, or tenant for life and he in the remainder, join in the grant of a copyhold, one fine only is due, and it shall enure as one grant only; so if a surrender be made, and after a common recovery is had by plaint, in the nature of a writ of entry, for better assurance —one fine only shall be paid. Co. Copyholder, 162, 163.—[Note 266.]

" *And know, my son, that it is one of the most honorable, &c.*" Here is to bee observed the excellency of good pleading, and *Littleton*'s grave advice, that the student should imploy his courage and care for the attaining thereof; which hee shall attaine unto by three meanes: first, by reading; secondly, by observation; and thirdly, by use and exercise. For in ancient time the serjeants and apprentices of law did draw their owne pleadings, which made them good pleaders. And in this sense *placitum* may be derived *à placendo, quia omnibus placet.*

See my Preface to the 9 Booke of my Reports. (Ante, 17. a. 126. b. 181. a. 283. a. Sid. 339.)

Now seeing good pleading is so honourable and excellent, and that many a good cause is daily lost for want of good and orderly pleading, it is necessary to set downe some few rules (amongst many) of the same, to facilitate this learning, that is so highly commended to the studious reader. For when I diligently consider the course of our bookes of years and termes from the beginning of the raigne of *Edw.* 3. I observe, that more jangling and questions grow upon the manner of pleading, and exceptions to forme, than upon the matter it selfe, and infinite causes lost or delayed for want of good pleading. Therefore it is a necessary part of a good common lawyer to be a good prothonotary. And now wee will performe our promise.

The order of good pleading is to be observed, which being inverted great prejudice may grow to the party, tending to the subversion of law. *Ordine placitandi servato, servatur & jus, &c.*

First, in good order of pleading a man must pleade to the jurisdiction of the court. Secondly, to the person; and therein first to the person of the plaintife, and then to the person of the defendant. Thirdly, to the count. Fourthly, to the writ. Fifthly, to the action, &c. [*a*] which order and forme of pleading you shall reade in the ancient authors agreeable to the law at this day; and if the defendant misorder any of these he loseth the benefit of the former.

[*a*] Bracton, li. 5. fo. 400. Britton, fo. 41. a. & 122. Fleta, li. 6. ca. 35, 36, &c. 40 E. 3. 9. b. 17 E. 3. 74. 8 E. 3. 5 & 9. 35 H. 6. 12.

The count must be agreeable and conforme to the writ, the barre to the count, &c. and the judgement to the count; for none of them must be narrower or broader than the other.

A count or declaration, which anciently and yet is called *narratio*, ought to containe two things [*b*] viz. certainty and verity, for that it is the foundation of the suite, whereunto the adverse party must answer, and whereupon the court is to give his judgement: [*c*] *Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.* But it must be understood that there be three kinde of certainties; first, to a common intent, and that is sufficient in a barre which is to defend the party and to excuse him. [*d*] Secondly, a certaine intent in generall, as in counts, replications, and other pleadings of the plaintife, that is to convince the defendant, and so in inditements, &c. Thirdly, a certaine intent in every particular, as in estoppels (B).

[*b*] Pl. Com. fo. 121, 122. 3 E. 4. 21. Vid. lib. 5. fo. 120, 121.

[*c*] Bracton, lib. 2. fo. 140.

[*d*] Lib. 5. 120, 121. Long's ca. Pl. Com. 56. Wimbishe's case.

He

(B) *Acc. post.* 352. *b. as to the third kind of certainty. Yet, in* 5 *Rep.* 121. *lord Coke says, that certainty to a certain intent in every particular is rejected in law, for that,* nimia subtilitas in jure reprobatur, & talis certitudo certitudinem confundit. *On the three kinds of certainty mentioned in the text, and particularly with respect to the certainty which is required in a charge or accusation, see the judgment delivered by* De Grey, *Chief Justice, in the case of Rex v. Horne in* Dom. Proc. 11 *May* 18 *Geo.* 3. *Cowp.* 672. 682. *See also The King* v. *The Mayor and Burgesses of Lyme Regis, Doug.* 149. 158. *In Comyn's Digest various instances of certainty are mentioned, for which see the references there under the head* Certainty.

[e] 7 H. 6. 17. 32 H. 6. 12. 15. Pl. Com. 33. b.

[e] He pleadeth a plea in abatement of the writ (which of ancient times was, and yet is called *breve*) or a plea after the latter continuance, ought to plead it certainly.

[f] 34 H. 6. 48. 8 H. 5. 4. b. 21 E. 4. 52. 5 E. 3. 15. 39 H. 6. 3. 10 H. 6. 2. 21 H. 7. 26.

[f] The ancient formes of courts are to be duly observed, as *cùm dimisit*, or *cùm dedit*, and not to say, that he was seised and demised, &c. (And yet if he say so, it maketh not the count vicious) [g] but in a barre replication or other kinde of pleading, the party must alledge a seisin in the lessor or donor, and ancient formes of pleading are also to be observed.

[g] 48 E. 3. 8. 2 H. 4. 13. 9 H. 6. 59. 6 H. 4. 2. b. 10 E. 4. 2. 10 E. 4. 4. F. N. B. 156. C. 11 E. 3. Aide, 32.

[h] Pl. Com. Bret's case, 342. 27 H. 8. 27. 27 H. 6. 9 H. 7.

[h] Counts, or such as be in nature of counts, (as an avowry, wherein the defendant is an actor) need not to be averred, but all other pleas in the affirmative ought to be averred, *et hoc paratum est verificare, &c.* but pleas meerly in the negative ought not to be averred, because a negative cannot be proved.

[i] 40 E. 3. 31, 32, 33. 41 E. 3. 11. 9 H. 6. 46. 27 E. 3. 81. 44 E. 3. 23. 33 H. 6. 51.

[i] Where there is but one tenant or one defendant, he cannot have two such pleas, as each of them doe go to the whole: but where there are divers, each of them may pleade severall pleas which extend to the whole (1).

5 E. 3. Double plea, 39. 43 E. 3. 21. 36 H. 6. 29. 37 H. 6. 23. 15 E. 4. 25. 7 H. 4. 12. 41 E. 3. Double plea, 78.

[k] Pl. Com. 81 11 H. 4. 89. 34 H. 6. 48. 19 R. 2. Action sur le case, 52.

[k] That which is alledged by way of conveyance or inducement to the substance of the matter need not to be so certainly alledged, as that which is the substance it selfe.

22 E. 3. 19. 30 E. 3. 9.

[l] 5 H. 7. 8. 6 E. 4. 2. 21 E. 4. 44. 27 H. 8. 4.

[l] Every plea must be direct, and not by way of argument or rehearsall.

22 H. 6. 17 E. 4. 7. 22 E. 4. 8.

[m] Pl. Com. 65. a. b. & 100. 376. & 410. 22 H. 6. 38. 19 H. 6. 49. 37 H. 6. 14. 36 H. 6. 5. 21 E. 4. 54. 11 H. 6. 15. 38 H. 6. 23. 35 H. 6. 35. 7 E. 4. 32.

[m] Where a matter of record is the foundation or ground of the suite of the plaintife, or of the substance of the plea, there it ought to be certainly and truly alledged; otherwise it is, where it is but conveyance. But the proceedings and sentences in the ecclesiasticall courts may be alledged summarily: as that a divorce was had between such parties, for such a cause, and before such a judge, and *concurrentibus hiis quæ in jure requi-*

42 Ass. 3. 48 E. 3. 11. 4 E. 4. 12. 9 E. 3. 46. 21 E. 4. 52. 10 H. 7. 9. 15. 11 H. 7. 8. 22 E. 3. 2. 34 H. 6. 27. 12 H. 8. 5, 6. 9 E. 4. 24. 8 E. 4. 31. 8 Ass. 29. 5 E. 4. 70. 3 E. 4. 1.

runtur;

(1) This is altered by 4 Ann. cap. 16. sect 4 & 5. by which it is enacted, that it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with the leave of the same court, to plead as many several matters thereto as he shall think necessary for his defence; but it is thereby also provided, that if any such matter, upon a demurrer joined, be judged insufficient, costs shall be given at the discretion of the court; or if a verdict shall be found upon any issue in the said cause for plaintiff, or the defendant, costs shall be also given in like manner, unless the judge, who tried the said issue, shall certify that the defendant, tenant, or plaintiff in replevin, had a probable cause to plead such matter, which upon the said issue shall be found against him.—Note to the 11th edition.—[Note 267.]

runtur; for the judge must be alledged, to the intent the court may write to him if it be denied.

Good matter must be pleaded in good forme, in apt time, and in due order, or otherwise great advantages may be lost.

[303. b.] [n] ☞ Generall estates in fee simple may be generally alledged, but the commencement of estates tayle, and other particular estates regularly must be shewed, unlesse in some cases where they are alledged by way of inducement, and the life of tenant in taile, or for life, ought to be averred.

[n] 35 H. 6. 35. 21 E. 4. 51. 9 H. 4. 5. 19 H. 6. 73. 5 E. 4. 12. 10 E. 4. 18. 13 H. 7. 18. 36 H. 8. Pleading, Br. 160.

[o] When any speciall and substantiall matter is alledged by either party, that ought to bee especially answered, and not to be passed over by a generall pleading.

22 Ass. 45. 2 E. 3. 42. 13 E. 3. Anc. Demesne, 15. 20 E. 3. ib. Lib. 10. fo. 91. Li. 11. fo. 10.

[o] V. Sect. 193. 3 H. 6. 47. 41 E. 3. 22. 9 Ass. 9. 45. 7 H. 7. 8.

[p] The plea of every man shall be construed strongly against him that pleadeth it, for everie man is presumed to make the best of his owne case: *ambiguum placitum interpretari debet contra proferentem.*

Debt, 43. 7 H. 6. 24. 31. 35 H. 6. 48. 47 E. 3. 14. Pl. Com. 46. Linc. Col. case.

[p] 3 H. 7. 3. 26 Ass. 10. 14 H. 4. 4. b. 27 H. 6. 8. b. 21 H. 6. a. Li. 3. fo. 59.

[q] Every plea that a man pleadeth ought to be triable, for without triall the cause can receive no end: *et expedit rei publicæ ut sit finis litium.*

[q] 22 E. 4. 40. 2, 3. 20 E. 4. 10. 21 E. 4. 36. 22 H. 6. 50.

[r] The tenant before his default saved, may plead all pleas which prove the writ abated, as death, &c. or matters apparent in the writ; but no plea, which proves it abateable, as taking of husband, &c.

42 E. 3. 3. 10. 46. 6 E. 3. 37. 8 E. 3. 20. 10 E. 3. 60. 14 H. 4. 15. 12 E. 4. 1. 38 E. 3. 28. 7 H. 7. 3.

[r] 40 E. 3. 40. 43. 46. 41 E. 3. 2. 18 E. 3. 16. 26 E. 3. 68.

[s] When a man is authorised to doe any thing by the common law, by grant, commission, act of parliament, or by custome, he ought to pursue the substance and effect of the same accordingly.

27 H. 8. 13. 21 H. 7. 25. 11 H. 4. 33. Pl. Com. 79. 16 E. 4. 1b. 20 H. 7. 1. 6 E. 4. 4, 5. 21 E. 4. 54. 22 H. 6. 47. 11 H. 6. 8. 23 Ass. 7. 2 Eliz. Dyer, 184.

[s] 10 E. 4. 3. 27 H. 6. 8. 8 H. 7. 13. 9 H. 7. 26. 37 H. 6. 1. 1 H. 7. 33. 25 E. 3. 50. b.

[t] All necessary circumstances implied by law in the plea need not to be expressed, as in the plea of a feoffment of a manor, livery and attornement are implied.

[t] Pl. Com. 149. b. & 105. a. 37 H. 6. 38.

[u] When a count, barre, replication, &c. is defective in respect of omission of some circumstance, as time, place, &c. there it may be made good by the plea of the adverse party; but if it be insufficient in matter, it cannot be salved.

18 E. 3. 34. Pl. Com. 229. b. Lib. 8. 133. Turner's case.

[u] 18 E. 4. 16. b. 22 E. 4. 2. 7b. 5 H. 7. 13. 38 H. 6. 17, 18, 19.

[w] Every man shall plead such pleas as are pertinent for him, according to the quality of his case, estate, or interest, as disseisors, tenants, incumbents, ordinaries, and the like.

[w] 5 H. 7. 34. 5 E. 3. 26. 22 H. 6. 28.

Surplusage

[x] 19 H. 6. 30. 32. Pl. Com. 232. b. & fo. 502, per Dyer, & 503.

[x] Surplusage shall never make the plea vicious, but where it is contrarient to the matter before (1).

[y] 13 H. 4. 17. 10 E. 4. 18. 33 H. 6. 54. 35 H. 6. 30. 21 H. 7. 32. Bract. li. 3. fo. 154. Pl. Com. 87. b. 26 H. 6. Gard. 58.

[y] That which is apparent to the court by necessary collection out of the record need not to be averred.

[a] 2 H. 7. 15. 4 H. 7. 12. 10 H. 7. 12. 13 H. 7. 19. 26 H. 8. 5. b. [b] Li. 8. fo. 133. Turner's case, & fo. 120. Bonham's case. Li. 9. 25. 61. Li. 10. 100. [c] 12 H. 8. 6, 7. 2 R. 3. 17. 14 E. 4. 7. 9 E. 4. 19. [d] 44 E. 3. 2. 34 H. 6. 5. 10 H. 6. 6. & 17.

[a] A man is bound to performe all the covenants in an indenture: if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to so many he must plead specially (for a negative cannot be performed), and to the rest generally. [b] So if any be in the disjunctive, he must shew which of them he hath performed. So if any are to be done of record, he must shew that specially, and cannot involve that in generall pleading.

[c] In many cases the law doth allow generall pleading, for avoyding of prolixity and tediousnesse, and that the particular shall come on the other side.

[d] Pleadings which amount to the generall issue are not to be allowed; but the generall issue is to be entred. *Vid. Sect.* 10. 485. 499.

12 E. 4. 11. 14. 14 H. 8. 24. 7 E. 3. 12. 17 E. 3. 44.

[e] 18 H. 6. 33. 22 H. 6. 53. 36 H. 6. 17. 38 H. 6. 18. 25. 5 E. 3. 15, 16. 22 Ass. 33. 2 Eliz. Dyer, 184.

[e] Every plea ought to have his proper conclusion, as a plea to the writ to conclude to the writ, a plea in barre to conclude to the action, an estoppell to relie upon the estoppells: *et sic de similibus.*

[f] Pl. Com. 14, 15. 2 E. 4. 18. 39 E. 3. 14. 32, 33. 8 E. 3. 57. Qu. Imp. 25. 18 H. 6. 30. 7. 4. 18. 38 Ass. 14. 24 E. 3. 48. 22 E. 3. 13. 38 H. 6. 25. 32 H. 6. 14. 19 H. 8. 7. 27 H. 8. 12. b.

[f] When the conclusion of a plea, *et issint, et sic*, is in the affirmative, it shall not wave the speciall matter, for there the speciall matter is the substance and foundation of the conclusion, and affirmed by the same. But where the conclusion is in the negative, there the speciall matter regularly is waved.

[g] 7 E. 4. 26. 11 H. 7. 4. 12 H. 7. 6. 36 H. 6. 9. 37. 43.

[g] Whensoever speciall matter is pleaded, and the conclusion *(et sic)* is to the point of the writ or action, the speciall matter is waved.

The names of legall records are, a writ, a count, a barre, a replication, a rejoynder, a rebutter, a surrebutter, &c.

[h] V. Sect. 485.

[h] New and subtill devices and inventions of pleading ought not to alter any principle of law, whereof you have heard plentifully before.

The count or declaration is an exposition of the writ, and addeth time, place, and other necessary circumstances, that the same may be triable; and any imperfection in the count doth abate the writ.

Pleadings are divided into barres, replications, rejoynders, surrejoynders, rebutters, and surrebutters, &c. They are words of art,

(1) And then it does, because the plaintiff cannot discern what to answer to in his replication. Note to the 11th edition.

art, and are called barres, *barræ*, so called, because it barreth the plaintife of this action. *Replicationes, à replicando*; *rejunctiones, à rejungendo*; *rebutter*, of the French word *rebouter, i. e. à repellendo*, to put backe or avoide, and so of surrebutter.

But each party must take heed of the ordering of the matter of his pleading, lest his replication depart from his count, or his rejoynder from his barre; *et sic de cæteris.*

[i] In ancient writers a barre is called *exceptio peremptoria*: a replication was then called *replicatio*, as now it is; a rejoinder *triplicatio*; a surrejoinder, *quadriplicatio*; *et sic ulterius in infinitum.*

[i] Bract. li. 5. fo. 400. Flet. li. 6. ca. 37.

[304. a.] ☞ A departure in pleading is said to be when the second plea containeth matter not pursuant to his former, and which fortifieth not the same, and thereupon it is called *decessus*, because he departeth from his former plea; and therefore whensoever the rejoynder (taking one example for all) containeth matter subsequent to the matter of the barre, and not fortifying the same, this is regularly a departure, because it leaveth the former, and goeth to another matter. As if in an assise the tenant plead a discent from his father, and giveth a colour, the demandant intituleth himselfe by a feoffement from the tenant himselfe, the plaintife cannot say, that that feoffement was upon condition, and to shew the condition broken; for that should be a cleare departure from his barre, because it containeth matter subsequent. But in an assise, if the tenant pleadeth in barre, that *I. S.* was seised and infeoffed him, &c. and the plaintife sheweth, that he himselfe was seised in fee, until by *I. S.* disseised, who infeoffed the tenant, and he reentred, the defendant may plead a release of the plaintife to *I. S.* for this doth fortifie the barre.

(Sid. 10. 77. 176. 277. Finch. 391. 2 Cro. 264.) 39 E. 3. 13. b. 39 H. 6. 15. 6 H. 7. 8. 21 H. 6. 32. Pl. Com. 105. 1 Mar. Dyer, 95. 28 H. 8. ib. 31. (Doc. Pla. 119. 1 Cro. 228, 229. 257.) 6 H. 7. 8. 3 H. 6. Departure, 2.

If a man plead performance of covenants, and the plaintife reply, that he did not such an act according to his covenant, the defendant saith, that he offered to do it, and the plaintife refused it; this is a departure, because the matter is not pursuant; for it is one thing to doe a thing, and another to offer to doe it, and the other refused to doe it: therefore that should have been pleaded in the former plea. *Vide & cave* in a *quare impedit*, what plea shall be safely pleaded *in primo placito.*

(Sid. 10. 77. 180. 404.) 8 El. Dy. 253. 23 El. Dy. 271. 6 E. 3. 3. 40 E. 3. 32. 43 E. 3. 32. 43 E. 3. 11. 1 E. 4. 4. 18 E. 4. 24.

When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of parliament. So when in his former plea he intituleth himself egenerally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.

5 H. 7. 27. 8 H. 6. 11. 33 H. 6. 14. (Cro. Car. 257. 1 Saund. 83. 189.) Pl. Com. 105. b. Fulmerston's case.

If a man plead an estate generally, (as for example a feoffement in fee) he in his second plea shall not maintain it by other matter *tantamount* in law, as by a disseisin and release, or by a lease and release, or a gift in tayle in barre, and in the second plea a recovery in value; for this is a departure: but he in that case shall count of a gift, and maintaine it in his replication by a recovery in value, because he could have no other count.

21 H. 7. 25. 27 H. 8. 3. 21 H. 7. 17. 37 H. 6. 5. 38 H. 6. 25. (Saund. 142. S. C. 1 Leo. 81.

S. C. Raym. 60. Sid. 142.) 21 H. 7. 25. 1 E. 4. 4. 3 H. 7. 5. 7 H. 7. 2.

See more of this matter, where the plaintife varying from time or place alledged in the count of actions transitory, shall commit no departure.

Vid. Sect. 485.

The

Pl. Com. 139. 142.

The plea that containes duplicity or multiplicity of distinct matter to one and the same thing, whereunto severall answers (admitting each of them to be good) are required, is not allowable in law. And this rule you see extendeth to pleas perpetuall or peremptory, and not to pleas dilatory; for in their time and place a man may use divers of them; and hereof ancient writers * speake notably: *Sicut actor unâ actione debet experiri saltem illâ durante, sic oportet tenentem unâ exceptione dum tamen peremptoriâ (quod de dilatoriis non est tenendum); quia si liceret pluribus uti exceptionibus peremptoriis simul & semel, sicut fieri poterit in dilatoriis, sic sequeretur, quòd si in purbatione unius defecerit, ad aliam probandam possit habere recursum, quod non est permissibile, non magis quàm aliquem se defendere duobus baculis in duello, cùm unus tantùm sufficiat.*

* Fleta, li. 6. ca. 35 (A). Bracton, li. 5. fol. 400.

But where the tenant or defendant may pleade a general issue, thereupon the generall issue pleaded, he may give in evidence as many distinct matters to barre the action or right of the demandant or plaintife, as he can (1).

17 E. 3. 73. (Doc. Pla. 135.)

A speciall verdict may containe double or treble matter; and therefore in those cases the tenant or defendant may eyther make choice of one matter, and to plead it to barre the demandant or plaintife, or to plead the general issue, and to take advantage of all; or he may plead to part one of the pleas in barre, and to another part another plea; and his conclusion of his plea shall avoide doublenesse, and hereby neither the court nor the jury is so much inveigled, as if one plea should containe divers distinct matters. And if the tenant make choice of one plea in barre, and that be found against him, yet he may resort to an action of an higher nature, and take advantage of any other matter. And the law in this point is by them that understand not the reason thereof misliked, saying, *Nemo prohibetur pluribus defensionibus uti.*

39 H. 6. 27.

(Ante, 139. a.)

And it is worthy of observation, that in the raignes of *Edward* the second, *Edward* the first, and upwards, the pleadings were plain and sensible, but nothing curious, evermore having chiefe respect to matter, and not to formes of words, and were often holpen with a *quæsitum est*, and then the questions moved by the court, and the answers by the parties were also entred into the rolle. But even in those dayes the formes of the register of originall writs were then punctually observed, and matters in law excellently debated and resolved; and where any great difficulty was, then it was resolved by all the judges and sages of the law (who were for matters in law called *concilium regis*) and their assembly

Hil. 32 E. 1. Cor. Reg. in fine rotul.

(A) *For the Latin quotation in the text, see Fleta, li. 6. ca. 36. § 12.*

(1) *It is natural to plead first to the jurisdiction, and afterwards to the writ of the count.* Nota, *The brief ranked before the count,* 17 *Edw.* 3. 74. Nota, *Upon default in the count, the judgment shall be that the brief shall abate.* 3 *Hen.* 6. 41. 9 *Hen.* 6. 10. *Brooke, Count,* 78. *Vide* 303. *b. Therefore, as it seems, it is more proper to reserve the exception to the writ for the last place, if the first fails. In special cases the order of pleading is not observed; as for example, a defendant in debt, in the custody of the sheriff, was permitted to plead a plea in abatement of the writ before any count was made, and before any of the other defendants came in.* 3 *Hen.* 6. *Fitz. Debt,* 20. *Lord Willoughby and other defendants in assise against Wimbish, pleaded in abatement of the writ before any count was made. Plowd. Com.* 73.—Lord Nott. MSS.—[Note 268.]

assembly and resolution was entred into the rolle. As for example, in the great case in a *quare impedit*, between the king and the prior of Worcester, concerning an appropriation, whether it were a mortmaine, the record saith, *ad quem diem venit* [304. b.] *prælictus prior per attornatum suum, &c. Et* &c. *examinatis et intellectis recordo et processu coram toto concilio tam thesaurario et baronibus de scaccario quàm cancellario, ac etiam justiciariis de utroque banco inspectâ causâ, pro quâ, pro domino rege dicunt, quòd ad ipsum regem pertinet præsentare, &c. consideratum est, &c.* For in those dayes though the chancellor and treasurer were for the most part men of the church, yet were they expert and learned in the lawes of the realme.

As for example, in the time of the Conqueror, *Egelricus episcopus Cicestrensis vir antiquissimus, et in legibus sapientissimus*, as elsewhere I have said.

[a] *Nigellus episcopus Eliensis Hen.* 1. *thesaurarius in temporibus suis incomparabilem habuit scaccarii scientiam, et de eâdem scripsit optimè.* [a] Ockham, fo. 17.

[b] *Henricus Cant. episcopus, H. Dunelm' episcopus, Willielmus Eliensis episcopus, G. Roffens. episcopus.* [b] Pasc. 5 R. 1. cor. Rege.

[c] *Martinus de Pateshul clericus decanus Divi Pauli London' constitutus fuit capitalis justic' de banco, quia in legibus hujus regni peritissimus.* [c] 1 H. 3. Rot. pat. Bract. sæpe.

[d] *Will'us de Raleigh clericus justiciarius domini regis.* [d] Bract. sæpe.

[e] *Johannes episcopus Carliensis tempore H.* 3. [e] 8 E. 3. 31.

Robertus Passelewe episcopus Cicestrensis tempore H. 3.

[f] *Robertus de Lexintonio clericus constitutus capitalis justic' de banco.* [f] Rot. pat. 24 H. 3.

[g] *Johannes Britton episcopus Hereford.* [g] Libere jus de legibus extat script. temp. E. 1.

[h] *Henricus de Stanton clericus constitutus fuit capitalis justiciarius ad placita*; with many others. And so were divers and many of the nobility, who when matters of great difficultie were brought into the upper house of parliament by writ of error, adjournement, or other parliamentary course, did by the assistance of the reverend judges, who ever attended in that court, judge and determine the same as by former and ancient records, and specially by the said record of 5 *R.* 1, doe manifestly appeare; and therefore the lords of parliament were called for those purposes, *concilium regis*; and like to the aforementioned record there be very many. [h] Rot. pat. 17 E. 2.

In the reigne of *Edward* the third pleadings grew to perfection both without lamenesse and curiosity; for then the judges and professors of the law were excellently learned, and then knowledge of the law flourished, the serjeants of the law, &c. drew their owne pleadings; and therefore truly said that reverend justice *Thirning*, in the raigne of *H.* 4, that in the time of *Edw.* 3. the law was in a higher degree than it had been any time before; for (saith he) before that time the manner of pleading was but feeble in comparison of that it was afterward in the raigne of the same king. 12 H. 4. 3.

In the time of *Henrie* the Sixth the judges gave a quicker eare to exceptions to pleadings, than either their predecessors did, or the judges in the raigne of *Edw.* the fourth, when our author flourished, or since that time have done, giving no way to nice exceptions, so long as the substance of the matter were sufficiently shewed. And as in the raigne of king *Edward* the third, (Hob. 332. Ante, 72. a.)

[*]36E.3.ca.15. 46 E. 3. 21. Dy. 299. Li. 8. fo. 161. Lib. 10. fo. 131. (Doc. Pla. 116) Li. 10. fo. 88. Pl. Com. 421.

by an act of parliament [*] it is provided, that counts or declarations should not abate so long as the matter of the action be fully shewed in the declaration and writ; so since our author wrote, in the raigne of queen *Elizabeth*, provision is made, that after demurrer the judges shall give judgement according to the right of the cause and matter in law, without regarding any imperfection, defect, or want of forme in any writ, retorne, plaint, declaration, or other pleading or course of proceeding whatsoever, except such as the party demurring shall specially shew. In which acts appeales and indictments of felony, murder, or treason concerning man's life, and the forfeiture of his lands and goods, are excepted. An excellent and a profitable law, concurring with the wisedome and judgement of ancient and latter times, that have disallowed curious and nice exceptions tending to the overthrow or delay of justice; *apices juris non sunt jura:* yet it is good for a learned professor to make all things plain and perfect, and not to trust to the after aide or amendment by force of any statute, lest his client's cause matcheth not therewith; and as it is in physicke for the health of a man's body, so it is in remedies for the safety of a man's cause. In law *præstat cautela quàm medela.*

But now let us returne to our author.

(Sid. 175, 176.) (Doc. Pla. 70. 118. 136. 138. 254.) (11 Rep. 52. a.)

Sect. 535, 536, 537.

*ALSO, if there be lord and tenant, * albeit the lord confirme the estate which the tenaunt hath in the tenements, yet the seigniorie remaineth intire to the ☞ lord as it was before.* [305. a.]

Sect. 536.

IN the same manner is it, if a man hath a rent charge out of certaine land, and hee confirme the estate which the tenant hath in the land, yet the rent charge remayneth to the confirmor.

Sect. 537.

IN the same manner it is, if a man hath common of pasture in other land (si un home ad common de pasture † en auter terre), *if he confirme the estate of the tenant of the land, nothing shall passe from him of his common; but notwithstanding this, the common shall remayne to him, as it was before.*

HERE

* *albeit—and,* L. and M. and Roh. † en—ou, *L. and M. and Roh.*

HERE is the sixth case wherein the release and confirmation doe differ; for by the release (A) of the seigniory, rent charge or common are extinct. And so these three Sections be evident, and need no explication, saving that some doe gather upon these two last Sections and the next ensuing, that a man cannot abridge a rent charge or common pasture by a confirmation, as he may doe a rent service in respect of the privitie betweene the lord and tenant, so as (say they) a tenure may be abridged by a confirmation, but not a rent charge or common: and therefore *Littleton* beginneth the next Section with an adverbe adversative, viz. (*but*) &c. But a man may release part of his rent charge, or common, &c.

Sect. 538.

BUT if there be lord and tenant, which tenant holdeth of his lord by the service of fealtie and 20 *shillings rent, if the lord by his deed confirme the estate of the tenant, to hold by* 12 *pence, or by a penny, or by a halfe peny: in this case the tenant is discharged of all the other services, and shall render nothing to the lord, but that which is comprised in the same confirmation.*

AND the reason wherefore no service of another (B) cannot be reserved upon the confirmation is, because as long as the state of the land continueth, it cannot by the confirmation of the lord be charged with any new service. So as it is evident that the lord by his confirmation may diminish and abridge the services, but to reserve upon the confirmation new services he cannot, so long as the former estate in the tenancie [305. b.] continueth. And as where a confirmation doth ☞ inlarge an estate in land, there ought to be privitie, as hath beene said; so regularly where a confirmation doth abridge services, there ought to be privitie also.

28 E. 3. 92, 93. 26 Ass. 37. 6 Eliz. Dy. 230. b. 7 E. 4. 25. a. 21 E. 4. 62. per Brian. 10 E. 3. tit. Avowrie, 100. (9 Rep. 33.)

And therefore here *Littleton* putteth his case of lord and tenant betweene whom there is privitie. And therefore if there be lord, mesne and tenant, the lord cannot confirme the estate of the tenant to hold of him by lesser services, but this is void, for that there is no privitie betweene them, and a confirmation cannot make such an alteration of tenures.

7 E. 3. 19. 22 E. 3. 18. b.

And the case in 4 *E.* 3, maketh nothing against this opinion; for there the case in substance is this: *John de Bonvile* held certaine lands of *Ralfe Vernon*, and before the statute of *quia emptores terrarum*, levied a fine of the same lands to the abbot of *Cogsall* and his successors, to hold of the chiefe lord (which was *Ralfe Vernon*) by the services due and accustomed. *Ralfe Vernon* made a charter to the said abbot in these words: *Concessi etiam eidem abbati et successoribus suis relaxavi et quietum clamavi totum jus, &c. quod habeo, vel potero habere in omnibus tenementis quæ idem abbas habet de dono Johannis de Bonvile, tenendum de me et hæredibus*

4 E. 3. 19.

(A) *Here the word "of," seems printed by mistake. See Mr. Ritso's Intr. p.* 120.
(B) *Here "cannot" seems printed by mistake instead of "can." See Mr. Ritso's Intr. p.* 120.

hæredibus meis in puram et perpetuam eleemosinam; and adjudged, that it was a good tenure in frankalmoigne: which case proveth nothing that the lord paramount may by his confirmation to the tenant peravaile extinct the mesnaltie (as it is abridged by master *Fitzherbert* in the title of Confirmation, pl. 21.) for the immediate lord did there make the said charter, and not any lord paramount (And therefore it is ever good to relie upon the booke at large, for many times *compendia sunt dispendia*, and *melius est petere fontes, quàm sectari rivulos*). And of this opinion was master *Plowden* upon good advisement and consideration.

4 E. 3. 19.
9 E. 3. 1.
12 E. 4. 11.
16 E. 3. Fines, 4.
6 Eliz. Dier, 230.

And here is the seventh case wherein the release and confirmation doth agree; for if there be lord and tenant by fealty and twenty shillings rent, the lord may release all his right in the seigniorie or in the tenancie, saving fealtie and ten shillings rent; but he cannot save a new kinde of service, for he may aswell abridge his services upon a release as upon a confirmation. And as there is required privitie when the lord abridgeth the services of his tenant by his confirmation; so must there be also, when the lord by his release abridgeth the services of his tenant. And therefore the lord paramount cannot release to the tenant peravaile saving to him part of his services, but the saving in that case is void (1).

(Ant. 47. a.)
(Plo. 563. b.)
Britton, f. 57.
177. 40 E. 3.
21. 47, 48.
18 E. 3. 26.
50 Ass. 6.
14 H. 4. 8.

"*And shall render nothing to the lord, but that which is comprised, &c.*" Which words are thus to be understood; that the tenant shall not render any more rent or annuall service to the lord than is contained in the deed; but other things notwithstanding the said confirmation the tenant shall yeeld to the lord, as releefe, ayde *pur file marier*, and ayde *pur faire fitz chivaler*, because these are incidents to the tenure that remaine, and shall not be discharged without speciall words, by the generall words of all other actions, services and demands. And so if a man hold of me by knight's service, rent, suit, &c. and I release to him all my right in the seigniorie, excepting the tenure by knight's service, or confirme his estate to hold of me by knight's service only for all manner of services, exactions, and demands; yet shall the lord have ward, marriage, releefe, ayde *pur file marier*, *et pur faire fitz chivaler*, for these be incidents to the tenure that remaine. But it is holden, that if a man make a gift in taile by deed, reserving two shillings rent *a luy et ses heires pro omnibus et omnimodis servitiis, exactionibus secularibus et cunctis demandis*, if the donee die his heire of full age, the donor shall have no releefe, because in the originall deed of the gift in taile it is expressly limited, that by the service of two shillings rent he shall be quite of all demands (and releefe lieth in demand); and by reason of those words, say they, there cannot any releefe become due; but some doe hold the contrary in that case.

(Ant. 76. a.)

13 R. 2. tit. Avowrie, 89. Nota dictum Fitzh.

(Ant. 23. a.)

Sect.

(1) 3 Inst. 47. A saving will serve for any thing that is implied in the judgment, as in case of felony to save the wife's dower; but a saving will not serve against the express judgment, for that should be repugnant, as saving the life of the offender should be void.—[Note 269.]

Sect. 539.

[306. a.] *BUT if the lord will by his deed of confirmation, that the tenant in this case shall yeeld ☞ to him a hawke or a rose yearly at such a feast, &c. this confirmation is void* (cest * confirmation est voide), *because hee reserveth to him a new thing which was not parcell of his services before the confirmation: and so the lord may well by such confirmation abridge the services † by which the tenant holdeth of him, but hee cannot reserve to him new services.*

THIS upon that which hath beene said before in the next preceding Section is evident, and needeth no further explication.

Sect. 540.

ALSO, if there be lord, mesne, and tenant (si soit seignior ‡ mesne et tenant), *and the tenant is an abbot, that holdeth of the mesne by certaine services yearly, the which hath no cause to have acquitance against his mesne* (le quel n'ad ascun cause § d'aver acquitance envers son mesne,) *for to bring a writ of mesne, ‖ &c. in this case, if the mesne confirme the estate that the abbot hath in the land, to have and to hold the land unto him and his successors in frankalmoigne, or free almes, &c. in this case this confirmation is good, and then the abbot holdeth of the mesne in frankalmoigne. And the cause is, for that no new service is reserved, for all the services specially specified bee extinct, and no rent is reserved ¶ to the mesne, but the abbot shall hold the land of him as it was before the confirmation* (forsque ** que l'abbe tient de luy la terre, et ceo fist †† il devant la confirmation); *for he that holdeth in frankalmoigne ought to doe no bodily service; so that* (issint ‡‡ que) *by such confirmation it appeareth, the mesne shall not reserve unto him* (A) *no new service* (le mesne ne reserva a luy ascun novel service), *but that the lands shall* [306. b.] *bee holden of him as it was before. And in this ☞ case the abbot shall have a writ of mesne, if hee bee distrained in his default, by force of the said confirmation, where per case hee might not have such a writ before* (lou per case il ne puissoit aver ‖‖ un briefe adevant), *&c.*

HERE

* confirmation—reservacion, *L. and M. and Roh.*

† *by which the tenant holdeth of him,* not in L. and M. or Roh.

‡ mesne—mesme, *L. and M. but not in Roh.*

§ per cas, *added in L. and M. and Roh.*

‖ *&c.* not in L. and M. or Roh.

¶ *to the mesne,* not in L. and M. or Roh.

** que *not in L. and M.*

†† il—a lui, *L. and M. and Roh.*

‡‡ que *not in L. and M. or Roh.*

‖‖ un—tiel, *L. and M. and Roh.*

(A) *Here* "no" *seems printed by mistake, instead of* "any" *or* "some." *See Mr. Ritso's Intr. p.* 110.

4 E. 3. 19. 22 E. 3. 15. b. the lord Wake's case. 10 E. 3. 5. 15 E. 3. Confirmat. 8.

HERE our author having seene the former bookes putteth his case, that the mesne maketh the confirmation to hold in frankalmoigne, and not the lord paramount.

4 E. 3. 19, 20. F. N. B. 136. H. & Q. 4 E. 4. 35. 31 E. 1. Mesne, 55. 11 E. 3. Avowrie, 100. 22 E. 3. 18. b.

"*And in this case the abbot shall have a writ of mesne.*" Here is to bee noted, that upon a confirmation to hold in freealmoigne there lyeth a writ of mesne, albeit the cause of acquitall beginne after the seignior. And so upon such a confirmation the tenant shall have, *contra formam feoffamenti.*

30 E. 3. 13. 16 H. 3. Avowrie, 243. (9 Rep. 130.)

Sect. 541.

ALSO, if I be seised of a villeine as of a villeine in grosse, and another taketh him out of my possession, clayming him to bee his villein† there where hee hath no right to have him as his villeine, and after I confirme to him the estate which hee hath in my villeine, this confirmation seemeth to be voide, for that none may have possession of a man as of a villeine in grosse, but he which hath right to have him as his villeine in grosse. And so inasmuch as hee to whom the confirmation was made, was not seised of him as of his villeine at the time of the confirmation made, such confirmation is void.

45 E. 3. 10. 30 H. 6. tit. Barre, 59. Registrum, 102. 1 H. 6. cap. 5. (Post. 323. a.) Brooke, tit. Propertie, 28. (Sect. 589, 590. 591.)

HERE is to be observed a diversitie betweene the custodie of the body of a ward within age, and a right of inheritance in the body of a villeine in grosse; for a man may bee put out of possession of the custodie of his ward, but not of his villeine in grosse, no more than a man can bee of his prisoner which he hath taken in warre.

Also of things that are in grant, as rents, commons, and the like, it is at the election of the party whether hee will be disseised of them or no, as shall bee said after in his proper place (1). But of a villeine in grosse he cannot at all be disseised. [*a*] *Non valet confirmatio nisi ille qui confirmat sit in possessione rei vel juris unde fieri debet confirmatio, & eodem modo nisi ille cui confirmatio fit, sit in possessione.*

[*a*] Bract. lib. 2. 59. b. 24 E. 3. tit. Discont. 16. 42 E. 3. 18. 40 E. 3. 17. 43 E. 3. 4. 9 E. 4. Dier, 38. 10 Eliz. Growche's case.

And materially doth *Littleton* put his case of a villeine in grosse; for of a villeine regardant to a mannor, the lord may be put out of possession; for by putting him out of possession of the mannor, which is the principall, hee may likewise bee put out of possession of the villeine regardant, which is but accessory. And by the recovery of the mannor the villeine is recovered. But if another doth take away my villeine in grosse or regardant, he gaineth

† *there where hee hath no right to have him as his villeine*, not in L. and M. or Roh.

(1) See ant. 239. a. note 1.

gaineth no possession of him. And this doth well appeare by the writ of *nativo habendo*, for that writ is not brought against any person in certaine (because no man ☞ can gaine the possession of him). But the writ is to this effect: *Rex vic' salutem. Præcipimus tibi, quòd justè et sine dilatione habere facias A. B. nativum et fugitivum suum, &c. ubicunque inventus fuerit, &c. et prohibemus super forisfacturam nostram ne quis eum injustè detineat*; so as detaine him one may, but to possesse himselfe of him, and dispossesse the lord, he cannot. (Ant. 303. a.)

[307. a.]

And if a man might have been dispossessed of a villeine in grosse, or of a villeine regardant (unlesse he be dispossessed of the mannor also, as hath beene said), the law would have given a remedie against the wrong doer, as the law doth in the case of a ward.

Now, seeing it doth appeare by our bookes [*a*] (and by *Littleton* himselfe by implication speaking only of a villeine in grosse) that if a man be disseised of the mannor whereunto the villeine is regardant, he is out of possession of his villeine, and so an advowson appendant, and the like. Hereby (*Littleton* putting his case of a villeine in grosse) and by divers authorities a point controverted in our bookes [*] is resolved, viz. that by the grant of the mannor, without saying *cum pertinentiis*, the villeine regardant, advowson appendant, and the like, doe passe: for if the disseisor shall gaine them as incidents to the mannor, whose estate is wrongfull, *à multò fortiori* the feoffee, who commeth to his estate by lawfull conveyance, shall have them as incidents. But where the entrie of the disseisee is lawfull, he may seise the villeine regardant, or present to the advowson, &c. before he enter into the mannor: otherwise it is where his entrie is not lawfull; and so are the ancient authors [*b*] to be intended (1).

[*a*] Bracton, fol. 243. Britt. fol. 126. (5 Rep. 11. b. Ant. 77. a. 121. b.)

[*] 9 E. 4. 38. 3 H. 4. 15. 18 E. 3. 44. 16 E. 3. Quar. Imp. 146. 19 R. 2. Tresp. 255. 19 H. 6. 33. 21 H. 6. 9. 33 H. 6. 33. 5 H. 7. 36. 38. 10 H. 7. 9.

F. N. B. 33. 9. 22 H. 6. 33. per Moyle. 30 E. 3. 31. 39 E. 3. 21. 43 E. 3. 12. (Plowd. 258. a. Ant. 122. b. Post. 349. b. 363. b.) [*b*] Bracton, fol. 242, 243. Britton, fol. 126. Fleta, acc.

Sect. 542.

BUT in this case, if these words were in the deed, &c.* Sciatis me dedisse et concessisse † tali, &c. talem villanum meum, *this is good*; *but this shall enure by force and way of grant, and not by way of confirmation, &c.*

HERE it is to be observed, that a man hath an inheritance in a villeine, whereof the wife of the lord shall be endowed, as hath beene said; for in him a man may have an estate in fee or fee taile for life or yeeres. And therefore *Littleton* is here to be understood, that in the grant there were these words (*his heires*) or else nothing passed but for life, as of other things that lie in grant. 2 H. 6. F. N. B. 77. a. b. 24 E. 3. Discont. 16.

Sect.

* *&c.* not in L. and M. or Roh. † tali *not in L. and M. or Roh.*

(1) See the Chapter on Villenage.

Sect. 543.

AND sometimes (Et ‡ ascun foits) *these verbes* dedi et concessi *shall enure by way of extinguishment of the thing given or granted; as if a tenant hold of his lord by certaine rent, and the lord grant by his deed to the tenant and his heires the rent, &c. this shall enure to the tenant by way of extinguishment, for by this grant the rent is extinct, &c.*

3 E. 3. 12. & 3 Ass. 7. And this grant of the rent shall enure by way of release.

(2 Roll. 405.)

☞ Sect. 544.

[307. b.]

IN the same manner it is where one hath a rent charge out of certaine land (En mesme le manner est lou * un ad un rent charge hors de certaine terre), *and hee grant to the tenant of the land the rent charge, &c. And the reason is, for that it appeareth, by the words of the grant, that the will of the donor is, that the tenant shall have the rent, &c. And inasmuch as hee cannot have or perceive any rent out of his owne land, therefore the deed shall be intended and taken for the most advantage and availe for the tenant that it may be taken, and this is by way of extinguishment.*

34 H. 6. fol. 41. (Ante, 280. a.) BUT if the grantee of the rent-charge granteth it to the tenant of the land and a stranger, it shall be extinguished but for the moietie: and so it is of a seigniorie.

Sect. 545.

ALSO, if I let land to a man for terme of yeares, and after I confirme his estate without putting more words in the deed, by this he hath no greater estate than for terme of yeares, as hee had before.

Sect. 546.

BUT if I release to him all my right which I have in the land without putting more words in the deed (sans plus † parols mitter en le fait), *hee hath an estate of freehold* (1). § *So thou maist understand* (*my sonne*) *divers great diversities betweene releases and confirmations.*

In

‡ Et—item, *L. and M. and Roh.*
* un—home, *L. and M. and Roh.*
† parols *not in L. and M. or Roh.*
§ *And* added in L. and M. and Roh.

(1) To give a confirmation this effect, in the case of a lease at common law, the

In these two Sections is the seventh case wherein a release and confirmation doe differ.

[308. a.]

☞ Sect. 547.

(Ant. 296.)

ALSO, if I being within age let land to another for terme of xx. yeares, and after he granteth the land to another for term of x. years, so hee granteth but parcell of his terme: in this case when I am of full age, if I release to the grantee of my lessee, &c. this release is void, because there is no privitie betweene him and me, &c. But if I confirme his estate, then this confirmation is good. But if my lessee grant all his estate to another, then my release made to the grantee is good and effectuall(1).

HERE are two things to be observed: First, that the lease of an enfant in this case is not void but voidable. Secondly, this is the eighth case put by *Littleton*, wherein the release and confirmation doe differ.

7 E. 4. 6. b. 18 E. 4. 2. 9 H. 7. 24. (Cro. Jac. 320. Sid. 42. 1 Roll. 729, 730.)

Sect. 548.

(Sid. 285.) (Mo. 30.)

ALSO, if a man grant a rent-charge issuing out of his land to another for terme of his life, and after hee confirmeth his estate in the said rent, to have and to hold to him in fee taile or in fee simple; this confirmation is void as to inlarge his estate, because hee that confirmeth hath not any reversion in the rent.

HERE the diversitie is apparent, betweene a rent newly created and a rent in *esse:* which needeth no explication. Only this is to be observed, that *Littleton* intendeth his deed of

(2 Roll. 415.) 21 E. 3. 47. 15 E. 4. 8. b. Pl. Com. 35. 8 H. 4. 19. (Ant. 148. a. Post. 317. a.)

confirmation

the lessee must have previously made an actual entry. But no entry is necessary for the purpose, if the lease is a bargain and sale under the statute.—[Note 270.]

(1) So Crusoe d. Blencowe v. Bugby, 3d Wilson, 234. Henry Blencowe and Mary his wife, seised in fee, demised to William Alder for 21 years, with a proviso for re-entry on default of payment of the rent, or breach of any of the covenants. Among other covenants, there was one from William Alder,—" that he should not assign, transfer, or set over, or otherwise do or " put away the indenture of demise, or the premises thereby demised, or any " part thereof, to any person or persons whomsoever, without the consent of " the said Henry Blencowe and Mary his wife, their heirs and assigns, in " writing, under his, her, or their hands and seals, first had and obtained " for doing thereof."—William Alder, without any licence, demised to John Bugby for 14 years.—It was held, that there was no *privity of contract* between the original lessor and Bugby, the under-lessee. So that it was an underlease, and not an assignment; and therefore no breach of the covenant. And see 1 Strange, 405. See also Gregson v. Harrison, 2 Term Rep. p. 425. Kinnersley v. Orpe and others, Dougl. 56.—[Note 271.]

confirmation not to containe any clause of distresse; for otherwise, as to the confirmation the deed is void, but the clause of distresse doth amount to a new grant, as in the Chapter of Rents hath beene said.

(Post. 366. a. Finch, 234.)

Sect. 549.

BUT if a man be seised in fee of rent service or rent charge, ☞ and he grant the rent to another for life, and the tenant attorneth, and after hee confirmeth the estate of the grantee in fee taile, or in fee simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent.* [308. b.]

HERE is the eighth case wherein the release and confirmation doth agree: and it is here to be observed, that to the grant of the estate for life, *Littleton* doth put an attornement, because it is requisite; but to the confirmation to the grantee of the rent to enlarge his estate, there is none necessary, and therefore he putteth none: but of this more shall be said in the Chapter of Attornement, *Sect.* 556, 557.

Sect. 550.

BUT in the case aforesaid where a man grants a rent charge to another for terme of life, if he will that the grantee should have an estate in taile, or in fee, it behoveth that the deed of grant of the rent charge for terme of life be surrendred or cancelled, and then to make a new deed of the like rent charge, to have and perceive to the grantee in tayle or in fee, &c. Ex paucis † plurima concipit ingenium.

Vid. Sect. 636. (Cro. Car. 399. Ant. 148. a. 225. b. 10 Rep. 66. Plowd. 237. a. Post. 338. 1 Vent. 297.)

"*SURRENDRED or cancelled* (1)." Note by cancellation of the deed the rent which lieth only in grant ceaseth (as here it appeareth) as well as by the surrender. And the reason wherefore (if the grantor make a new grant of the rent, and not enlarge it by way of confirmation, as *Littleton* must be intended) the deed should be surrendred or cancelled, is lest the grantor should be doubly charged, viz. with the old grant for life, and with the new grant in fee; or, as hath beene said, the grantor may grant to the grantee for life and his heires, that he and his heires shall distreine for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge, whereof you may see before in the Chapter of Rents.

CHAP.

* *the estate* added in L. and M.

† plurima concipit ingenium—dictis, &c. *L. and M.*

(1) See ant. 225. b. note 1.

[309. a.] ☞ CHAP. 10. Of Attornement. Sect. 551.

ATTORNEMENT is, as if there bee lord and tenant, and the lord will grant by his deed the services of his tenant to another for terme of yeares, or for terme of life, or in taile, or in fee, the tenant must attorne to the grantee in the life of the grantor, by force and vertue of the grant, or otherwise the grant is void. And attornement is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, * *&c. or I am* † *well content with the grant made to you; but the most common attornment is, to say,* ‡ *Sir, I attorne to you by force of the said grant, or I become your tenant, &c. or to deliver to the grantee* (ou ‖ liverer al grantee) *a pennie, or a halfe-pennie, or a farthing, by way of attornement.*

"ATTORNMENT" is an agreement of the tenant to the grant of the seigniorie, or of a rent, or of the donee in tayle, or tenant for life or yeeres, to a grant of a reversion or remainder made to another. It is an ancient word of art, and in the common law signifieth a torning or attorning from one to another. Wee use also *attornamentum* as a Latine word, and *attornare* to attorne. And so *Bracton* [*a*] useth it: *Item videndum est si dominus attornare possit alicui homagium et servitium tenentis sui contra voluntatem ipsius tenentis, et videtur quòd non.*

Bracton, lib. 2. fol. 81. Britt. f. 105. b. 176, et 177. Fleta, lib. 3. cap. 6. (1 Roll. Abr. 293.) (1 Rep. 68.)

[*a*] Bract. lib. 2. fo. 81. b.

Fleta. Britton, ubi supra.

And the reason why an attornment is requisite, is yeelded in old bookes to be, *Si dominus attornare possit servitium tenentis contra voluntatem tenentis, tale sequeretur inconveniens, quod possit eum subjugare capitali inimico suo, et per quod teneretur sacramentum fidelitatis facere ei qui eum damnificare intenderet* (1).

Bracton, lib. 2. fo. 81. b. Britton, ubi supra.

" *The*

* *&c.* not in L. and M. or Roh.
† *well* not in L. and M. or Roh.
‡ *&c.* added in L. and M. and Roh.
‖ liverer—deliverer, *L. and M. and Roh.*

(1) Sir Martin Wright and many other writers have laid it down as a general rule, that by the old feudal law the feudatory could not alien the feud without the consent of the lord; nor the lord alien or transfer his seigniory without the consent of his feudatory: for the obligations of the lord and his feudatory being reciprocal, the feudatory was as much interested in the conduct and ability of the lord, as the lord in the conduct and ability of his feudatory; and that as the lord could not alien, so neither could he exchange, mortgage, or otherwise dispose of his seigniory, without the consent of his vassal. See Sir Martin Wright's Introduction to the Law of Tenures, 30, 31.—It is certain that

Vid. Litt. fol. 128. 11 H. 7. 19. Lib. 1. fol. 104. 105. Shelleye's case.

40 Ass. 19. 34 H. 6. 7. 20 H. 6. 7. (Doc. and Stud. 86. a.)

"*The tenant must attorne to the grantee in the life of the grantor, &c.*" And so must he also in the life of the grantee: and this is understood of a grant by deed. And the reason hereof is, for that every grant must take effect as to the substance thereof in the life both of the grantor and the grantee. And in this case if the grantor dieth before attornement, the seigniorie, rent, reversion, or remainder descend to his heire; and therefore after his decease the attornement commeth too late: so likewise if the grantee (9 Rep. 84. Sect. 564.)

dieth

that this doctrine formerly prevailed in England. But, in general, it does not appear to have prevailed (at least in an equal extent) in other countries. It seems there to have been admitted, that the lord might transfer the *whole fee*, without the consent of the vassal, and that the vassal immediately, by such a transfer, became the tenant of the new lord.—It seems also to have been admitted, that the lord might transfer to another the beneficial fruits of the tenure, without the consent of the vassal. But it was a great question whether the lord could transfer his vassal to another, without the vassal's consent, unless by transferring the *whole fee*.—See Basnage *Commentaire de la Coutume de Normandie, des Fiefs et Droits feodaux*, art. 204.—This necessity, which subsisted in our old law, that the tenant should consent to the alienation of the lord, gave rise to the doctrine of attornment.—At the common law, attornment signified only the consent of the tenant to the grant of the seigniory; or, in other words, his consent to become the tenant of the new lord.—The necessity of attornment was, in some measure, avoided by the statute of uses; as by that statute the possession was immediately executed to the use;—and by the statute of wills, by which the legal estate is immediately vested in the devisee.—Yet attornment continued after this to be necessary in many cases. But both the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 Ann. c. 16. and 11 Geo. 2. c. 19. By the former of these statutes, sect. 9. it was enacted, "That all grants and conveyances of any manors or rents, or of the reversion or remainder of any messuages or lands, should be good without attornment of the tenants; provided that no such tenant should be damaged by payment of rent to any such grantor or conusor, or by breach of any condition for non-payment of rent before notice given him of such grant by the conusee or grantee." By the latter statute it was enacted, "That the attornments of tenants to strangers claiming title to the estate of their landlords, should be absolutely null and void to all intents and purposes whatsoever, and that the possession of their respective landlord or landlords, lessor or lessors, should not be deemed or construed to be any wise changed, altered, or affected, by any such attornment or attornments; provided that nothing therein contained should extend to vacate or affect any attornment made pursuant to, and in consequence of, some judgment at law, or decree, or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee, after the mortgage is become forfeited."—Till the passing of these statutes, the doctrine of attornment was one of the most copious and abstruse points of the law. But these statutes having made attornment both unnecessary and inoperative, the learning upon it is so useless, that Mr. Viner has inserted nothing respecting it in his voluminous compilation but an extract from lord chief baron Gilbert.—Mr. Bacon has not the article Attornment in his work; and the learning and industry of lord chief baron Comyn have furnished him with little material upon it, that is not to be found either in Littleton or Sir Edward Coke.—[Note 272.]

[309. b.] dieth before attornement, an attornement to the heire ☞ is void, for nothing descended to him: and if he should take, he should take it as a purchasor, where the heires were added but as words of limitation of the estate, and not to take as purchasors.

But if the grant were by fine, then albeit the conusor or conusee dieth, yet the grant is good. For by fine levied the state doth passe to the conusee and his heires; and the attornment to the conusee or his heires at any time to make privitie to distraine is sufficient. But all this is to be taken as *Littleton* understood it, viz. of such grants as have their operation by the common law. For since *Littleton* wrote, if a fine be levied of a seigniorie, &c. to another to the use of a third person and his heires, he and his heires shall distraine without any attornment, because he is in by the statute of 27 *H.* 8. *cap.* 10, by transferring of the state to the use, and so he is in by act in law.

34 H. 6. 7. 20 H. 6. 7. Bracton, lib. 2. fol. 81, 82. acc. Lib. 6. fol. 68. Sir Moyle Finche's case.

And so it is, and for the same cause, if a man at this day by deed indented and inrolled according to the statute, bargaineth and selleth a seigniorie, &c. to another, the seigniorie shall passe to him without any attornement; and so it is of a rent, a reversion, and a remainder. So as the law is much changed, and the ancient privilege of tenants, donees, and lessees much altered concerning attornement since *Littleton* wrote.

(2 Cro. 193. Post. 321. 6 Rep. 68.) 27 H. 8. cap. 16. Vide Sect. 584.

But if the conusee of a fine before any attornement by deed indented and inrolled, bargaineth and selleth the seigniorie to another, the bargainee shall not distraine, because the bargainor could not distraine. *Et sic de similibus*; for *nemo potest plus juris ad alium transferre quàm ipse habet. Vide Sect.* 149, where upon a recovery, the recoveror shall distraine and avow without attornement.

(Ant. 104. b. Post. 321. b. 5 Rep. 113.) Lib. 6. ubi supra. Vide Sect. 149.

A grant to the king, or by the king to another, is good without attornement, by his prerogative.

49 E. 3. 4. 34 H. 6. 8. 6 E. 4. 13.

"*Attornement is no other in effect, &c.*" It is to be understood that there be two kinde of attornements, viz. an attornement in deed or expresse, and an attornement in law or implicite. Of attornement expresse or in deed *Littleton* speaketh here, and of attornement in law he speaketh after in this chapter. And to both these kinds of attornements there is an incident inseparable, that is, that the tenant hath notice of the grant; for (an attornement being an agreement or consent to the grant, &c.) he cannot agree or consent to that which he knoweth not. And the usuall pleading is, to which grant the tenant attorned. And therefore if a bayly of a mannor who used to receive the rents of the tenants, purchase the mannor, and the tenants having no notice of the purchase continue the payment of the rents to him, this is no attornement. So if the lord levie a fine of the seigniorie, and by fine take backe an estate in fee, the tenant continueth the payment of the rent to the first conusor without notice of the fines, this is no attornement. But it is to be knowne, that there be two kinde of notices, viz. a notice in deed or expresse, whereof *Littleton* here speaketh, when he saith, that the tenant agreeth to the grant, and a notice in law or implied, whereof *Littleton* hereafter speaketh in this chapter.

(Post. 314. b. 1 Roll. Ab. 294. Sect. 564. 1 Rep. Alton Wood's case. 8 Rep. 89. 1 Roll. Rep. 301. 1 Cro. 441. Jones, 376.) Lib. 2. fol. 67. b. Tooker's case. 13 Eliz. Dier, 302. Tooker's case, ubi supra. Lib. 2. Tooker's case, ubi supra.

"*Of the grant made by his lord.*" Here is to be seene when the thing granted is altered, what becommeth of the attornement.

If

If there be lord, mesne and tenant, and the mesne grant over his mesnaltie by deed, the lord releaseth to the tenant, whereby the mesnaltie is extinct, and there is a rent by surplusage, an attornement to the grant of this rent secke is good, although the qualitie of that part of the rent is altered, because it is altered by act in law.

If a reversion of two acres be granted by deed, and the lessor before attornement levie a fine of one of them, and the tenant attorne to the grantee by deed, this is good for the other acre.

[a] 18 E. 3. tit. Variance, 63. 22 E. 3. 18. Tooker's case, ubi supra. (Post. 314.)

[a] If the reversion be granted of three acres, and the lessee agree to the said grant for one acre, this is good for all three; and so it is of an attornement in law, if the reversion of three acres be granted, and the lessee surrender one of the acres to the grantee, this attornement shall be good for the whole reversion of the three acres according to the grant.

"*The same tenant do agree.*" Hereafter in this chapter *Littleton* doth teach what manner of tenant shall attorne.

"*Agree by parol, &c.*" And so hee may, and more safely by his deed in writing.

39 H. 6. 3. Tooker's case, ubi supra.

"*As to say to the grantee, &c.*" Here is to be seene to what manner of grantees the attornement is good. Regularly the attornement must be according to the grant, either expressly or impliedly. Of the first *Littleton* hath here spoken.

(Post. 313. a. Ant. 52. a. 297. b. 296. a.)

☞ Impliedly, as if a reversion be granted to two by deed, and the lessee attorne to one of them according to the grant, this attornement is good, but not to vest the reversion only in him to whom attornement is made; but it shall enure to both the grantees, for that is according to the grant, and for that it cannot vest the reversion only in him to whom the attornement is made. And so it is if one grantee dieth, the attornement to the survivor is good. [310. a.]

Tooker's case, ubi supra. 11 H. 7. 12.

20 H. 6. 7. (Ant. 298. a.)

If the lord grant by deed his seigniorie to *A.* for life, the remainder to *B.* in fee, *A.* dieth, and then the tenant attorne to *B.* this attornement is void, because it is not according to the grant; for then *B.* should have a remainder without any particular estate.

Tooker's case, ubi supra. Pl. Com. 187. 483. (Ant. 187. b.)

If a reversion be granted to a man and a woman, they are to have moities in law; but if they entermarrie and then attornement is had, they shall have no moities (and yet by the purport of the grant they are to have moities), because it is by act in law.

2 R. 2. tit. Attornement, 8. Lib. 4. f. 61. Hemling's case, (Mo. 91. con. 1 Leo. 58.)

If a feme grant a reversion to a man in fee, and marry with the grantee, the lessee attorne to the husband, this is a good attornement in law to the husband.

If a reversion be granted by deed to the use of *I. S.* and the lessee hearing the deed read, or having notice of the contents thereof attorne to *cesty que use*, this is an implied attornement to the grantee.

Temps E. 1. Attorn. 22. 18 E. 4. 7. (Ant. 212. b. 312. b. 6 Rep. 63. 5 Rep. Ford's case. 1 Roll. Abr. 412. 3 Leo. 17. 4 Leo. 23.)

If a reversion be granted for life, the remainder in taile, the remainder in fee, the attornement to the grantee for life shall enure to them in the remainder, to vest the remainder in them.

And in those cases if the tenant should say, that I doe attorne to the grantee for life, but that it shall not benefit any of them in remainder

remainder after his death, yet the attornement is good to them all; for having attorned to the tenant for life, the law (which he cannot controll) doth vest all the remainder. And of this more shall be said hereafter in this chapter.

Littleton here putteth five examples of an expresse attornement, but of them the last is the best, because the care is not only a witnesse of the words, but the eye of the delivery of the penny, &c. and so there is *dictum et factum*. And any other words which import an agreement or assent to the grant, doe amount to an attornement. And albeit these five expresse attornements be all set down by *Littleton*, to be made to the person of the grantee [*b*], yet an attornement in the absence of the grantee is sufficient; for if he doth agree to the grant either in his presence or in his absence, it is sufficient.

[*b*] Lib. 2. fol. 68, 69. Tooker's case. 28 H. 8. tit. Attornement, Br. 40. (10 Rep. 52. Cro. Car. 440. 1 Roll. Abr. 300. Dyer, 298. a.)

Sect. 552.

ALSO, if the lord grant the service of his tenant to one man, and after by his deed bearing a later date hee grant the same services to another, and the tenant attorne to the second grantee, now the said grantee hath the services; and albeit afterwards the tenant will attorne to the first grantee, this is clearely void, &c.*

HERE it is to be observed, that *Littleton* expresseth not what estate is granted, and very materially; for if the former grant were in fee, and the latter grant were for life, and the tenant doth first attorne to the second grantee, he cannot after attorne to the first grantee to make the fee simple passe, for that should not be according to the grant; but in that case the attornement to the first is countermanded. And so it is if a reversion expectant upon an estate for life be granted to another in fee, and after the grantor before attornement confirme the estate of the lessee in taile, the attornement to the grantee for the fee simple is void. (Cro. Car. 284. 1 Roll. Abr. 500. Ant. 296. a.)

In the same manner, if a reversion upon an estate for yeeres be granted in fee, and the lessor confirme the estate of the lessee for life, he cannot afterwards attorne.

[310. b.] ☞ If a feme sole maketh a lease for life or yeares, reserving a rent, and granteth the reversion in fee, and taketh husband, this is a countermand of the attornement. 11 H. 7. 19. 2 R. 2. ubi supra.

Where our author putteth his case of the whole reversion, if two coparceners bee of a reversion, and one of them granteth her moity by fine, the conusee shall have a *quid juris clamat* for the moitie. P. 3 Eliz. Bendloes. Hemling's case, ubi supra. (1 Roll. Abr. 299.)

If in the case that our author here putteth of severall grantees, if the tenant attorne to both of them, the attornement is void, because it is not according to the grant. If a reversion be granted for 11 H. 7. 12.

* *said—second*, L. and M. and Roh.

for life, and after it is granted to the same grantee for yeares, and the lessee attorneth to both grants, it is voide for the incertaintie; *à multò fortiori*, if the lord by one deed grant his seigniorie to *I.* bishop of *London* and to his heires, and by another deed to *I.* bishop of *London* and to his successors, and the tenant attorne to both grants, the attornement is void; for albeit the grantee be but one, yet he hath severall capacities, and the grants are severall, and the attornement is not according to either of the grants.

(Ant. 190. a. Mo. 84.)

But if *A.* grant the reversion of *Black-Acre* or *White-Acre*, and the lessee attorne to the grant, and after the grantee maketh his election, this attornement is good; for albeit the state was incertaine, yet he attorned to the grant in such sort as it was made: and so note a diversity between one grant and severall grants, and observe in this case an attornement good in expectation, and yet nothing passed at the time of the attornement but by the election subsequent.

Sect. 553.

ALSO, if a man be seised of a mannor, which mannor is parcell in demesne, and parcell in service, if hee will alien this mannor to another, it behooveth that by force of the alienation, all the tenants which hold of the alienor as of his mannor doe attorne to the alienee, or otherwise the services remaine continually in the alienor, saving the tenants at will†; for it needeth not that tenants at will doe attorne upon such alienation, &c.* (car il ne besoigne que tenants a volunt atturnent sur tiel alienation, &c. ‡)

Temps E. 2. Attornement. 48 E. 3. 15. (Sid. 310. 312. 373. Ant. 263. a. Post. 341. a. 3 Rep. 29. 1 Leo. 208.)

HERE it is to bee observed, that when a man maketh a feoffment of a mannor, the services doe not passe, but remaine in the feoffor untill the freeholders doe attorne; and when they doe attorne, the attornement shall have relation to some purpose, and not to other. For albeit the attornement bee made many yeares after the feoffment, yet it shall have relation to make it passe out of the feoffor *ab initio* even by the liverie upon the feoffment, but not to charge the tenants with any meane arrerages, or for waste in the meane time, or the like.

(2 Roll. Abr. 394, 395. Plo. 482. b. 483. a. Ant. 270. b. 279. b.) Pasch. 5 E. 3. coram rege. Sussex in Thesaur.

If a reversion of land bee granted to an alien by deed, and before attornement the alien is made denizen, and then the attornement is made, the king, upon office found, shall have the land: for as to the estate betweene the parties, it passeth by the deed *ab initio* (1).

If

* *&c.* added in L. and M. and Roh.

† *&c.* added in L. and M. and Roh.

‡ pur ceo que mesmes les terres et tenements que ils teignont a volunte passont al aliene per force de tiel alienation, *added in L. and M. and Roh. and in MSS.*

(1) Here the fee is supposed to vest immediately in the grantee: but when an estate is granted upon a condition precedent, the estate does not vest, even

If a man plead a feoffment of a mannor, hee need not plead an attornement of the tenants; but (if it be materiall) it must be denied or pleaded of the other side.

And upon consideration had of all the bookes touching this point, whether the services of the freeholders doe passe wherein there have been three severall opinions, viz. some have holden that the services doe passe in the right by the livery as parcell of the mannor, but not to avow without attornement, as in the case of the fine. And others have holden, that they both passe in right and in possession to distreine without attornement. And the third opinion is, that in this case the said services passe neither in possession nor in right, but untill attornement [311. a.] ☞ remaine continually in the alienor, as *Littleton* here holdeth. And so it was resolved *Pasch.* 15 *Eliz.* betweene *Brasbitch* and *Barwell*, according to the opinion of our author. And I never yet knew any of *Littleton's* cases (albeit I have knowne many of them) to be brought in question, but in the end the judges concurred with our author.

21 E. 3. 47. 34 E. 3. Double Plea, 24. 42 Ass. p. 6. 43 Ass. p. 20. 30 E. 3. 29 E. 3. 26 E. 3. Per quæ Servitia, 21. 8 H. 4. 1. b. 12 H. 4. 20 H. 6. 7. 35 H. 6. 9 E. 4. 33. 13 H. 7. 14. a. 1 H. 7. 31. 4 E. 6. Attornement, Br. 30. Vid. Hill. 14 Eliz. Rot. 508. in Communi Banco.

And where our author speaketh of the attornement of the freeholders, if the lord make a lease for yeares or for life of a mannor, and the freeholders attorne to the lessee, if after the reversion of the mannor be granted, the attornement of the lessee for yeares or life shall binde the freeholders: for by their former attornement they have put the attornement into the mouth of the lessee.

9 E. 2. tit. Attornement, 18. b. 19 E. 2. ibid. 19. 21 E. 3. 47. 5 H. 5. 12. b. Vid. Lit. Sect. 549 & 556.

"*Saving the tenants at will, &c.*" Here is implied tenant at will or by copie of court roll according to the custom of the mannor, so as the freehold and inheritance both of lands in the hands of tenant at will by the common law or by custome shall passe both in right and in possession without any attornement (1).

Sect. 554.

ALSO, if there bee lord and tenant, and the tenant letteth the land to another for term of life, or giveth the land in taile saving the reversion to himselfe, &c. if the lord in such case grant his seigniory to another, it behoveth that hee in the reversion attorne to the grantee, and not the tenant for terme of life, or the tenant in taile, because that in this case he in the reversion is tenant to the lord, and not the tenant for terme of life, nor the tenant in taile.

FOR

even by way of relation, till the performance of the condition. Pl. 482. b.—[Note 273.]

(1) For the difference between seisin and attornment, See Brediman's case, 6 Rep. 56. b.

(8 Rep. 42.) FOR it is a maxime in law, that no man shall attorne to any grant of any seigniorie, rent service, reversion or remainder, but he that is immediately privie to the grantor; and because in this case there is no privitie betweene the lord and the tenant for life, or donee in taile, but only betweene the lord and him in the reversion; for in this case the attornement of him in the reversion only is good.

"*Saving the reversion to himselfe, &c.*" That is to say, without limitation of any remainder over; and this is but to make his opinion plaine as to the point that he putteth it.

Sect. 555.

IN the same manner is it where there are lord, mesne and tenant, * *if the lord will grant the services of the mesne, albeit hee maketh no mention in his grant of the mesne, yet the mesne ought to attorne,* † *&c. and not the tenant peravaile, &c.* ☞ *for that the mesne is tenant unto him, &c.* [311. b.]

This standeth upon the same reason that the next precedent case did.

Sect. 556.

BUT otherwise it is where certaine land is charged with a rent-charge or rent secke; for in such case if he which hath the rent-charge grant this to another, it behooveth that the tenant of the freehold attorn to the grantee, for that the freehold is charged with the rent, &c. And in a rent-charge, no avowrie ought to be made upon any person for the distresse taken, &c. but hee shall avow the prisel to bee good and rightfull, as in lands or tenements so charged with his distresse, &c.

(6 Rep. 59. a.) HERE is to be observed a diversitie betweene a rent service and a rent charge, or a rent secke; for as to the rent service, no man (as hath beene said) can attorne, but he that is
21 H. 6. 9. b. privie; so in case of a rent charge, it behooveth that the tenant of the freehold doth attorne to the grantee, without respect of
(2 Rep. 67.) any privitie. And therefore the disseisor onely, in the case of a grant of a rent charge, shall attorne, because he is (as *Littleton* saith) tenant of the freehold; but in case of a grant of a rent service, the attornement of a disseisee sufficeth.

(6 Rep. 39. a.) If there be lord and tenant by homage, fealtie, and rent, the tenant is disseised, the lord granteth the rent to another, the disseisee attorneth, this is void: but if he had granted over his whole seigniorie, the attornment had been good; and the reason of

* *if—and,* L. and M. and Roh. † *&c.* not in L. and M. or Roh.

of this diversitie is here given by our author, for that when the rent was granted onely, it passed as a rent secke, and consequently the disseisor being terre-tenant, must attorne. But when the seigniorie is granted, then the disseisee in respect of the privitie may attorne.

" *It behoveth that the tenant of the freehold, &c.*" And therefore if the tenant of the land charged with a rent charge or a rent secke make a lease for life, and he that hath the rent charge or rent secke granteth it over, the tenant for life shall attorne, for he is tenant of the freehold, according to the expresse saying of our author, and (as hath beene said) there needeth no privitie.

And it was holden by *Dyer* chiefe justice of the court of common pleas, and *Mounson* justice, in the argument of *Bracebridge*'s case abovesaid, and not denied, that if he that hath a rent charge granteth it over for life, and the tenant of the land attorne thereunto, and after he granteth the reversion of the rent charge, that the grantee for life may attorne alone; and that these words of *Littleton* are to be understood when a rent charge or rent secke is granted in possession; and therewith agreeth 46 *E.* 3. where it appeareth, that the *quid juris clamat*, in that case, did lie against the grantee for life. (1 Leon. 265. a.)

A man maketh a lease for life, and after grants to *A.* a rent charge out of the reversion, *A.* granteth the rent over, he in the reversion must attorne, and not the tenant of the freehold, for that the freehold is not charged with the rent; for a release made to him by the grantee doth not extinguish the rent. And *Littleton* is to be understood, that the tenant of the freehold must atturne when the freehold is charged. 46 E. 3. 27. 2 H. 6. 9. Vi. Lit. Sect. 549 & 553.

[312. a.] ☞ *And in a rent-charge no avowrie ought to be made upon any person, &c.*" This is the reason that *Littleton* giveth of the difference betweene the rent service and the rent charge. Now it may bee said, that this reason is taken away by the statute of 21 *H.* 8, for by that statute the lord needs not avow for any rent or service upon any person in certaine: and then by *Littleton*'s reason there needeth no privitie to the attornement of a seigniorie; for (say they) *cessante causâ vel ratione legis, cessat lex*, as at the common law no aid was grantable of a stranger to an avowrie; because the avowrie was made of a certaine person: but now the avowrie being made by the said act of 21 *H.* 8, upon no person, therefore the reason of the law being changed, the law itselfe is also changed; and consequently in an avowrie according to that act, aid shall be granted of any man, and the like in many other cases; which case is granted to be good law: but albeit the lord (as hath beene said) may take benefit of the statute, yet may he avow still at his election upon the person of his tenant. And albeit the manner of the avowrie be altered, yet the privitie (which is the true cause of the said difference) remaineth still as to an attornement. 21 H. 8. cap. 19. Vide Sect. 454. 27 H. 8. 4. b. (Doc. Plac. 25, 26.)

" *Rent charge, &c.*" It is to be observed, to what kinde of inheritances being granted, an attornement is requisite. And in this chapter *Littleton* speaketh of five. First, of a seigniorie, rent service, &c. Secondly, of a rent charge. Thirdly, of a rent secke. And hereafter in this chapter of two more, viz. of a reversion and remainder of lands; for the tenant shall never need 21 H. 7. 1. (1 Roll. Abr. 292, 293.)

1 H. 5. 1.
37 Ass. 14.
36 Ass. pl. 3.
31 H. 8. tit. Attornement, Br. 59.
(Ant. 303. b.)

need to attorne but where there is tenure, attendance, remainder, or payment of a rent out of land. And therefore if an annuitie, common of pasture, common of estovers, or the like, be granted for life or yeares, &c. the reversion may be granted without any attornement; and albeit sometimes in some of these cases, or the like, an attornement be pleaded, yet it is surplusage, and more than needeth, because in none of them there is any tenure, attendance, remainder, or payment out of land.

Sect. 557.

ALSO, if there be lord and tenant, and the tenant letteth his tenement to another for terme of life, the remainder to another in fee, and after the lord grant the services to another, &c. and the tenant for life attorne, this is good enough, for that the tenant for life is tenant in this case to the lord, &c. and he in the remainder cannot be said to be tenant to the lord, as to this intent, untill after the death of the tenant for life: yet in this case if hee in the remainder dieth without heire, the lord shall have the remainder by way of escheat, because that albeit the lord in such case ought to avow upon the tenant for life (pur ceo que coment que le seignior en tiel cas* covient d'avower sur le tenant a terme de vie), *&c. yet the whole entire tenement, as to all the estates of the freehold or of fee simple, or otherwise, &c. in such case are together holden of the lord, &c.*

☞ † *But not to make avowrie upon them all together.* M. 3 H. 6: [312. b.]

15 E. 3. Attorn. 10.
12 E. 4. 4.
18 H. 6. 2.
9 E. 2. tit. Attorn. 18.
18 E. 4. 7.
Temps E. 1. Attorn. 22.
Vide Sect. 580.
(3 Rep. 66.
Ant. 310. a.
Post. 320. b.)

"*AND the tenant for life attorne, &c.*" For he that is (as hath beene said) privie and immediately tenant to the lord must attorne; and that is in this case the tenant for life: and so of the other side if a seigniorie be granted to one for life, the remainder to another in fee, the attornement to the tenant for life is an attornement to the remainder also; unlesse it be that (A) they in the remainder ought to have acquitall, or other privilege (whereof they should be prejudiced); and then albeit an attornement be had to the tenant for life, and he acknowledge the acquitall, &c. yet after his decease, he in the remainder shall not distreyne untill he acknowledge the acquitall, notwithstanding the attornement (B) of the tenant for life.

(9 Rep. 134. b.
Ant. 280. a.)

"*Shall have the remainder by way of escheat.*" For the remainder is holden of the lord, but not immediately holden; and in this case, by the escheat of the remainder the seigniorie is extinct; for the fee simple of the seigniorie being extinct, there cannot remaine a particular estate for life thereof, in respect of the

* covient d'avower—d'avowera, *L. and M. and Roh.*

† This paragraph not in L. and M. or Roh.

(A) *Here it seems the text should be understood as if lord Coke had said* "unless it be that they who attorned, &c." *instead of* "unless it be that they in the remainder, &c." *See Mr. Ritso's Intr. p.* 120

(B) *Here* "of" *seems printed by mistake instead of* "to."

the tenure and attendance over; and of this opinion is *Littleton* [a] himselfe in our bookes. But otherwise it is of a rent charge in fee; for if that be granted for life, and after he in the reversion purchase the land, so as the reversion of the rent charge is extinct, yet the grantee for life shall enjoy the rent during his life, for there is no tenure or attendance in this case.

3 H. 6. 1. Old Tenures, 107.
[a] 15 E. 4. 13. a. (1 Leon. 225.)

"*But not to make avowrie.*" This is added to *Littleton*, but it is consonant to law, and the authoritie truly cited.

M. 3 H. 6. 1.

Sect. 558.

ALSO, if there be lord and tenant, and the tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh husband, and after the lord grant the services, &c. to the husband and his heires; in this case the service is put in suspence during the coverture. But if the wife die living the husband, the husband and his heires shall have the rent of them in the remainder, &c. And in this case there needeth no attornement by parol, &c. for that the husband which ought to attorne accepted the deed of grant of the services, &c. the which acceptance is an attornement in the law.

"*THE which acceptance is an attornment in the law, &c.*" *Littleton* having spoken (as hath beene said) of attornements in deed, or expresse, now cometh to speake of attornements in law, or implied; and having before set downe five expresse attornements in deed, doth in this chapter enumerate seven attornements in law. Here it is to be understood, that the expresse attornement of the husband will binde the wife after the

[313. a.] ☞ coverture, and in as much as this acceptance of the grant is an attornement in law, without a word of attornement the seigniorie shall passe. And this is the first example that *Littleton* putteth of an attornement in law, which amounteth to an expresse attornement, for that it is an agreement to the grant.

3 E. 3. 42. 15 E. 3. Attornement, 11. (6 Rep. 63. 9 Rep. 85. 2 Roll. Abr. 424.) 44 E. 3. tit. Fines, 37. 11 E. 4. 4. (1 Roll. Abr. 303.) (Ant. 280. a. 301. 310.)

If the lord grant his seigniorie to the tenant of the land, and to a stranger, and the tenant accept the deed, this acceptance is a good attornement to extinguish the one moitie, and to vest the other moitie in the grantee, as hath beene said.

Sect. 559.

IN the same manner is it, if there be lord and tenant, and the tenant taketh wife, and after the lord grant (A) *his services to the wife and* (B) *his heires* (et puis le seignior granta les services a la feme et ses heires), *and the husband accepteth the deed; in this case after the death of the husband the wife and her heires shall have the services, &c. for by the acceptance*

(A) "the services," *and not* "his services," *would be the literal translation of the original text. See Mr. Ritso's Intr. p.* 112.

(B) *Here* "his" *seems printed by mistake instead of* "her." *See Mr. Ritso's Intr. p.* 112.

acceptance of the deed by the husband (per le acceptance ¶ del fait per le baron), *this is a good attornement, &c. albeit during the coverture the services shall be put in suspence, &c.*

(1 Roll. Abr. 938, 939, 940.) HERE is the second example that *Littleton* putteth of an attornement in law, and standeth upon the former reason.

(Ant. 148. b.) (4 Rep. 52.) (Cro. Car. 101.) "*Shall be put in suspense.*" Suspence commeth of *suspendeo*, and in legall understanding is taken when a seigniorie, rent, profit apprender, &c. by reason of unitie of possession of the seigniorie, rent, &c. and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked. And they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perdurable an estate in the one as in the other.

Sect. 560.

*ALSO, if there be lord and tenant, and the tenant grant the tenements to a man for terme of his life, the remainder to another in fee, if the lord grant the services to the tenant for life * in fee, in this case the tenant for terme of life hath a fee in the services; but the services are put in suspence during his life. But the heires of the tenant for life shall have the services after his decease* (Mes les heires ⸸ le tenant a terme de vie averont les services apres † son decease), *&c.* ‡ *And in this case there needeth no attornement* (Et en cest cas il ne besoigne § attornement); *for by the acceptance of the deed by him which ought to attorne, &c. this is an attornement of it selfe* ‖.

HERE is the third case that *Littleton* putteth of an attornement in law. And it is to bee observed, that albeit a grant, as hath beene said, may enure by way of release, and a release to the tenant for life doth worke an absolute extinguishment, whereof hee in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties as ☞ here it should; for if by construction it should enure to a release, the heires of the tenant for life should be disherited of the rent; and therefore *Littleton* here saith, that the heires of the grantee shall have the seigniorie after his death. And here is an attornement in law to a grant suspended that cannot take effect in the grantee so long as he liveth, but shall take effect in his heires by descent; for the inheritance of the seigniorie was in the tenant for life, and the suspension onely during his life.

(Siderf. 25.) [313. b.]

Sect.

¶ del fait per *not in L. and M. or Roh.*

* *in fee* not in L. and M. or Roh.

⸸ le tenant a terme de vie, *not in L. and M. or Roh.*

† son *not in L. and M. or Roh.*

‡ *&c.* not in L. and M. or Roh.

§ ascun *added in L. and M. and Roh.*

‖ *&c.* added in L. and M. and Roh.

Sect. 561.

(Ant. 279.

BUT where the tenant hath as great and as high estate in the tenements as the lord hath in the seigniory; in such case, if the lord grant the services to the tenant in fee, this shall enure by way of extinguishment. Causa patet.

HERE *Littleton* intendeth not onely as great and high an estate, but as perdurable also, as hath beene said; for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate, as shall make an extinguishment.

Sect. 562.

ALSO, if there bee lord and tenant, and the tenant maketh a lease to a man for terme of his life, saving the reversion to himselfe, if the lord grant the seigniory to tenant for life in fee; in this case it behoveth that he in the reversion must attorne to the tenant for life by force of this grant, or otherwise the grant is voide, for that he in the reversion is tenant to the lord, &c.

* *Yet hee shall not hold of the tenant for life during his life.* Causa patet, &c.

HERE in this case he in the reversion of the tenancy must attorne, because he is the tenant to the lord; and yet the seigniorie shall be suspended during the life of the grantee, because hee hath an estate for life in the tenancie, but his heires shall enjoy the seigniorie by discent.

[314. a.] "*Yet hee shall not* ☞ *hold, &c.*" This is added, and not in the originall, and is against law, and therefore to be rejected.

"*Tenant to the lord, &c.*" Here is to bee understood a diversity when the whole estate in the seigniory is suspended, and when but part of the estate in the seigniory is suspended. And in this case the seigniorie is suspended but for terme of life; [a] and therefore as to all things concerning the right it hath his being; but as to the possession during the particular estate the grantee shall take no benefit of it; therefore during that time he shall have no rent, service, wardship, releefe, herriot, or the like, because these belong to the possession: but if the tenant dieth without heire, the tenancie shall escheat unto the grantee, for that is in the right; and yet when the seigniorie is revived by the death of the

[a] 34 Ass. p. 15.

16 E. 3. tit. Voucher, 88.

* This paragraph not in L. and M. or Roh.

the tenant, there shall be wardship: as if the tenant marry with the seignioresse and dieth, his heire within age, the wife shall have the wardship of the heire. Also in the case that *Littleton* here putteth, albeit the seigniorie be suspended but for life, yet some hold that he cannot grant it over, because the grantee tooke it suspended, and it was never *in esse* in him. But if the tenant make a lease for yeares or for life to the lord, there the lord may grant it over, because the seigniorie was *in esse* in him, and the fee simple of the seigniorie is not suspended. But if the lord disseise the tenant, or the tenant enfeoffe the lord upon condition, there the whole estate in the seigniorie is suspended, and therefore he cannot during the suspension take benefit of any escheat or grant over his seigniorie.

5 E. 3. Twong's case. (Ant. 298. b.)

Sect. 563.

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by xx. manner of services, and the lord grant his seigniory to another; if the tenant pay in deed any parcell of any of the services to the grantee, this is a good attornement, of and for all the services, albeit the intent of the tenant was to attorne but for this parcell, for that the seigniorie is intire (pur ceo que le seigniory est † entier), *although there bee divers manner of services which the tenant ought to doe, &c.*

4 E. 3. 55. Malman's case. 29 E. 3. 23. 5 E. 4. 2. 22 Ass. 66. 7 H. 4. 10. 35 H. 6. 8. per Prisott.

HERE it appeareth that an attornement being made for parcell, is good for the whole; for seeing hee hath attorned for part, it cannot bee void for that, and good it cannot be unlesse it be for the whole: but of this sufficient hath beene said before in this chapter. (Ant. 309. b.)

40 E. 3. 34. (4 Rep. 8.)

"*Pay any parcell of the services.*" Here is the fourth example of an attornement in law; for payment of any parcell of the services is an agreement in law to the grant.

(Siderf. 283. 4 Rep. 85. a.)

"*Albeit the intent of the tenant was to attorne, &c.*" ☞ *Quia intentio inservire debet legibus, non leges intentioni.* And yet as farre as it may stand with the rule of law, it is honourable for all judges to judge according to the intention of the parties, and so they ought to doe. And of this somewhat in this chapter hath beene said before. [314. b.]

20 H. 6. (1 Rep. 101. b. 104. a. Doctor & Student, 52. a. 1 Roll. Abr. 419. Cro. Car. 1. 401. Dyer, 4. a. Post. 367. a. Ant. 20. 47. b. 48. b. 2 Rep. 23. 4 Rep. 81. a. Ant. 42. 213. a. 217. b. 222. b. 229. a. 1 Roll. Abr. 303.)

Sect.

† forsque un et *added in L. and M. and Roh.*

Sect. 564.

ALSO, if there bee lord and tenant, and the tenant holdeth of the lord by many kinde of services, and the lord grant the services to another by fine; if the grantee sue a scire facias *out of the same fine for any parcell of the services, and hath judgment to recover, this judgment is a good attornement in law for all the services* *.

HERE is to be observed, that this judgment in the *scire facias* (which is no more but that the demandant shall have execution, &c.) is a good attornement, albeit it is presumed that *judicium redditur in invitum*, and that an attornement in law of any part is good for the whole. And this is the fifth example that *Littleton* putteth of an attornment in law.

48 E. 3. 24. 3 E. 3. Quid juris clamat. 4 E. 3. 28, 29. 37 H. 6. 14. per Moyle. 17 E. 3. 29. (Ant. 248. b. 6 Rep. 64. b.)

Note, that in case of a deede nothing passeth before attornement, as hath beene said. In the case of the fine, the thing granted passeth as to the state, but not to distraine, &c. without attornement. In the case of the king the thing granted doth passe both in estate and in privitie to distraine, &c. without attornement, unlesse it be of lands or tenements that are parcell of the duchy of *Lancaster*, and lie out of the county palatine (1).

(5 Rep. 123. Sect. 551. Cro. Car. 284. 2 Rep. 67. b. Sect. 579. 1 Roll. Abr. 394. Ant. 309. a.) (1 Sid. 139. 1 Lev. 28.)

Sect. 565.

(Ant. 159. b. 160. a.)

ALSO, if the lord of a rent service grant the services to another, and the tenant attorne by a penny, and after the grantee distraine for the rent behinde, and the tenant make rescous; in this case the grantee shall not have an assise for the rent, but a writ of rescous, because the giving of the penny by the tenant was not but by way of attornement (pur ceo que le done del denier per le tenant † ne fuit forsque per voy d'attornement), *&c. But if the tenant had given to the grantee the said penny as parcell of the rent, or a halfe penny or a farthing by way of seisin of the rent, then this* ☞ *is a good attornement, and also it is a good seisin to the grantee of the rent; and then upon such rescous the grantee shall have an assise, &c.*

[315. a.]

HEREUPON is to be observed a diversitie betweene money given by way of attornement, and where it is given as parcell of the rent by way of seisin of the rent. For albeit the rent be

39 H. 6. 3. 26. 5 E. 4. 2. Vide Sect. 235. 25 E. 3. 44. 49 E. 3. 15. 37 H. 6. 39. 49 Ass. p. 6. 34 H. 6. 42. 15 E. 3. Execution, 63. 40 E. 3. 22. 28 H. 6. 6. b. 7 H. 4. 2. tit. Attorney, Br. 97. (6 Rep. 59.) (Ant. 281. a.)

not

* &c. added in L. and M. and Roh. † ne *not in L. and M. or Roh.*

(1) See Pl. Com. 221. 4 Inst. 209.

not due before the day, yet a payment of parcell of the rent before hand is an actuall seisin of the rent to have an assise. And so it is if he give an oxe, a horse, a sheepe, a knife, or any other valuable thing in name of seisin of the rent before-hand, this is good. And therefore a payment in name of seisin is more beneficiall for the grantee, because that is both an actuall seisin and an attornement in law; and yet being given before the day in which the rent is due, it shall not be abated out of the rent. So as to give seisin of the rent, it is taken for part of the rent; but as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversitie is, for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actuall seisin, or a seisin in deed of a rent, whereof (as *Littleton* here speaketh) an assise doth lie; and a seisin in law which the grantee hath by attornement before actuall possession (1).

Sect. 566.

ALSO, if there bee many jointenants which hold by certaine services (Item, si sont plusors jointenants * que teignont per certaine services), *and the lord grant to another the services, and one of the joyntenants attorne to the grantee, this is as good as if all had attorned* (ceo est auxy bon, sicome touts † ussent attorne), *for that the seigniory is entire, &c.*

(1 Ro. Ab. 302.) (2 Rep. 67.)

[*b*] 39 H. 6. 3. 26.

See Tooker's case, ubi supra, and the authorities there cited. (2 Roll. Abr. 424. Ant. 297. b.)

HERE is to be observed what manner of tenants shall attorne to the grant. And first, [*b*] if there be two or more jointenants, and one of them attorne, it is sufficient: for, as it hath beene often said, there cannot be an attornement in part. And albeit there is great authoritie against *Littleton*, yet the law hath beene adjudged according to *Littleton*'s opinion, as it hath beene in other of his cases when they have come in question: and as it is of an attornement, so it is of a seisin; a seisin of a rent by the hands of one joyntenant is good for all, and a seisin of part of the rent is a good seisin of the whole.

[*c*] Vid. Lib. 4. fol. 8. Lib. 6. fol. 57. Lib. 9. fol. 34. Vid. 4. H. 6. 29. 18 E. 4. 10.

[*c*] If either the grantor or the grantee die, the attornement is countermanded; but if the tenant die, he that hath his estate may attorne at any time. If the tenant grant over his estate, his assignee may attorne.

[*d*] 42 E. 3. Age, 33.

[*d*] If an infant hath lands by purchase or by discent, he shall

26 E. 3. 62. 37 H. 8. tit. Attorne. Br. 26 E. 3. 62. 26 Ass. 27. 32 E. 3. tit. Per quæ Servit. 9. 2 E. 2. Attorn. 78. 2 E. 2. ibid. 77. 18 H. 6. 2. Lib. 9. f. 84, 85. Conye's case. 4 Mar. Dier, 137. 21 E. 3. Age, 85. 7 E. 2. Age, 140.

be

* que—et, *L. and M. and Roh.*

† ussent attorne—attornerent, *L. and M. and Roh.*

(1) This is only to be understood of a rent at common law; but if the rent is limited, as an use under the statute,—as if lands are conveyed by lease and release to *A.* and his heirs, to the use that *B.* may receive out of them an annual rent; the statute immediately executes the use of the rent in *B.*—[Note 274.]

be compelled to attorne in a *per quæ servitia*, and no mischiefe to the infant; for when he commeth to full age, he may disclaime to hold of him, or he may say that he holds by lesser services: but there should be a greater mischiefe for the lord if the attornement of an infant should not be good, for he should lose his services in the meane time.

If an infant be a lessee, he shall be compelled to attorne in a *quid juris clamat*. The attornement of an infant to a grant by deed is good, and shall binde him, because it is a lawfull act, albeit he be not upon that grant by deed compellable to attorne. Of baron and fem *Littleton* putteth many cases in this chapter.

[e] A man that is deafe and dumbe, and yet hath understanding, may attorne by signes: [f] but one that is not *compos mentis* cannot attorne, for he that hath no understanding cannot agree to the grant.

[e] 26 E. 3. 63.
[f] 18 E. 3. 53.

What conveyances shall be good without attornements more shall be said in this chapter in his proper place.

[315. b.]

☞ Sect. 567.

ALSO, if a man letteth tenements for terme of yeares, by force of which lease the lessee is seised, and after the lessor by his deed grant the reversion to another for terme of life, or in taile, or in fee; it behoveth in such case that the tenant for yeares attorne, or otherwise nothing shall passe to such grantee by such deed. And if in this case the tenaunt for yeares attorne to the grantee, then the freehold shall presently passe to the grantee by such attornement without any liverie of seisin, &c. because if any liverie of seisin, † &c. should be or were needful to bee made, then the tenant for yeares should be at the time of the livery of seisin ousted of his possession, which should be against reason* (‡ le quel serroit encounter reason), *&c.*

HERE *Littleton* having spoken of grants of seigniories and rent charges, and rents secke issuing out of land, here treateth of a grant of a reversion of land upon an estate for yeares; seeing this grant of the reversion must be by deed, and the agreement of the lessee for yeares requisite thereunto, the freehold and inheritance doe passe thereby, as well as by liverie of seisin, if it were in possession: and the grant of the reversion by deed with the attornement of the lessee, doe countervaile in law a feoffment by liverie, as to the passing of the freehold and inheritance.

"*For terme of yeares.*" [g] And yet a tenant by statute merchant, or tenant by statute staple, or by *elegit*, must also attorne; for the grantee may have a *venire facias ad computandum*, or tender the money, &c. and discharge the land; and if the

[g] 6 E. 3. 53. 25 E. 3. 53. Brook. tit. Attorn. 48. 32 E. 3. Scir. fac. 101. Dy. 1, 2. (Ante, 113. a. 181. b.)

reversion

* *the lessee* not in L. and M. or Roh.

† *&c.* not in L. or M. and Roh.

‡ le quel,—que, *L. and M. and Roh.*

reversion be granted by fine, they shall be compelled to attorne in a *quid juris clamat.*

And so the executors that have the land untill the debts bee paid must attorne upon the grant of the reversion, although they have not any certaine terme for yeares.

Sect. 568.

ALSO, if tenements be letten to a man for terme of life, or given in taile, saving the reversion, &c. if hee in the reversion in such case grant the reversion to another by his deed, it behooveth that the tenant of the land attorne to the grantee in the life of the grantor, or otherwise the grant is voyd.*

HERE *Littleton* speaketh of a reversion expectant upon an estate for life, or a gift in taile.

[316. a.]

"*It behooveth that the tenant of the land ☞ attorne to the grantee, &c.*" Let us therefore speake first of tenant for life: and yet in some case albeit tenant for life hath granted over his estate, yet he shall atturne. [*a*] As if tenant in dower or by the curtesie grant over his or her estate, and the heire grant over the reversion, the tenant in dower or by the curtesie may atturne, because at the time of the grant made they were attendant to the heire in reversion, and the grantee cannot be tenant in dower, or tenant by the curtesie. And if the reversion be granted by fine, the fine must suppose that the tenant in dower or by the curtesie did hold the land, albeit they had formerly granted over their estate, and albeit the reversion doth passe by the fine; yet the *quid juris clamat* must be brought against him that was tenant at the time of the note levied. But yet after the reversion is granted over, the grantee shall not have any action of waste against the tenant in dower or by the curtesie, but the action of wast must be brought against their assignee, and not against themselves; for tenant by the curtesie or tenant in dower cannot hold of any but of the heire: and therefore in respect of the privitie, they shall attorne and be subject to an action of wast, as long as the reversion remaineth in the heire, albeit they have granted over their whole estate. And it is worthy of the observation, that if the grantee of the reversion doth bring an action of wast against the assignee of the tenant by the curtesie, [*b*] the pl. must rehearse the stat. which proveth that no prohibition of waste in that case lay at the common law, as it did if the heire had brought it against the tenant by the curtesie itselfe: and therefore some doe hold, that if the heire doe grant over the reversion, that the attornement of the assignee of the tenant by the curtesie, or of tenant in dower is sufficient, because they afterward must be attendant and subject to the action of waste.

[*a*] 10 H. 4. tit. Attorn. 16. 11 H. 4. 18. 30 E. 3. 16. 38 E. 3. 23. 18 E. 3. 3. 10 E. 3. Quid juris clam. 41. 41 E. 3. 18. Temps E. 1. tit. Waste, 122.

(Ant. 54. a.) F. N. B. 55. E. Regist. f. 72. 4 E. 3. 26.

(3 Rep. 23. b.)

[*b*] Regist. 72.

If the reversion of lessee for life be granted, and lessee for life assigne over his estate, the lessee cannot attorne; but the attornement

18 E. 4. 10. b. 26 E. 3. 62.

* *&c.* added in L. and M. and Roh.

attornement of the assignee is good, because (as *Littleton* here saith) it behooveth that the tenant of the land doe attorne, and after the assignement there is no tenure or attendance, &c. betweene the lessee and him in reversion.

If lessee for life assigneth over his estate upon condition, he having nothing in him but a condition shall not attorne; but the assignee may attorne, because he is tenant of the land. 5 H. 5. 10.

Sect. 569.

IN the same manner is it, if land be† granted in taile, or let to a man for terme of life, the remainder to another‡ in fee, if he in the remainder will graunt this remainder to another, &c. if the tenant of the land attorne in the life of the grantor, then the grant of such a remainder is good, or otherwise not.

LITTLETON also speaketh here of an attornement by tenant in taile; and true it is that he may attorne; but where the reversion is granted by fine, he is not compellable to attorn, because he hath an estate of inheritance which may continue for ever. And so it is of a tenant in taile after possibilitie of issue extinct, he shall not be compelled to attorne for the inheritance which was once in him. [c] But if tenant in taile after possibilitie of issue extinct grant over his estate, his assigne shall be compelled to attorn, because he never had but a bare state for life.

12 E. 4. 3, 4. 3 E. 4. 11. 43 E. 3. 1. 46 E. 3. 13. (9 Rep. 85. b.) (Ant. 27. b.) 5 H. 5. (11 Rep. 79.) 20 E. 3. Quid juris clam. 50.

[c] See the chap. of tenant in taile after possibilitie of issue extinct; and Ewin's case there cited to be adjudged.

[316. b.] ☞ But as to tenant in taile, note a diversitie betweene a *quid juris clamat*, and a *quem redditum reddit* or a *per quæ servitia*; for against a tenant in taile no *quid juris clamat* lieth, as is aforesaid. But if a man make a gift in taile, the remainder in fee, and the seigniorie or rent charge issuing out of the land be granted by fine, the conusee shall maintaine a *per quæ servitia*, or a *quem redditum*, and compell him to attorne; for herein his estate of inheritance is no privilege to him, for that a tenant in fee simple (as his estate was at the common law) is also compellable in these cases to attorne.

Sect. 570. (11 Rep. 79.)

*P. 12 Edw. 4. *It is there holden by the whole court that tenant in taile shall not be compelled to attorne, but if he will attorne* gratis, *it is good enough.*

THIS

† *granted in tail or*, not in L. and M. or Roh.

‡ *in fee—&c.* L. and M.

* This paragraph not in L. and M. or Roh.

12 E. 4. 3, 4. THIS is added to *Littleton*, and therefore though it be good law, and the booke truly cited, yet I passe it over.

Sect. 571.

ALSO, if land bee let to a man for years, the remainder to another for life, reserving to the lessor a certaine rent by the yeare, and liverie of seisin upon this is made to the tenant for yeares; if hee in the reversion in this case grant the reversion to another, &c. and the tenant which is in the remainder after the terme of yeares attorne (si cestuy en le reversion en cest case granta le reversion a un auter, † &c. et le tenant que est en le remainder apres le terme d'ans ‡ soy attourna) *this is a good attornement, and hee to whom this reversion is granted by force of such attornement shall distreine the tenant for yeares for the rent due after such attornement, albeit that the tenant for yeares did never attorne unto him. And the cause is, for that where the reversion is depending upon an estate of freehold, it sufficeth that the tenant of the freehold doe attorne upon such a grant of the reversion, &c.*

"*IT sufficeth that the tenant of the freehold doe attorne* (1)." Note, *Littleton* saith not here, that the tenant of the franktenement ought in this case to attorne, but that ☞ it sufficeth that he doth attorne. And I heard sir *James Dier* chiefe justice of the common pleas hold, that in this case if the tenant for yeares did attorne, it would vest the reversion; for seeing the estate for yeares is able to support the estate for life, he shall binde him in the remainder by his attornement in respect of his estate and privitie. [317. a.]

Pasch. 15 Eliz. in Brasbritche's case, in Communi Banco.

(Ant. 143. a. 150. b. 247. a. 308. a.) (2 Roll. Abr. 60. 424.)

Sect. 572.

AND it is to be understood, that where a lease for yeares or for life, or a gift in taile, is made to any man, reserving to such lessor or donor a certaine rent, &c. if such lessor or donor grant his reversion to another, and the tenant of the land attorne, the rent passeth to the grantee, although that in the deed of the grant of the reversion no mention be made of

† &c. *not in L. and M. or Roh.* ‡ soy *not in L. and M. or Roh.*

(1) Two reasons are given for this. One is, that the possession of the tenant for years is the possession of the immediate freeholder. See Brediman's case, 6 Rep. 56. b. The other reason is, that as the termor for years holds of the reversioner, and pays the services to him, so the tenant for life holds also of him.—Thus, as both hold estates of the reversioner, either of them may attorn. —[Note 275.]

of the rent, for that the rent is incident to the reversion in such case, and not è converso, &c. *For if a man will grant the rent in such case to another, reserving to him the reversion of the land, albeit the tenant attorne to the grantee, this shall bee but a rent secke, &c.*

Of this *Littleton* hath spoken before in the chapter of Rents.

Sect. 573.

(Plowd. 25. b.)

ALSO, if a man let land to another for his life, and after hee confirme by his deed the estate of the tenant for life, the remaynder to another in fee, and the tenant for life accepteth the deed, then is the remaynder in fait in him to whom the remaynder is given or limited by the same deed. * *For by the acceptance of the tenant for life*† *of the deed, this is an agreement of him, and so an attornement in law. But* [317. b.] *yet hee in the remaynder shall not have any action* ☞ *of waste, nor other benefit by such remaynder, unlesse that hee hath the said deed in hand, whereby the remaynder was entayled or granted to him. And because that in such case the tenant for life peradventure will retaine the deed to him, to this intent, that he in the remaynder should not have any action of waste against him, for that hee cannot come to have the deed in his possession, it will be a good and sure thing in such case for him in the remaynder* (Et pur ceo que en tiel cas le tenant a terme de vie voile per cas‡ reteigner le fait a luy, a cel entent, que celuy en le remainder n'averoit ascun action de waste envers luy, pur ceo que il ne poit vener d'aver le fait en sa possession,‖ il serra bone§ et sure chose en tiel cas pur celuy en le remainder), *that a deed indented bee made by him which will make such confirmation, and the remaynder over, &c. and that hee which maketh such confirmation deliver one part of the indenture to the tenant for life, and the other part to him that shall have the remaynder. And then he by shewing of that part of the indenture may have an action of waste against the tenant for life, and all other advantages that he in the remaynder may have in such a case, &c.*

HERE *Littleton* putteth a case of a remainder whereunto an attornement is requisite. And this is the sixth example of an attornement in law. (1 Roll. Abr. 301.) Vid. Sect. 325. 575.

"*The remainder to another, &c.*" Of this sufficient hath beene said in the chapter of Confirmation, Sect. 525. Vid. Pl. Com. in Colthirst's case. Doct. and Stud. cap. 20. fol. 93, 94.

"*Unlesse that hee hath the said deed in hand.*" And albeit he hath no remedy to come to the deed during the life of tenant for life, yet because he is privie in estate, he shall not maintaine an 8 R. 2. in waste, in livre escrite. 17 E. 3. Confirmat. 4. 35 H. 6. fol. 8. 14 H. 8. Pl. Com. 149. in Throckmorton's case.

action

* *For* not in L. and M. or Roh.

† *of the deed* not in L. and M. or Roh.

‡ reteigner—resceiver, *L. and M. and Roh.*

‖ et pur ceo *added in L. and M. and Roh.*

§ et sure chose *not in L. and M. or Roh.*

action of waste without shewing the deed; but when the remainder is once executed he shall not need to shew the deed.

45 E. 3. 14, 15. 11 H. 4. 39. 14 H. 4. 31. (Ant. 10. a.)

"*It will be a good and sure thing, &c.*" Hereby it appeareth how necessary it is to use learned advice in a man's conveyance, for thereby shall be prevented many questions, and not to follow the advice of him that is experimented only. For as in physicke, *Nullum medicamentum est idem omnibus*, so in law one forme or president of conveyance will not fit all cases.

☞ Sect. 574. [318. a.]

*ALSO, if two joyntenants be, who let their land to another for terme of life, rendring to them and to their heires a certaine yearely rent; in this case if one of the joyntenants in the reversion release to the other joyntenant in the same reversion, this release is good, and he to whom the release is made shall have only the rent of the tenant for life, and shall only have a writ of waste against him, although he never attorned by force of such release, * &c. And the reason is, for the privitie which once was betweene the tenant for life and them in the reversion.*

(6 Rep. 78. 2 Ro. Abr. 403. Ant. 193. a.)

"*TWO jointenants.*" And so it is (as it is here to be understood) albeit there be three or more joyntenants, and one of them releaseth to one of the other.

(Ant. 238.)

It is true, that there is a difference betweene these releases; for the release in the one case maketh no degree, but hee to whom the release is made is supposed in from the first feoffor; and in the other it worketh a degree, and hee to whom the release is made is in the *per* by him; yet in neither of these cases there is requisite any attornement, for both of them are within *Littleton*'s reason (for the privitie, &c.)

2 Eliz. Dier, 176. (Ant. 185. a.

"*For the privitie, &c.*" For if one joyntenant make a lease for yeares, reserving a rent, and dieth, the survivor shall not have the rent; and therefore *Littleton* here addeth materially for the privitie that was betweene the tenant for life and them in the reversion.

45 E. 3. 6. b. 13 Eliz. Dier, 288. 3. fol. 86. Justice Windham's case.

And here it is good to be seene what grantors or others that make conveyances, &c. are such as their grants or conveyances are either good without attornement, or where the tenant is no way compellable to attorn. Tenant for life shall not be compelled to attorne in a *quid juris clamat* upon a grant of a reversion by fine holden of the king in chiefe without licence; but the reason hereof is not because the tenant for life might be charged with the fine, for his estate was more ancient than the fine levied, but because the court will not suffer a prejudice to the king, and the king may seise the reversion and rent, and so the tenant shall be attendant to another. Also it is a generall rule, that when the grant by fine is defeasible, there the tenant shall not be compelled to attorne.

36 H. 6. 24. (1 Roll. Abr. 297.)

As

* *&c.* not in L. and M. or Roh.

As if an infant levie a fine, this is defeasible by writ of error during his minoritie, and therefore the tenant shall not be compelled to attorne.

So if the land be holden in ancient demesne, and he in the reversion levied a fine of the reversion at the common law, the tenant shall not be compellable to attorne, because the estate that passed is reversible in a writ of deceit. 5 E. 3. 25. 31 E. 3. Antient demesne, 16.

So if tenant in taile had levied a fine, the tenant should not be compelled to attorne, because it was defeasible by the issue in taile. 24 E. 3. 25. b. 37 H. 6. 33. 48 E. 3. 23.

But now the statutes of 4 *H.* 7, and 32 *H.* 8, having given a further strength to fines to barre the issue in taile, the reason of the common law being taken away, the tenant in this case shall be compelled to attorne, as it was adjudged [*] in justice *Windham's* case.

If an alienation be in mortmaine, the tenant shall not be compelled to attorne, because the lord paramount may defeat it. [*] Lib. 3. fol. 86. Justice Windham's case. 17 E. 3. 7. 22 E. 3. 18.

[318. b.]

☞ Sect. 575.

(1 Roll. Abr. 301.)

IN the same manner, and for the same cause, is it, where a man letteth land to another for life, the remainder to another for life, reserving the reversion to the lessor (En mesme le maner, el pur mesme la cause, est, lou home lessa terre a un auter pur terme de vie, le remainder a un auter pur terme de vie, reservant le reversion al * lessour); *in this case if hee in the reversion releaseth to him in the remainder and to his heires all his right, &c. then he in the remainder hath a fee, &c. and hee shall have a writ of wast against the tenant for life without any attornement of him, &c.*

This needeth no explication.

Vide Sect. 549. 553. 556.

Sect. 576.

ALSO, if a man lett lands or tenements to another for terme of yeares, and after he oust his termor, and thereof enfeoffe another in fee, and after the tenant for yeares enter upon the feoffee, clayming his term, &c. and after doth waste; in this case the feoffee shall have by law a writ of waste against him, and yet hee did not attorne† unto him. And the cause is, as I suppose, for that hee which hath right to have lands or tenements for yeares,‡ or otherwise, should not by law bee misconusant of the feoffments which were made of and upon the same lands, &c. And inasmuch as by such feoffment the tenant for yeares was put out of his possession, and by his entrie he caused the reversion to bee to him to whom the

* lessour—luy, *L. and M. and Roh.*
† *unto him* not in L. and M. or Roh.
‡ *or otherwise*, not in L. and M. or Roh.

the feoffment was made, this is a good attornement (Et entant que per tiel feoffment le tenant a terme d'ans fuit ǂ mis hors de son possession, et per son entre il causast le reversion d'estre a celuy a que le feoffment fuit fait, ceo est bone attornement); *for he to whom the feoffment was made, had no reversion before the tenant for years had entred upon him, for that he was* ‖ *in possession in his demesne as of fee, and by the entrie of the tenant for yeares, hee hath but a reversion, which is by the act of the tenant for yeares, scilicet, by his entrie, &c.*

Sect. 577.

THE same law is, as it seemeth, where a lease is maile for life, saving the reversion to the lessor, if the lessor disseise the lessee, and make a feoffment in fee, if the tenant for life enter and make waste, the feoffee shall have a writ of waste without any other attornement, causâ quâ supra, &c. (1).

(6 Rep. 69. a.)

THERE have been now in all seven examples, that *Littleton* putteth of an attornement in law, and here he putteth two cases also of a notice in law. And the reason of both these are here rendred by *Littleton*. First for the notice, *Littleton* saith that the lessee shall not by law be misconusant of the feoffments that were made of and upon the same land. And the reason of the attornement is, because the whole fee simple passeth by the feoffment, and the lessee by his regresse leaveth the reversion in the feoffee, which (saith *Littleton*) is a good attornement. The same law it is of a tenant by statute merchant or staple, or *elegit*. And so it is of a lease for life, as *Littleton* here saith; and so it was resolved [*e*] in *Brasbritche*'s case, and after in the deane of *Paul*'s his case in the ☞ common place. But shall the lessee in this case whether hee will or no doe an act that amounts to an attornement, viz. by his regresse, or else lose the profit of his land? And some doe hold, that in that case if the lessee for life doe recover in an assise, this is no attornement, because hee comes to it by course of law, and not by his voluntary act. And yet in that case, as in the case of the fine, the state of the reversion is in the feoffee. [*f*] But others doe hold it all one in case of a recovery, and a regresse.

46 E. 3. 30. b.
2 H. 5. 4.
5 H. 5. 12.
34 H. 6. 6.
18 E. 3. 47.
9 H. 6. 10.
(5 Rep. 113. b.)

[*e*] Brasbritche's case. P. 15 Eliz. Deane of Paul's case, 20 Eliz. (34 H. 6. 7.)

[319. a.]

[*f*] 18 E. 3. 48. b. Lib. 6. fol. 60. b. Sir Moyle Finche's case.

[*g*] If the lessor disseise tenant for life, or ouste tenant for yeares,

[*g*] 9 H. 6. 16. Deane of Paul's case, ubi supra. (Post. 321. b.) (6 Rep. 70. a.)

ǂ mis hors de son possession, et per son entrie il causa le reversion d'estre a celuy a que le feoffment fuit, *not in* ‖ *in possession—seised,* L. and M. and Roh.

L. and M. or Roh.

(1) In these cases, the tenant for life enters only for a partial estate; he therefore only partially defeats the operation of the feoffment: so much of the fee as he does not defeat, necessarily remains in the feoffee.—[Note 276.]

yeares, and maketh a feoffment in fee, by this the rent reserved upon the lease for life or yeares is not extinguished, but by the regresse of the lessee the rent is revived, because it is incident to the reversion: and so hath it beene adjudged. But if a man be seised of a rent in fee, and disseise the tenant of the land, and make a feoffment in fee, the tenant re-entreth, this rent is not revived. And so note a diversitie between a rent incident to a reversion, and a rent not incident to a reversion.

If two joynt lessees for yeares or for life be ousted or disseised by the lessor, and he enfeoffe another, if one of the lessees re-enter, this is a good attornement, and shall binde both; for an attornement in law is as strong as an attornement in deed. (Ant. 297. b. 2 Rep. 67. a.)

If a man make a lease for life, and then grant the reversion for life, and the lessee attorne, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornement in law of the grantee for life, because he doth no act, nor assent to any which might amount to an attornement in law. *Et res inter alios acta alteri nocere non debet.* Neither hath the grantee for life the land in possession, so as he may well be misconusant of the feoffment made upon the land, and so out of the reason of *Littleton*. But yet the reversion in fee doth passe to the feoffee. (6 Rep. 69. Mo. 99 Ant. 266. a.) (2 Rep. 671.)

[319. b.]

☞ Sect. 578.

ALSO, if a lease be made for life, the remainder to another in taile, the remainder over to the right heires of the tenant for life; in this case, if the tenant for life grant his remainder in fee to another by his deede, this remainder maintenant passeth by the deede without any attornement, &c. for that if any ought to attourne in this case, it should be the tenant for life, and in vaine it were that he should attorne upon his owne grant, &c.*

HERE it appeareth, that where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heires, that the fee simple vesteth in himself, as well as if it had beene limited to him and his heires; for his right heires are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for yeares: as if a lease for yeares be made to *A.* the remainder to *B.* in tayle, the remainder to the right heires of *A.* there the remainder vesteth not in *A.* but the right heires shall take by purchase if *A.* die during the estate taile: for as the ancestor and the heire are *correlativa* of inheritances, so are the testator and executor, or the intestate and administrator of chattels. And so it is if *A.* make a feoffment in fee to the use of *B.* for life, and after to the use of *C.* for life or in taile, and after to the use of the right heires of *B.* *B.* hath the fee simple in him as well when (Ant. 13. b. 1 Roll. Abr. 127.) (1 Rep. 66.) (Ant. 54. b.) (1 Roll. Abr 627.)

* &c. not in L. and M. or Roh.

when it is by way of limitation of use, as when it is by act executed (1).

Vid. Sect. 194. 273. "*In vaine it were, &c.*" *Quod vanum et inutile est lex non requirit. Lex est ratio summa, quæ jubet quæ sunt utilia et necessaria et contraria prohibet*; and arguments drawne from hence are forcible in law.

Sect. 579.

ALSO, if there be lord and tenant, and the tenant holdeth of the lord by certaine rent, and knight's service, if the lord grant the services of his tenant by fine, the services are presently in the grantee by force of the fine; but yet the lord (A) *may not distreine for any parcell of the services, without attornement: but if the tenant dieth, his heire within age, the lord shall have the wardship* ☞ *of the bodie of the heire, and of his lands, &c. albeit he never attorned, because that the seigniorie was in the grantee presently by force of the fine. And also in such case if the tenant die without heire, the lord shall have the tenancie by way of escheat.* [320. a.]

HERE *Littleton* beginneth to shew what advantages the conusee of a fine may take before attornement, and what not.

[*h*] 8 E. 3. 44. 26 E. 3. 63. 10 H. 6. 16. 34 H. 6. 7. 12 E. 4. 4. 40 E. 3. 7. 5 H. 5. 12. 48 E. 3. 15. b. 3 E. 2. Droit, 33. (F. N. B. 60. Sect. 564. 4 Inst. 209, 210.)

[*h*] First, he cannot distreyne, because an avowrie is in lieu of an action; and thereupon privitie is requisite. So likewise, and for the same cause, he can have no action of waste, nor writ of entrie, *ad communem legem*, or *in consimili casû*, or *in casû proviso*, writ of customes and services, nor writ of ward, &c. (1*)

But if a man make a lease for yeares, and grant the reversion by fine, if the lessee be ousted, and the conusee disseised, the conusee, without attornement, shall maintaine an assise; for this writ is maintained against a stranger, where there needeth no privitie. And such things as the lord may seise, or enter into without suing any action, there the conusee, before any attornement, may take benefit thereof; as to seise a ward or heriot; or to enter into the lands or tenements of a ward; or escheated to him; or to enter for an alienation of tenant for life or yeares: or of tenant by statute merchant, staple, or *elegit*, to his disherison.

Sect.

(A) i. e. *the grantee of the services. For, as Littleton says,* "the seigniory was in the grantee presently by force of the fine," *and, consequently, the grantee of the services is supposed to become lord by virtue of the grant.*

(1) The observation of Mr. Douglas upon this point (note to page 506 of his Reports) deserves the reader's most serious attention.

(1*) The distinction in these cases seems to be, that the grantee is entitled, before attornement, to what the lord may seize; but not to any thing which lies in action.—[Note 277.]

Sect. 580, 581, 582.

IN the same manner it is, if a man graunt the reversion of his tenant for life to another by fine, the reversion maintenant passeth to the grantee by force of the fine, but the grantee shall never have an action of wast without attornement, &c.

Sect. 581.

*BUT yet if the tenant for life alieneth in fee, the grantee may enter, * &c. because the reversion was in him by force of the fine, and such alienation was to his disheritance.*

Sect. 582.

BUT in this case where the lord granteth the services of his tenant by fine, if the tenant die (his heire being of full age) the grantee by the fine shall not have reliefe, nor shal ever distreine for reliefe, unlesse that hee hath the attornement of the tenant that dieth (Mes en † ceo cas lou le seignior granta les services de son tenant per fine, si tenant devie (son heire esteant de plein age) le grantee per le fine n'avera reliefe, ne unques distreynera pur reliefe, sinon que il ‡ avoit l'attornement del tenaunt que morust): ‖*for of such a thing which lieth in distresse, whereupon the writ of replevin is sued, &c. a man must and ought to avow the taking good and rightfull, &c. and there there ought to be an attornement of the tenant, although the graunt of such a thing be by fine: but to have the wardship of the lands or tenements so holden during the nonage of the heire, or to have them by way of escheat, there needs no distresse, &c. but an entrie into the land by force of the right of the seigniorie, which the grauntee hath by force of the fine, &c.* Sic vide diversitatem, &c. (..... que le grantee ad per force del fine, &c. *Sic vide diversitatem* §.)

IT is said in our books that if tenaunt for life have a privilege not to be impeachable of waste, or any other privilege, if he doth attorne without saving his privilege, that he hath lost it; which is so to be understood, where he attornes in a *quid juris clamat* brought by the conusee of a fine, that if he claimeth not his privilege, but attorne generally, his privilege is lost, for that the writ supposeth him to be but a bare tenant for life; and by his generall attornement, according to the writ, he is barred for ever to claime any privilege but a bare estate for life. But if upon a grant of the reversion by deed, the tenant for life doth attorne, 40 E. 3. 7. 43 E. 3. 5. 48 E. 3. 32. 45 E. 3. 6. 21 E. 3. 48. 24 E. 3. 32. 39 H. 6. 25. F. N. B. 136. b. (3 Rep. 36. 11 Rep. 79. 1 Roll. Abr. 412. 296. Ant. 274. b.)

* &c. not in L. and M. or Roh.
† ceo *not in L. and M. or Roh.*
‡ avoit l'attornement—fusoit attornement, *L. and M. and Roh.*
§ &c. *added in L. and M. and Roh.*
‖ &c. added in L. and M. and Roh.

attorne, he loseth no privilege; for there can be no conclusion or barre by the attornement *in pais:* and so it is of an attornement in law. As if the lessor disseise the lessee for life, and make a feoffement in fee, and the lessee re-enter; this is an attornement in law, which shall not prejudice him ☞ of any privilege: so it is if the lessor levie a fine of the reversion, and the conusee die without heire, whereby the reversion escheateth, in this case the law doth supply an attornment, and therefore the lessee shall lose no privilege. But in the *quid juris clamat*, if the lessee shew his estate and his privilege, and is ready, saving to him his privilege, &c. to attorne, hereby either his privilege shall bee allowed and entred of record, or he shall not be compelled to attorne: [*b*] and if the plaintife be within age, so as hee cannot acknowledge the privilege, the tenant shall not be compelled to attorne untill his full age, when he may acknowledge it. But otherwise it is (as some hold) if a *quid juris clamat* be brought by baron and feme, the privilege shall be entred into the rolle, notwithstanding shee is a feme covert. And in a *per quæ servitia* brought by the conusee of the mesme, the tenant may shew that he held by homage auncestrell, and saving to him his warrantie and acquittall, he is readie to attorne. In the same manner, if the tenant hath any other acquittall, and the mesne levie a fine to one for life, the remainder to another in fee, the tenant for life bringeth a *per quæ servitia*, and the tenant is ready to attorne, saving his acquitall, and the plaintife acknowledgeth it, and thereupon the tenant attorne, tenant for life dieth; in this case, albeit regularly the attornement to the tenant for life is an attornement to him in the remainder, yet in this case hee in the remainder shall not distreine, till he hath acknowledged the acquitall, which must be in a *per quæ servitia*, brought by him against the tenant.

[320. b.]

(5 Rep. 39. b.)

(Ant. 157. b.)

[*b*] 43 E. 3. 5. (6 Rep. 4. a. 9 Rep. 85. b.)

45 E. 3. 11. a. Vet. N. B. in per quæ servitia. 5 E. 3. Mesne 56, & per quæ servitia, 16. 37 H. 6. 33. 39 H. 6. 25. 18 E. 4. 7. (7 Rep. 4. b.)

Vid. Sect. 557.

"*Alieneth in fee, &c.*" Of this sufficient hath beene said in the next precedent Section.

"*Shall not have reliefe, &c.*" Of this sufficient hath beene said in the next precedent Section.

☞ Sect. 583.

[321. a.]

*ALSO, if there be lord, mesne and tenant, and the mesne grant by fine the services of his tenant to another in fee, and after the grantee die without heire, now the services of the mesnaltie shall come and escheate to the lord paramount by way of escheat; * and if afterwards the services of the mesnaltie bee behind, in this case he which was lord paramont may distreine the tenant, notwithstanding that the tenant did never attorne: and the cause is, for that the mesnaltie was in deed in the grantee by force of the † said fine, and the lord paramont may avow upon the grantee, because in deed hee was his tenant, albeit he shall not be compelled to this, &c. But if the grantor in this case had died without heire in the life of the grantee, then he should bee compelled to avow upon the grantee; and also*

* *and* not in L. and M. or Roh. † *said* not in L. and M. or Roh.

also in as much the lord paramont doth not claime the mesnaltie by force of the grant made by fine levied by the mesne ‡, *but by vertue of his seigniorie paramont,* ‖ viz. *by way of escheat, he shall avow upon the tenant for the services which the mesne had,* &c. *albeit that the tenant did never attorne.*

HERE *Littleton* putteth the case where one that claimeth under a conusee by fine may distraine or maintaine any action, albeit there was never any attornement made to the conusee, or to him that hath his estate.

45 E. 3. 2. 34 H. 6. 7. 37 H. 6. 33. 39 H. 6. 32. 5 H. 7. 18. per curiam.

And here is a diversitie betweene an act in law that giveth one inheritance in lieu of another, and an act in law that conveyeth the estate of the conusee only. Of the former *Littleton* here putteth an example of the escheat of the mesnaltie which drowneth the seigniorie paramont; and therefore reason would that the lord by this act in law should have as much benefit of the mesnaltie escheated, as he had of the seigniorie that is drowned; and the rather for that the law casteth it upon him, and hee hath no remedy to compell the tenant to attorne. Another reason hereof *Littleton* here yeeldeth, because the lord commeth to the mesnaltie by a seigniorie paramont, and therefore there needeth no attornement.

Lib. 6. fol. 68. Sir Moyle Finch's case.

[321. b.]

[c] As if lessee for life be of a mannor and he surrender his estate to the lessor, there needeth no attornement of the tenant's, because the lessor is in by a title paramount. But if the conusee dieth, and the law casteth his seigniorie upon his heire by descent, he shall not be in any better estate than his ancestor was, because he claimeth as heire meerely by the conusee.

[c] Temps E. 2. Attorn. 18. 39 H. 6. 38. per Prisot. (Ant. 104. b. 309. b.)

So it is (as hath beene said) if the conusee of a fine before attornement bargaineth and selleth the seigniorie by deed indented and inrolled, the bargainee shall not distraine, because the bargainor, from whom the seigniorie moveth, had never actuall possession.

(5 Rep. 113.)

So and for the same reason if a reversion be granted by fine, and the conusee before attornement disseise the tenant for life and make a feoffment in fee, and the lessee re-enter, the feoffee shall not distraine.

Sir Moyle Finche's case, ubi supra.

Sect. 584.

IN the same manner it is, where the reversion of a tenant for life is granted by fine to another in fee, and the grantee afterwards dieth without heire, now the lord hath the reversion by way of escheat; and if after the tenant maketh wast, the lord shall have a writ of waste against him, notwithstanding that he never attorned, causâ quâ supra. *But where a man claimeth by force of the grant made by the fine,* † scil. *as heire, or as assignee,* &c. *there hee shall not distraine* ‡ *nor avowe, nor have an action of waste,* &c. *without attornement.*

HERE

‡ &c. added in L. and M. and Roh.

‖ viz. *not in L. and M. or Roh.*

† &c. added in L. and M. and Roh.

‡ *nor avowe*, not in L. and M. or Roh. nor in MSS.

(Ant. 104. b.)

HERE *Littleton* expresseth two diversities. First, betweene an act in law, and the grant of the party. This case is put of an [*d*] escheat, which is a meere act in law, but so it is when it is partly by act in law, and partly by the act of the party; as if the conusee of a statute merchant extendeth a seigniorie or rent, hee shall distraine without any attornement. If a man make a lease for life or yeares, and after levie a fine to *A.* to the use of *B.* and his heires, *B.* shall distraine and have an action of waste, albeit the conusee never had any attornement, because the reversion is vested in him by force of the statute, and hath no remedy to compell the lessee to attorne.

[*d*] 45 E. 3. 2. 34 H. 6. 7. 5 H. 7. 18. per curiam. 13 H. 4. Avowrie, 237. (4 Rep. 64. 1 Roll. Abr. 293. Ant. 153. a.) Lib. 6. fol. 68. in Sir Moyle Finche's case.

(Mo. 92. 68.) 27 H. 8. cap. 10.

(Ant. 309. 2 Cro. 193. 5 Rep. 113. a. 6 Rep. 68. b. 10 Rep. 45.)

And so it is of a bargaine and sale by deed indented and inrolled, but this is by force of a statute since *Littleton* wrote.

Secondly, where he that commeth in by act in law is in the *per*, as the heire of the conusee, who setteth in his ancestor's seat, *tanquam pars antecessoris de sanguine*; and the lord by escheat, which is an estranger, and commeth in meerely in the *post*.

(F. N. B. 121. a.)

Sect. 585.

ALSO, in ancient boroughs and cities, where lands and ☞ *tenements within the same boroughes and cities are devisable by testament by custome and use, &c. if in such borough or citie a man be seised of a rent service, or of a rent charge* [322. a.] (si en tiel § borough au citie home soit seisie de rent service ou de rent charge), *and deviseth such rent or service to another by his testament and dieth; in this case, he to whom such devise is made, may distreine the tenant for the rent or service arere, although the tenant did never attorne.*

34 H. 6. 6. 5 H. 7. 18. 19 H. 6. 24. 21 H. 6. 38. F. N. B. 121. N.

HERE doth *Littleton* put a case where a man may have a seigniory, rent, reversion, or remainder meerely by the act of the party, and may distraine, and have any action without any attornement, and that is by devise of lands devisable by custome when *Littleton* wrote by the last will and testament of the owner.

Sect. 586.

(6 Rep. 23.) (5 Rep. 68.) (1 Rep. 120. 3 Rep. 19. 6 Rep. 16. 81.) (8 Rep. 94.) (10 Rep. 46. 87.) (4 Rep. 66.)

IN the same manner is it, where a man letteth such tenements devisable to another for life, or for yeares, and deviseth the reversion by his testament to another in fee, or in fee taile, and dyeth, and after the tenant commits waste, he to whom the devise was made shall have a writ of waste, although the tenant doth never attorne. And the reason is, for that the will

§ cas *added in L. and M. and Roh.*

will of the devisor made by his testament shall bee performed according to the intent of the devisor; and if the effect of this should lye upon the attornement of the tenant, † then perchance the tenant would never attorne, and then the will of the devisor should never bee performed, ‡ &c. and for this the devisee shall distraine, &c. or he shall have an action of waste, &c. without attornement. For if a man deviseth such tenements to another by his testament, habendum sibi in perpetuum, *and dieth, and*

[322. b.] *the ☞ devisee enter, he hath a fee simple,* causâ quâ supra; *yet if a deed of feoffment had beene made to him by the devisor of the same tenements,* habendum sibi in perpetuum, *and livery of seisin were made upon this, hee should have an estate but for terme of his life* (* uncore ‖ si fait de feoffment ust este ‡‡ fait a luy per le devisor en sa vie de mesmes les tenements, *habendum sibi in perpetuum,* et livery de seisin sur ceo fuit fait, il n'averoit estate forsque pur terme de sa vie).

BOTH this and the precedent case stand upon one and the same reason, which *Littleton* here yeeldeth, viz. because that the will of the devisor expressed by his testament shall be performed according to the intent of the devisor; and it shall not lie in the power of the tenant or lessee to frustrate the will of the devisor by denying his attornement. Here *Littleton* mentioneth a maxime of the common law, viz. *Quòd ultima voluntas testatoris est perimplenda secundum veram intentionem suam:* and, *Reipublicæ interest suprema hominum testamenta rata haberi.* (1 Roll. Abr. 293.) Vide Sect. 167. Bracton, li. 1. f. 11. & f. 60. Fleta, lib. 2. cap. 15. Britton, fol. 78. & f. 212. b. (6 Rep. 23. Ant. 9. b.)

"*Testament,*" *Testamentum, i. e. testatio mentis,* which is made *nullo præsentis metu periculi, sed solâ cogitatione mortalitatis. Omne testamentum morte consummatum.*

"*For if a man deviseth such tenements to another, &c.*" Here *Littleton* putteth a case where the intent of the testator shall be taken, viz. where a man by devise shall have a fee simple without these words (heires); and here *Littleton* putteth the diversitie betweene a will and a feoffment. 22 E. 3. 16. 34 H. 6. 7. 15 H. 7. 12. 19 H. 8. 4.

Now by the statutes of 32 and 34 *H.* 8. (as hath beene said in the chapter of Burgage) lands, tenements, and hereditaments are devisable, as by the said acts doe appeare. Vide Sect. 167.

Sect. 587.

ALSO, if a man bee seised of a mannor which is parcell in demesne and parcell in service, and is thereof disseised, but the tenants which hold of the mannor doe never attorne to the disseisor (Item, si home seisie d'un mannor quel est parcel en demesne et parcel en service, et ent soit disseisie, mes les tenants que teignont del mannor ne unque attournant § a le disseisor); *in this case, albeit the disseisor dieth seised, and his heire is in by discent, &c. yet may the disseisee distreine for the rent behinde, and have the services, &c. But if the tenants come to the disseisor and say,*

† *&c.* added in L. and M. and Roh.
‡ *&c.* not in L. and M. or Roh.
* et *added in L. and M. and Roh.*
‖ si—le, *L. and M. and Roh.*
‡‡ ust este—fuit, *L. and M.*
§ a le—de le, *L. and M. and Roh.*

say, We become your tenants, &c. or to make to him some other attornement, &c. and after the disseisor dieth seised, then the disseisee cannot distraine for the rent, &c. for that all the mannor descendeth to the heire of the disseisor, &c.

(6 Rep. 69. a.)

LITTLETON having spoken of estates gained by lawful conveyances, doth now speake of estates gained by wrong; and here putteth a case of a disseisin of a mannor, where it appeareth, that the disseisor cannot disseise the lord of the rents or services without ☞ the attornement of the tenants to the disseisor; for seeing an attornement is requisite to a feoffment and other lawfull conveyances, *à fortiori*, a disseisor or other wrong doer shall not gaine them without attornement. The like law is of an abator and an intrudor. But albeit the disseisor hath once gotten the attornement of the tenants and payment of their rents, yet may they refuse afterwards for avoiding of their double charge. And here the attornement of the tenant of a mannor to a disseisor of the demeanes shall dispossesse the lord of the rents and services parcell of the mannor, because both demeanes, rents and services make but one entire mannor, and the demeanes are the principall: but otherwise it is of rents and services in grosse, as in this next Section our author teacheth us.

[323. a.]

6 H. 7. 14. 11 H. 7. 28. 11 H. 4. 14. a. b. (Cro. Car. 303. Ant. 180.)

(1 Roll. Abr. 662.)

Sect. 588.

(Cro. Car. 303. 1 Roll. Abr. 658.) F.N.B. 179. K. (Ant. 180. b. 2 Siderf. 75.)

*BUT if one holdeth of mee by rent service, which is a service in grosse, * and not by reason of my mannor, and another that hath no right, claimeth the rent, and receives and taketh the same rent of my tenant by coertion of distresse, or by other forme* (et un auter que nul droit ad, † claima le rent, ‡ et receive et prent mesme le rent de mon tenant per cohersion de distres, ou per auter forme), *and disseiseth mee by such taking of the rent; albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distreine the tenant for the rent which was behinde before the decease of the disseisor* (devant le ‖ decease del disseisor), *and also after his decease. And the cause is, for that such disseisor is not my disseisor but at my election and will. For albeit he taketh the rent of my tenant, &c. yet I may at all times distreine my tenant for the rent behinde, § so as it is to mee but as if I will suffer the tenant to bee so long time behinde in payment of the same rent unto me* (per tant de temps arere ⸸ pur paier a moy meme le rent), *&c.*

Sect.

* *and not by reason of my mannor*, not in L. and M. or Roh.

† claima—claimant mesme, *L. and M. and Roh.*

‡ et receive—a receiver, *L. and M. and Roh.*

‖ decease—distress, *L. and M. and Roh.*

§ *&c.* added in L. and M. and Roh.

⸸ pur--de, *L. and M. and Roh.*

Sect. 589. (3 Rep. 77.)

FOR the payment of my tenant to another to whom hee ought not to pay, is no disseisin to me, nor shall oust me of my rent without my will and election (Car le payment de mon tenant a un auter a que il ne doit pas payer, n'est pas disseisin a moy, ne ousta moy pas de moi rent sans ma volunt ¶ et ma election), *&c. For although I may have* [323. b.] *an assise against such pernor, yet this is at my ☞ election, whether I will take him as my disseisor, or no. So such discents of rents in grosse shall not oust the lord of his distresse, but at any time he may well distreyne for the rent behinde, &c. And in this case if after the distresse of him which so wrongfully tooke the rent, I grant by my deed the service to another, and the tenaunt attorne, this is good enough, and the services by such grant and attornement are presently in the grantee, &c. But otherwise it is where the rent is parcell of a mannor, and the disseisor dieth seised of the whole mannor, as in the case next before is sayd, &c.*

HERE *Littleton* putteth a diversitie betweene a rent service parcel of a mannor, whereof he had spoken before, and a rent service in grosse. For a man cannot be disseised of a rent service in grosse, rent charge, or rent secke, by attornement or payment of the rent to a stranger, but at his election; for the rule of law is, *Nemo redditum alterius invito domino percipere aut possidere potest*; and our author hath before [*] taught us what be disseisins of rents services, rents charges, and rents secks, and payment to a stranger is none of them, but at the lord's election, as our author here saith. (2 Rep. 37. 9 Rep. 51. Hob. 322.) [*] Vide Sect. 237, 238, 239, 240. (Cro. Car. 303.)

"*Pernor*," *i. e.* the taker of my rent. But if the disseisee bring an assise against such a pernor, then he doth admit himselfe out of possession. 24 E. 3. 4. 1 E. 5. 5. See the authorities there following in the next paragraph.

"*Discents.*" A discent of a rent in grosse bindeth not the right owner but that he may distreyne, albeit he admitted himselfe out of possession, and determined his election, as by bringing of an assise, &c. 5 E. 4. 1. 23 H. 3. tit. Ass. 439. 24 E. 3. 40. 34.

If the tenant of the land pay the rent to a stranger which hath no right thereunto, and the right owner release to him, this release is good, because he thereby admitted himselfe to be out of possession. But if the tenant had given him any thing in name of attornement, and the right owner had released to him, this release had beene void, because an attornement only can be no disseisin of the rent. 16 Ass. p. 15. 16 E. 3. Release, 56. 1 E. 5. 5. F. N. B. 179. E. 15 E. 4. 8. Flet. li. 4. ca. 12.

"*I grant by my deed, &c.*" This also proveth, that the right owner is not out of possession, and that this grant over is a demonstration of his election that hee is in possession. (Ant. Sect. 541.)

Sect.

¶ et—ou sans, *L. and M. and Roh.*

Sect. 590.

(Dyer, 94. b.) (Cro. Car. 303.) (8 Rep. 89.)

ALSO, if I be seised of a mannor, parcell in demesne and parcell in service, and I give certaine acres of the land, parcell of the demesne of the same mannor, to ☞ *another in taile, yeelding to mee and to my heires a certaine rent, &c. if in this case I be disseised of the mannor, and all the tenaunts attorne and pay their rents to the disseisor, and also the sayd tenant in taile pay the rent by me reserved, to the disseisor, and after the disseisor dieth seised,* * *&c. and his heire enter, and is in by discent, yet in this case I may wel distreyne the tenant in taile, and his heires, for the rent by me reserved upon the gift,* scilicet, *as well for the rent being behinde before the discent to the heire of the disseisor, as also for the rent which happeth to be behind after the same discent, notwithstanding such dying seised of the disseisor, &c. And the reason is, for that when a man giveth lands* † *in taile, saving the reversion to himselfe, and hee upon the sayd gift reserveth to himselfe a rent or other services, all the rent and services are incident to the reversion; and when a man hath a reversion he cannot be ousted of his reversion by the act of a stranger, unlesse that the tenaunt be ousted of his estate and possession, &c. For as long as the tenant in taile and his heires continue their possession by force of my gift, so long is the reversion in me and in my heires* (car si longement § que le tenant en le taile et ses heires continuont lour possession per force de mon done, cy longement est le reversion en moy et en mes heires): *and in as much as the rent and services reserved upon such gift be incident and depending upon the reversion, whosoever hath the reversion, shall have the same rent and services, &c.* [324. a.]

☞ Sect. 591.

[324. b.]

IN the same manner is it, where I let parcell of the demesnes of the mannor to another for terme of life, or for terme of yeares, rendring to mee a certaine rent, &c. albeit I be disseised of the mannor, &c. and the disseisor die seised, ⊥ *&c. and his heire bee in by discent* (et son heire ¶ esteant eins per discent), *yet I may distreine for the rent arere* ut supra, *notwithstanding such discent; for when a man hath made such a gift in taile, or such a lease for life, or for yeares, of parcell of the demesnes of a mannor, &c. saving the reversion to such donor or lessor, &c. and after he is disseised of the mannor, &c. such reversion after such disseisin is severed from the mannor in deed, though it be not severed in right* ‡. *And so thou*

* *&c.* not in L. and M. or Roh.

† *to another,* added in L. and M. and Roh.

§ en ceo cas *added in L. and M. and Roh.*

⊥ *&c.* not in L. and M.

¶ esteant *not in L. and M. or Roh.*

‡ *&c.* added in L. and M. and Roh.

thou mayst see (my sonne) a diversitie, where there is a mannor parcell in demesne and parcell in services, which services are parcell of the same mannor not incident to any reversion, &c. and where they are incident to the reversion, &c.

HERE *Littleton* putteth a diversitie betweene rents and services parcell of a mannor (whereof he had spoken before) and rents and services incident to a reversion parcell of a mannor. (Cro. Car. 303. 1 Roll. Abr. 658.) (11 Rep. 47, 48. Plowd. 197. b.)

And the reason of this diversitie is, for that as long as the donee in taile, lessee for life, or lessee for yeares, are in possession, they preserve the reversion in the donor or lessor; and so long as the reversion continue in the donor or lessor, so long do the rents and services which are incident to the reversion belong to the donor or lessor. Neither can the donor or lessor be put out of his reversion, unlesse the donee or lessee be put out of their possession; and if the donee or lessee be put out of their possession, then consequently is the donor or lessor put out of their reversion. But if the donee or lessee make a regresse, and regaine their estate and possession, thereby doe they *ipso facto* revest the reversion in the donor or lessor.

And here is to be observed, that when a man is seised of a mannor, and maketh a gift in taile, or lease for life, &c. of parcell of the demesne of the mannor, [*a*] the reversion is part of the mannor, and by the grant of the mannor the reversion shall passe with the attornement of the donee or lessee. But if the lord make a gift in taile, or a lease for life of the whole mannor, excepting *Blacke-Acre*, parcell of the demesnes of the mannor, and after he granteth away his mannor; *Blacke-Acre* shall not passe; because during the estate taile, or lease for ☞ life, it is severed from the mannor. And so note a diversitie, that a reversion of part may be parcell of a mannor in possession, but a part in possession cannot be parcell of the reversion of a mannor expectant upon any estate of freehold. But if a man make a lease for yeares of a mannor, excepting Blacke Acre, and after granteth away the mannor, Blacke Acre shall passe, because the freehold being entire, it remaineth parcell of the mannor, and one *præcipe* of the whole mannor shall serve. But otherwise it is in case of the gift in taile or lease for life excepting any part, there must be severall writs of *præcipe*, because the freehold is severall.

[*a*] 18 Ass. p. 2. 38 H. 6. 33. Pl. Com. Fulmerstone's case, 103. Lib. 5. fol. 11, 12. 25. 19 E. 2. Briefe, 845. 4 E. 3. Briefe, 713. (Post. 349. 11 Rep. 50. b.)

[325. a.]

Chap. 11. Of Discontinuance. Sect. 592.

DISCONTINUANCE is an ancient word in the law, and hath divers significations, &c. But as to one intent it hath this signification, viz. *where a man hath aliened to another certaine lands or tenements and dieth, and another hath right to have the same lands or tenements, but hee may not enter into them because of such an alienation, &c.*

Vide Sect. 637. "DISCONTINUANCE" is a word compounded of *de* and *continuo*, for *continuare* is to continue without intermission. Now by addition of *de (euphoniæ gratiâ dis)* to it which is a privative, it signifieth an intermission. *Discontinuare nihil aliud significat quàm intermittere, desuescere, interrumpere.* And [a] 8 H. 4. 8. b. 11 H. 4. 85. b. as our author saith, [a] it is a very ancient word in law (1).

A discontinuance

(1) I. *As to discontinuances in general:*—In note 1, p. 239. a. it was observed, that in the case of a disseisin, while the possession remains in the disseisor, it is a mere naked possession, unsupported by any right; and that the disseisee may restore his possession, and put a total end to the possession of the disseisor, by an entry on the land, without any previous action; but that, if the disseisor dies, the heir comes to the possession of the estate by a lawful title. It was the same, by the old law, if the disseisor aliened; the alienee came in by a lawful title. By reason of this lawful title, the heir, in the first instance, and the alienee in the second, acquires a *presumptive right of possession*, which is so far good even against the person disseised, that he loses by it his right to recover the possession by entry, and can only recover it by an action at law. When the right of entry is thus lost, and the party can only recover by action, the possession is said to be *discontinued*. This is the *general* import of the word *discontinuance*; but, in its *usual* acceptation, it signifies the effect of alienations made by husbands seised *jure uxoris*; by ecclesiastics seised *jure ecclesiæ*; or by tenants in taile; those being the three instances adduced by Littleton of a discontinuance. But other cases, where the party having the right could not restore his possession by entry, and was therefore left to his remedy by action, were also, in Littleton's time, termed discontinuances. Thus, before the statute of the 11 H. 7. c. 20, the alienations of a woman seised of an estate in dower, or of an estate of the gift of her husband, or of any of his ancestors, were said to be a discontinuance; and before the statutes of 32 H. 8. c. 31. and 14 El. c. 8. recoveries suffered by tenants for life, or tenants by the courtesy, or tenants in tail after possibility of issue extinct, or even by the feoffee of tenant for years, worked a discontinuance. See sir William Pelham's case, 1 Rep. 14. It is to be observed, that there is a material difference between the situation or title of the alienee of any person whose alienation makes a discontinuance, and the situation or title of the heir or alienee of a disseisor; for the heir and alienee of a disseisor immediately claim under a person coming in by a wrongful title, and their estates, though not defeasible by entry, are immediately defeasible by action. But the alienee of every person, whose alienation is said to be a discontinuance, claims by a person having a lawful estate, and the estate of the alienee is unimpeachable during the life of the discontinuor. It should also be observed, that a discontinuance extends to those cases only where a person is dispossessed of an estate of freehold; and, where, though he has lost his right of entry, he *can* still recover the possession by action. At the common law, if there was a term for years, and the tenant of the freehold suffered a common recovery by covin, it was a good bar to the termor; for, not having the freehold, he could not falsify the recovery, so that all his term and interest in the land was lost, and his only remedy was an action of covenant against the lessor. His possession, therefore, or rather his interest, was absolutely lost, not merely interrupted. Even after the statutes of Gloucester, and the 21 H. 8. c. 15. which preserved the interest of the termor for years, against a common recovery, as the possession of the termor for years is considered in the law as the possession of him who has the next estate of freehold, the recovery is never said to discontinue the estate of the termor for years; the expression discontinuance being applied solely to those cases where the *freehold* is divested. The peculiar import of the word discontinuance,

A discontinuance of estates in lands or tenements is properly (in legall understanding) an alienation made or suffered by tenant in taile, or by any that is seised in *auter droit*, whereby the issue in taile, or the heire or successor, or those in reversion or remainder, are driven to their action, and cannot enter. (10 Rep. 97.)

All which is implied by the description of our author, and by the (*&c.*) in the end of this Section.

I have added (properly) by good warrant of our author himselfe, for *Sectione* 470, he useth discontinuance for a devesting or displacing of a reversion, though the entrie be not taken away.

This discontinuance consisteth in doing or suffering an act to be done, as hereafter shall appeare. And where our author saith, that it hath divers significations, there is also a discontinuance of processe consisting in not doing, where the processe is not continued, concerning which there is an excellent statute made in furtherance of justice in [*b*] 1 *E.* 6, and is well expounded in my Reports, and therefore need not here to be inserted. (1 Roll. Abr. 130. 485.)

[*b*] Vide the Stat. of 1 E. 6. ca. 7. & 31 Eliz. c. 1. lib. 7. f. 30, 31. &c. le case de discontinuance de proces.

There is another erroneous proceeding, and that consisteth in misdoing; as when one processe is awarded instead of another, or when a day is given which is not legall, this is called a miscontinuance, and if the tenant or defendant make default, it is error; but if he appeare, then the miscontinuance is salved, otherwise it is of a discontinuance. But let us returne to the discontinuance of estates in lands, whereof *Littleton* doth treat in this Chapter. (1 Sid. 173. 2 Cro. 284.) 39 E. 3. 7. a. 46 E. 3. 30.

37 H. 6. 25, 26. 9 E. 4. 18. 12 E. 4.

"*Significations.*" Here (as in many other places) it appeareth how necessary it is to know the signification of words. Vide Sect. 74. 174. 194. 441. 520.

And in this Chapter it appeareth, that when *Littleton* wrote, the estate in lands and tenements might have beene discontinued five manner of wayes, *viz.* by feoffment, by fine, by release with warrantie,

tinuance, where applied to the cases mentioned by Littleton, is shortly, but forcibly expressed by Mons. Houard, who explains the word discontinuance, "*Interruption du droit, qu'on a sur un fonds, par la vente qu'un autre chargé de conserver ce droit, en a faite.*" See *Anciennes Loix des François*, 2 vol. 435. Our doctrine of discontinuance bears some analogy to the doctrine of interruption in the civil law.—There, interruption, when applied to the real property, signifies the ousting of a person from the possession of his land. From that time he ceases to be the possessor of it; and if he does not renew his possession, but permits the dispossessor to retain it, he absolutely loses his right to it, and the disseisor is said to acquire it by prescription. It is observable, that by the laws of the Twelve Tables, possession during two years formed a prescription for land; one year, for personal estate. Dio. Sic. 20. In 6 Rep. fol. 8. b. 9. a. lord Coke observes, that the reason why the law will not permit a person who is in by judgment of law, to have his possession disturbed by the disseisee, is, "to take away the multiplicity and infiniteness of "suits, trials, recoveries, and judgments in one and the same case; and there- "fore in the judgment and policy of the law it was thought more profitable "to the commonwealth, and more for the honour of the law, to leave some "without remedy, and to put others to their writ of right, without any "respect of coverture, &c. than that there should not be any end of actions "and suits." In a preceding note, the writer has already referred to the excellent argument of the master of the rolls, in Beckford *v.* Wade, 17 Ves. 87. —[Note 278.]

warrantie, confirmation with warrantie, and by suffering of a recovery in a ☞ *præcipe quòd reddat.* And this was to the prejudice of five kinds of persons, *viz.* of wives, of heires, of successors, of those in reversion, and of those in remainder. But for wives, and their heires, and for successors, the law is altered by acts of parliament since *Littleton* wrote, as in this Chapter in their proper places shall appeare. [325. b.]

Sect. 593.

AS if an abbot be seised of certaine lands or tenements in fee, and alieneth the same lands or tenements to another in fee, or in fee taile, or for terme of life, and after the abbot dieth (et * puis l'abbe morust), *his successor cannot enter into the said lands or tenements, albeit he hath right to have them as in right of his house, but he is put to his action to recover the same lands or tenements, which is called a writ,* breve de ingressu sine assensu capituli, &c. †

HERE *Littleton* putteth an example of a discontinuance made by one seised in *auter droit*, as by an abbot who had a fee simple in the right of his monastery, and therefore his alienation without the assent of his covent had beene a discontinuance at the common law, and had driven his successor to a writ *de ingressu sine assensu capituli.*

Regist. Orig. fo. 230. F. N. B. 195. Bracton, lib. 4. fol. 323. Fleta, lib. 5. cap. 34.

"*De ingressu sine assensu capituli, &c.*" It is called so because the alienation was *sine assensu capituli*; for if it had beene *cum assensu capituli*, it should have beene a barre to the successor. And because the successor could not enter, the common law gave him this writ, and is so called of these words contained in the writ, which writ you may read in the Register, and *Fitzherbert's N. B.*

21 E. 4. 86. (Plo. 536.) (Ant. 85. a.) (Post. 341. b.) (11 Rep. Magdalen College's case.)

And here is to be noted, that in law the covent, albeit they be regular and dead persons in law, yet are they said in law to be *capitulum* to the abbot, as well as the deane and chapter, that be secular to the bishop. But it is to be observed and implied in this (*&c.*) that, a sole body politike that hath the absolute right in them, as an abbot, bishop, and the like, may make a discontinuance; but a corporation aggregate of many, as deane and chapter, warden and chaplaines, master and fellowes, maior and commonaltie, &c. cannot make any discontinuance; for if they joyne, the grant is good: and if the deane, warden, master, or maior make it alone where the body is aggregate of many, it is void, and worketh a disseisin. But now (as hath beene said) by the statute of 27 *H.* 8, and 31 *H.* 8, all the abbots, priors, and other religious persons are so dissolved, as there be none remaining this day, and by the statutes of 1 *Eliz.* and 13 *Eliz. cap.* 10, and 1 *Jac. cap.* 3, bishops and all other ecclesiasticall persons are

See more of this matter hereafter in this chapter, Sect. 648, and before Sect. 528.

* puis *not in L. and M. or Roh.* † &c. *not in L. and M. or Roh.*

are disabled to alien or discontinue any of their ecclesiasticall livings, as by the same acts doth appeare (1).

Sect. 594.

ALSO, if a man be seised of land as in right of his wife, &c. and thereof infeoffe another, † &c. and dieth, the wife may not enter, but is put to her action, the which is called,* cui in vitâ, &c.

[326. a.] "*IN right of his wife, &c.*" (2) That is to say, in fee simple, fee taile, ☞ or for life. Here *Littleton* putteth another case where a man is seised in *auter droit*, and may make a discontinuance, as the husband seised in the right of his wife, and therefore the common law gave her a *cui in vitâ*, and her heire a *sur cui in vitâ*, because they could not enter. But this is altered since our author wrote, by the statute of 32 *H.* 8. by the purview of which statute, the wife and her heires after the decease of her husband may enter into the lands or tenements of the wife, notwithstanding the alienation of her husband.

Bracton, lib. 4. f. 202. & 22 & 324. Fleta, lib. 5, ca. 34 & 36. F. N. B. 193. And Regist. 32 H. 8. cap. 28.

* *&c.* not in L. and M. or Roh. † *&c.* not in L. and M. or Roh.

(1) II. *As to discontinuances by ecclesiastical persons:*—It is generally supposed that ecclesiastical persons were permitted to acquire real estates as early as the reign of the emperor Constantine. The tenth century is commonly considered as the period when donations to them were most frequent and considerable. Very soon after they were permitted to acquire, they were restrained from alienating, their property. See Dec. Gra. Cas. 12. Q. 2. c. 3. Long leases made by ecclesiastical persons are declared to be null by the Council of Trent, Sess. 25. de Ref. ch. 11. For the learning relating to the leases made by ecclesiastical persons, the editor begs to refer to the much-admired collections on this subject in Bacon's Abr. vol. 3. tit. Leases, supposed to be extracted from a manuscript of sir Geoffry Gilbert. It is to be observed, that bishops and abbots were supposed to have the possession *in fee*, and might therefore alien in fee; but parsons were considered to have no more than a *life* estate. See Gilb. Ten. 110.—[Note 279.]

(2) III. *As to discontinuances by persons seised jure uxoris:*—It is generally supposed that women, by reason of their incapacity to perform military duty, were not originally admitted to succeed to *proper* fiefs: so that if the fief, by its original constitution, were descendible to the females, it was, upon that very account, ranked among *improper* fiefs. See Craig de Jure Feud. 48. 50. 23ß. Stry. Ex. Jur. Feud. cap. 4. 2. cap. 15. 2. 3. By the Salic law, the females were excluded from succeeding to estates, either lineally or collaterally.—It may not be improper to mention here, that there are two different codes of this law. One of them is supposed to have been collected before christianity was received into France.—The other is of a later date; and appears to be a republication of the former, with considerable alterations, both in substance and phraseology: and with several new regulations supposed to have been made by the princes who filled the throne of that kingdom, after the introduction of christianity. The former code contains the following clause: "*De terrâ verò "Salicâ in mulierem nulla portio hæreditatis transit; sed hoc virilis sexus "acquirit;*

it was the inheritance of them both. And so it is if the feoffment be made by the husband and wife, (albeit the words of the statute be by the husband only) for in substance this is the act of the husband only (1).

If the husband cause a *præcipe quòd reddat* upon a faint title to be brought against him and his wife, and suffereth a recovery without any voucher, and execution to be had against him and his wife, yet this is holpen by the statute; for this by like construction is the act of the husband, and the words of the statute be, *made*, *suffered*, or *done*.

(F. N. B. 205. F. 7 Rep. 42. 4 Rep. 29.) If the husband make a feoffment in fee of the lands which he holdeth in the right of his wife, and after they are divorced *causâ præcontractûs*, yet the woman may enter within the purview of that statute, and is not driven to her writ of *cui ante divortium*, as she was at the common law, albeit the entrie be by the statute given to the wife, and now upon the matter she was never his lawfull wife. But it sufficeth that she was his wife *de facto* at the time of the alienation, and where her husband dieth she cannot be his wife at the time of the entrie.

6 E. 6. Dier, 72. b. 4 H. 7. c. 24. If the husband levie a fine with proclamations, and dieth, the wife must enter, or avoid the estate of the conusee within five yeares, or else she is barred for ever by the statute of 4 *H.* 7, for the statute of 32 *H.* 8. doth helpe the discontinuance but not the barre; and the statute speaketh of a fine, and not of a fine with proclamations.

Greveleye's case ubi supra. Pasch. 7 Jac. (Hob. 261. 9 Rep. 140.) (Dyer, 224. a. 3 Inst. 216.) If lands be given to the husband and wife, and to the heires of their two bodies, and the husband maketh a feoffment in fee and dieth, the wife is holpen by the said statute, as hath beene said, and so is the issue of both their bodies. Feme tenant in taile taketh husband, the husband maketh a feoffment in fee, the wife before entrie dieth without issue, he in the reversion or remainder may enter. For, first, the reversion or remainder cannot be discontinued in this case, because the estate taile is not discontinued. Secondly, the words of the statute be, *shall not be prejudiciall or hurtfull to the wife or her heires, or such as shall have right title or interest by the death of such wife, but that the same wife and her heires, and such other to whom such right shall appertaine after her decease, shall or lawfully may enter into all such mannors, lands, &c. according to their rights and titles therein*; by which words the entrie of him in the reversion or remainder in that case is preserved. The husband is tenant in taile, the remainder to the wife in taile, the husband make a feoffment in fee; by this the husband by the common law did not only discontinue his owne estate taile, but his wife's remainder: but at this day after the death of the husband without issue, the wife may enter by the said act of 32 *H.* 8. If the husband hath issue, and maketh a feoffment in fee of his wife's land, and the wife dieth, the heire of the wife shall not enter during the husband's life, neither by the common law nor by the statute.

8 E. 2. tit. Cui in vitâ, 26. 34 E. 1. ibidem, 30. 10 E. 3. 12 Dier. 21 Eliz. 363.

" *Cui*

(1) But a fine levied both by husband and wife of her lands is not within the statute; and it operates as a bar to her and her heirs of all her estate and interest in the land.—See 2 Rep. 57. b. 77. b.

"*Cui in vitâ, &c.*" Here is also implied a *sur cui in vitâ* also for the heire. This writ here mentioned in our author is so called of those words contained in the writ, which you may reade in the Register and *Fitzherbert's N. B.*

[326. b.]

☞ Sect. 595.

ALSO, if tenant in taile of certaine land thereof enfeoffe another, &c. and hath issue and dieth, his issue may not enter into the land, albeit he hath title and right to this, but is put to his action, which is called a formedon in le discender, &c. (1)

"*ENFEOFFE another, &c.*" Here is implied, or make a gift in taile or an estate for life. Here *Littleton* putteth a third example of a discontinuance made by tenant in taile so as his issue is put to his *formedon* in the discender, which is given to the issue in taile by the statute of 13 *E.* 1. *cap.* 1, because he cannot enter.

Fleta, lib. 5. cap. 34. F. N. B. 211, 212. Registr. (4 Rep. 3. b. Post. 365. b.)

"*Tenant in taile.*" This extendeth as well to a woman tenant in taile as to a man, and was generally good law when *Littleton* wrote; but now by the statute of [*d*] 11 *H.* 7, if the woman hath any estate in taile joyntly with her husband, or only to her selfe,

[*d*] 11 H. 7. ca. 20. Vide Sect. 697.

(3 Cro. 244. 1 Rep. 102. b. 3 Rep. Lin. Coll. Case. 10 Rep. 39. b. 6 Rep. 9. b. Bend. 40. Hob. 332. Jo. 31. Cro. El. 2.)

or

(1) IV. *As to discontinuances by tenants in tail with respect to their issue:*— It is to be observed, that though the estate of the tenant in tail, as to his right of possession, or rather as to his beneficial property in the lands, has a duration for the term of his life only; yet, in the eye of the law, he is considered as seised of an estate of inheritance. To understand this, it should be remembered, that, in the case of a fee simple conditional at common law, the condition, from which that estate took its appellation, did not suspend the fee from vesting in the donee, immediately by the gift. Thus, we find, that, if he aliened before he had issue, it not only was no forfeiture, but, if afterwards he had issue, it was a bar to them. See Plo. 239. 2 Inst. 333. But the condition, though it did not prevent the fee from vesting in the donee, suspended his power of alienation. To that power it was considered to be a condition precedent, that the donee should have issue born. The statute extinguished the power, but did not affect the estate of the feudatory in any other respect: so that a tenant in tail was as much seised of the inheritance, after the statute *de donis*, as a tenant in fee simple conditional was before it. Hence, if he made a feoffment, it did not, during his life, affect or prejudice the issue. Thus, his alienation was, primarily, a lawful transfer of the freehold; the alienee came in by right; and his estate could not be impeached during the life of the donee. In conformity to the established rule of the common law, that whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry, however slender or unlawful the title of the grantor himself might be, the statute *de donis* did not absolutely nullify the alienations of the donee in tail, but enabled the issue to defeat them by the formedon in the descender.—[Note 281.]

or to her use in any lands or hereditaments of the inheritance or purchase of her husband, or given to the husband and wife in taile by any of the ancestors of the husband, or by any other person seised to the use of the husband or his ancestors, and shall hereafter being sole, or with any other after-taken husband, discontinue, &c. the same: every such discontinuance shall be void; and that it shall be lawfull for every person to whom the interest, title, or inheritance, after the decease of the said woman should appertaine, to enter, &c. So as if such a feme tenant in taile doe make any discontinuance in fee, in taile, or for life, although it be without (A) warrantie, yet this doth not take away the entry after her death, either of the issue or of him in reversion or remainder. This statute hath beene excellently expounded by divers resolutions and judgments [e] which I have quoted in the margent, and are worthy of due observation.

[e] Lib. 3. fol. 50, 51. Sir George Browne's case, eodem lib. fol. 60, &c. Linc. Coll. Case. Lib. 1. fol. 176. Mildemaye's case. Dier, 3 & 4 Ph. & Mar. 146. Idem. 8 Eliz. 248. 17 Eliz. 340. Idem. 19 Eliz. 354. Idem. 20 Eliz. 362. 27 H. 8. 23. Lib. 5. fol. 79. Fitzh. case. Lib. 8. fol. 71, 73. Greveleye's case. (F. N. B. 211. 217. 8 Rep. 88.)

If lands were entailed to a man and to his wife, and to the heires of their two bodies, and the husband had made a feoffment in fee and died, and then the wife died, this had beene a discontinuance at the common law: for the title of the issue is as heire of both their bodies, and not as heire to any one of them, and his entrie must ensue his title or action.

"*A formedon.*" *De formâ donationis,* so called because the writ doth comprehend the forme of the gift. And there be three kinde of writs of formedon, *viz.* The first in the discender to be brought by the issue in taile, which claime by discent *per formam doni.* The second is in the reverter, which lieth for him in the reversion or his heires or assigns after the state taile be spent. The third is the remainder, which the law giveth to him in the remainder, his heires or assignes, after the determination of the estate taile; of all which you may reade in the Register and *F. N. B.*

Here *Littleton* sheweth that the issue in taile shall have a formedon in the discender. What other actions tenant in taile may have, and not have, is good to be seene.

[a] 4 E. 3. 38. 43 E. 3. 25. 4 E. 4. 25. F. N. B. 124.

[a] Tenant in taile shall have a *quòd permittat.*

[b] 2 E. 2. Droit, 28.

[b] Tenant in taile shall have a writ of customes and services *in le debet, et solet,* but shall not have it in the *debet* only.

[c] F. N. B. 123.

[c] In like manner he shall have a *secta ad molendinum in le debet et solet,* but not in the *debet tantum.*

[d] 21 E. 3. 11. 5 E. 3. 23. 11 H. 4. 49.

[d] Tenant in taile shall have a writ of *entre in consimili casu,* and an *admesurement,* and a *nativo habendo, cessavit, escheat, waste,* and the like.

[e] 2 E. 3. Droit, 28. 13 H. 7. 24. 5 E. 4. 2. 20 E. 3. Avowrie, 131. F. N. B. 10.

[e] But tenant in taile shall not have a writ of right *sur disclaymer,* nor a *quo jure,* nor a *ne injuste vexes,* nor a *nuper obiit,* or *rationabile parte,* nor a *mordancester,* nor a *sur cui in vitâ*; for these and the like, none but tenant in fee shall have: and the highest writ that a tenant in taile can have is a formedon.

46 E. 3. tit. Cui in vita, 33.

Sect.

(A) *Here* "without" *seems printed by mistake instead of* "with." *See Mr. Ritso's Intr. p.* 121.

[327. a.]

☞ Sect. 596.

ALSO, if there bee tenant in taile, the reversion being to the donor and his heires, if the tenant make a feoffment, * *&c. and die without issue, hee in the reversion cannot enter, but is put to his action of* formedon in le reverter † (1).

Sect. 597.

IN the same manner is it, where tenant in taile is seised of certaine land whereof the remainder is to another in taile, or to another in fee (En mesme le manner est, lou tenant en le taile ‡ seisie de certaine terre dont le remainder est a un auter en le taile, ou a un auter en fee). *If the tenant in taile alien in fee, or in fee-taile,* ‖ *and after die without issue, they in the remainder may not enter, but are put to their writ of* formedon *in the remainder, &c.* (2), *and for that that by force of such feoffments and alienations*

* *&c.* not in L. and M. or Roh.
† *&c.* added in L. and M. and Roh.
‡ seisie *not in L. and M. or Roh.*
‖ *&c.* added in L. and M. and Roh.

(1) V. *As to alienations by tenants in tail, with respect to the reversioner :*— Upon the death of tenant in fee simple conditional without issue, if the estate was withheld from the reversioner, either by the alience of the tenant in tail, or by an abator, the reversioner was entitled, at the common law, to a formedon in the reverter. It has been observed before, that if tenant in fee simple conditional at the common law, aliened before he had issue, and afterwards had issue, the issue was barred by the alienation; but it does not seem clear whether the alienation in that case barred the reversioner. See Plo. 235. Ant. 19.—In general, when the ancestor aliened, it was with warranty; in that case, the warranty descended upon the issue in tail, and therefore prevented his claiming against the alienation of his ancestor. But nothing of this nature could be opposed to the reversioner.—[Note 282.]

(2) VI. *As to discontinuances by tenants in tail, with respect to those in remainder :*

I. It has been observed before, that all estates of inheritance were, at common law, either fees simple absolute, or fees simple conditional; and that tenants in fee simple conditional were, after the birth of issue, permitted to alien the fee, upon a supposition, that, by the birth of issue, the condition was performed. The statute *de donis* declared this to be manifestly contrary to the form and intent of the gift, and therefore required that thenceforth the will and intent of the donor should be observed, and the fee revert to him, for want of issue. This statute did not create any new estate, but, by disaffirming the supposed performance of the condition, preserved the fee to the issue, while there was issue to take it, and the reversion to the donor when the *issue* failed. *An estate of inheritance therefore remained in the donee*; but only a particular description of heirs being entitled to take under it, it received the

alienations in the cases aforesaid, and the like cases (en les cases avantdits, et en semblables § cases), *they that have title and right after the death of such*

§ auters *added in L. and M. and Roh.*

appellation of an estate tail, that is, an estate docked, cut off, or abridged, in contradistinction from the estate of fee simple absolute, which remained in the donor. Wright's Tenures, 186. Plo. 251. The expression estate tail does not occur in the statute *de donis*; but it is to be found in a statute of the same year. See Stat. West. cap. 4. The statute *de donis*, by thus securing the reversion to the donor, produced another material alteration in the law. For, by the common law, no remainder could be limited upon, or after, an estate in fee simple absolute or conditional; but, when estates in fee simple conditional were reduced to estates tail, remainders after them were permitted: and, by analogy to what was done for the issue and the reversioner, a formedon in the remainder was given to the remainder-man;—not, however, expressly, but by inference.—For the remainder-man after an estate tail being by the discontinuance in the same mischief with the issue or the reversioner in tail, an equitable construction of the statute brought him within the like remedy.—Five years after the enacting of the statute *de donis*, the statute *quia emptores terrarum* was passed; by which all persons were enabled to dispose of their lands; but the feoffees were to hold them immediately of the chief lord. Upon this statute, the courts took the following distinction, with respect to estates tail, and other particular estates; that, where a person seised in fee granted for life, or in tail, reserving the reversion to himself, the grantees of the particular estates held of the reversioner, and he of the chief lord: but, where a person granted for life, or in tail, with the remainder over in fee, both the tenant of the particular estate, and the remainder-man, held of the chief lord. 2 Inst. 505.

II. Care must be taken to distinguish between a *remainder limited after an estate tail, and a conditional, or contingent use, limited upon or after such an estate.* See page 203. b. note 1, and page 272. a. note 1. V.—There are few occasions where greater nicety, or skill, is required, in limiting uses of this kind, than in the two following cases.—The first is, when a person, being seised of two estates, wishes to raise two families; and, with this view, intends that one of the estates, (which shall be called here the family estate,) shall be settled on his eldest son and his issue; and for want of such issue, on his younger sons, successively, and their respective issue; and, that the other estate, (which shall be called here the second estate,) shall be settled on his second son, and his issue; and for want of such issue, on his other subsequent sons, successively, and their respective issue. In this case, by the death of the eldest son without issue, the family estate would descend on the second son, or his issue. This union of the two estates would effectually defeat the settler's intention. To guard against it, therefore, it is necessary to provide, that, if by the death of the first son, and failure of issue of his body, the family estate descends upon the second son, or any other younger son, or any issue of their bodies, the second estate shall, in that case, shift from the person upon whom the family estate descends, to the person next in remainder.—The other case is, when a person limits his estate in strict settlement with an injunction that the several persons taking under the settlement shall use his name and bear his arms. These being cases of difficulty, the rules of law respecting them not having been long settled; and the forms for carrying them into execution being in general very imperfect; the following observations, it is imagined, may be properly introduced here.

II. 1. *As*

such a feoffor or alienor may not enter, but are put to their actions, ut supra; *and for this cause such feoffments and alienations are called discontinuances.*

"*MAKE*

II. 1. *As to clauses for shifting the second estate, on the accession of the family estate.* From what has been said before, it is clear that the provisoes and injunctions, in these cases, are shifting or secondary uses; and the point now before us presents us with a curious and striking view of the gradual progress of the doctrines of our courts respecting them.—One of the most remarkable adjudications on this subject is the duke of Norfolk's case, 3d Ca. in Cha. 1. The case there was, that Henry earl of Arundel conveyed his estates to the use of himself for his life; and, after his decease, to the use of trustees for 200 years; and, after the expiration of that term, to the use of Henry Howard, his second son, in tail male; remainder to Charles Howard, and his other subsequent sons, successively, in tail male; with a declaration that the term of 200 years was limited in trust to attend the inheritance, so long as Thomas Howard, the settler's eldest son, or any issue male of his body should live; but with a proviso, that if by his death without issue male living at his decease, or by a subsequent failure of that issue male, the earldom of Arundel should descend on the second son, then the trust should cease as to the second son, and the heirs male of his body; and the trust should then be for the benefit of the third son, and the heirs male of his body. The eldest son died without issue, in the life-time of the second son; upon this the difficulty arose. The question was, whether the executory trust for the benefit of the third son was not too remote? It is clear, that the event upon which the trust was to take effect for the benefit of the third son, must, if it took place at all, necessarily take place within the compass of one life; it being, that by event of the death and failure of issue of the first son in *the second son's life-time*, the second son should become entitled to the earldom of Arundel. The law upon this head is, *now*, so clearly settled, that if a settlement were to be made now to this effect, all the parties interested would immediately acquiesce in it. But it was *then* a point so much questioned, that few cases have been heard in the courts, either of law or equity, in which there has been a greater difference of opinion. Lord Nottingham, before whom it was heard, was assisted by the three chief justices. His lordship held the trust to be good. But the three chief justices differed from his lordship; and his lordship's decree was afterwards reversed by lord keeper North: but the house of lords, on appeal, reversed the reversal; and affirmed lord Nottingham's decree. Thus, by this case, it was solemnly adjudged, that an executory trust of a term of years was good, if so framed as to take effect within the compass of *one life in being*. This reasoning extended, by analogy, to executory devises of legal estates; and to all shifting and secondary uses, whether created by deed, or will.—The next advance in limitations of this nature was to extend them to a period within the compass *of one or more life or lives in being, and twenty-one years after*. Upon this principle was determined the case of Lloyd *v.* Carew, Prec. in Cha. 72. Show. Cases in Par. 137.

In most cases, till the middle of the last century, the clauses in deeds or wills by which these purposes were intended to be effected were framed upon this plan; so that the event upon which the estate limited to the second son was to shift from him and his issue to the subsequent sons and their issue, viz. the accession of the family estate was confined to the contingency of its happening within the above period of one or more life or lives in being, and twenty-one years. Afterwards, as it was observed that a common recovery suffered by tenant in tail barred all limitations subsequent or collateral to his estate,

(F. N. B. 215.) "MAKE *a feoffment, &c.*" Here is implied fee simple, fee taile, or estate for life; and in this and the next Section *Littleton* putteth two cases, where if the issues in taile faile, they in

estate, it was concluded, that there was no necessity to confine the event, upon which the estate was to shift, to any particular period of time; and therefore it is now usual to express it generally, that if any of the younger sons, or of the heirs male of their bodies, shall come into possession of the family estate, (without limiting the period, when this happens, to any particular time,) the second estate shall shift from the person so becoming entitled to the family estate, and go to the persons next entitled in remainder. An instance of this kind may be seen in an act of parliament, passed in the year 1758, intituled, "*An Act to enable Charles Bagot, now called Charles Chester, and his sons, to* "*take the surname of Chester.*"

In clauses of this nature so many circumstances deserve minute attention and accurate expression, as to render it a clause of singular nicety.—1st. *The event in which the shifting clause is to have effect*, should be accurately described. A general direction, that it shall have effect, on the party's accession to the family estate, may be contended not to apply to the event of his succeeding to a proportion of it, however large; nor to the event of his succeeding to the whole, if it be charged with an incumbrance, to which it was not, in fact or in contingency, liable, when the settlement was framed; nor to the event, where the party accedes to the family estate, not under the instrument to which the clause refers, but by a subsequent and independent instrument, or by act of law; as when the eldest son suffers a recovery, and dies without issue and intestate, or settles the family estate on his next brother. In the former of these cases the next brother would take by heirship to his eldest brother; in the latter he would take under a conveyance from him; and he would take in neither (at least immediately), by the instrument containing the clause. The clause, therefore, should be so framed as to describe the events, in which it is to operate, and prevent its operation in other events.—2dly. The clause should describe accurately *what estates or interests* the younger brother solely, or both the younger brother and his issue male, are to take, in the family property, so as to give to the clause the effect of making the second estate shift from them.—When the property is included in a particular deed, and the party is to take it according to the terms of that deed, this may be easily described; but, where this is not the case, it is frequently difficult to frame the clause in such a manner, as will ascertain, with precision, the events to which the clause is intended to apply.—3dly. Equal attention must be observed in *describing the person to whom* the settler wishes the second estate to devolve when the party accedes to the family estate. It sometimes happens that, in the case proposed in this annotation, the settler directs that on the accession of any of the subsequent tenants for life to the family estate, the second estate shall devolve to the person next entitled in remainder. Now, in the case proposed, the person next entitled in remainder is the son of the tenant for life, or, (where such a limitation is introduced,) the trustees for preserving the contingent remainders. To one or other of these the limitation, worded in the manner which has been mentioned, has, in some adjudged cases, been held to carry the estate. But this, almost always, is contrary to the intention of the settler, as he generally wishes that the estate shifted should not devolve to the trustees, or to the issue of the son, from whom it shifts, but vest in the next son. This, therefore, should be provided for.—4thly. The clause should also direct to whom the second estate should devolve, if, at the time of its shifting, *the person to whom it is limited is not in existence*, but may afterwards come *in esse*. As, where an estate is limited to the sons of *I. S.*, (a person in existence,) successively in tail

in the reversion and remainder are driven to their *formedon* in reversion or remainder; and this remaineth as it was when *Littleton* wrote, not altered by any statute. And the reason whereof

tail male, with a clause, directing that, on the accession of any son of *I. S.* to a particular estate, the lands in settlement shall devolve to the next son of *I. S.*; and while *I. S.* is living, and has one son only, that son accedes to the estate. It is proper to provide for this case, by directing who is to be entitled to the estate, while there shall be a possibility of a subsequent son, but the existence of such subsequent son shall be in suspense.—5thly. In many cases it is necessary *to provide for the return of the property* to a person from whom it has been divested by the shifting clause. As when a person settles his family estate on himself for his life, with successive remainders to each of his sons *A. B. C.* and *D.* in the order of his birth, with remainders over to the sons of each of them successively in tail male; and settles a second estate on himself for life, with successive remainders over to each of his sons *B. C.* and *D.* in the order of his birth, with remainders to the sons of each successively in tail male, with remainder to *A.* his eldest son for life, with remainders to his sons successively in tail male, with ulterior remainders to the collateral branches of his family; and with a clause divesting the second estate from *B. C.* or *D.* and their respective issue male, on their respectively acceding to the family estate. On the death of *A.* without issue male, *B.* would accede to the family estate, and the second estate would therefore shift from him. Now, if *C.* and *D.* should die without issue male, the second estate would devolve to the collateral branches of the family, under the ulterior limitations. But it could not be the intention of the settler that this should take place while there should be issue male of his own body. To obviate these and other incongruities of a similar nature, the shifting clause should be so framed as not to take effect unless *C.* or *D.* or some issue male of their bodies should be living, when *B.* accedes to the family estate; and so as to provide, that, if the second estate shall have shifted, and *C.* and *D.* shall afterwards die without issue male, the second estate shall again revert to *B.* and his issue male according to the original limitations. Still nicer, and not improbable, cases may be easily supposed in such shifting clauses.

II. 2. *As to clauses enjoining persons, to whom estates are limited in strict settlement, to take the name and use the arms of the settler.* This, in some respects, is nicer than the former clause; because, in the former clause, the intention of the settler generally is, that the second estate, upon the accession of the family estate, shall pass, not only from the person himself upon whom the family estate descends, but from his issue, but, in the case now under consideration it generally is not the intention of the settler that the issue shall be prejudiced by the non-compliance of his parent with the condition or requisition annexed to his estate. Now suppose an estate is limited to *A.* for life, remainder to trustees and their heirs, during his life, to preserve the contingent remainders, remainder to *A.*'s sons successively in tail male; with a proviso, enjoining *A.* and his sons, and the heirs male of their bodies, when they become seised in possession of the estate, to take the name and bear the arms of the settler, otherwise the estates limited to them to determine: in this case, if *A.* the first taker should not comply with the condition or requisition annexed to his estate, before the birth of a son, his estate would determine, and the contingent remainders limited to his sons would either be void, or be preserved by the limitation to the trustees. The former would be entirely contrary to the intention of the settler: the latter also would be contrary to his intention, so far, as by the words usually inserted in limitations of this nature, the person refusing to comply with the condition, would be entitled to the rents of the estate during his life; and, if those words were not inserted, the

whereof these alienations in the severall cases in this and the next Section doe make a discontinuance, and put him in the reversion or remainder that right had to his action, and tooke away

the rents being undisposed of, would belong to the heir at law of the settler. To prevent this, it is proper to direct, that the trustees for preserving the contingent remainders shall, after the cesser or determination of the estate for life, and during the suspense and contingency of the then next expectant remainder, stand and be seised of the estate limited to them; in the first place, to preserve the contingent remainders till they come *in esse*; and in the next place, during the suspense of such remainder, upon trust to pay the rents to those, who would be entitled to the estate, if the persons taking under the contingent remainders then in suspense were dead. It may not, perhaps, be unacceptable to the reader to be presented with the following clauses, in which all the above circumstances seem to be attended to. It must be supposed, that the estate is previously limited to *A.* (a feme sole,) for her life, with a power to limit a rent-charge to any person whom she may marry, for his life, with a limitation to *C.* and *D.* and their heirs during her life, to preserve the contingent remainders; remainder to her sons successively in tail male; remainder to her daughters, as tenants in common in tail, with cross remainders in tail between them; with several remainders over; then the proviso in question immediately follows: "Provided always, and it is hereby agreed and declared between and "by the parties to these presents, that the person or persons, whom the said "*A.* shall marry, and every person, who by virtue of the limitations herein- "before contained, or of this proviso, shall become entitled to the possession, "or to the receipt of the rents and profits of the manors and other here- "ditaments hereby released, or expressed and intended so to be, shall and "do, within the space of one year next after they respectively shall so marry, "or so become entitled to the possession, or to the rents and profits of the "said manors and other hereditaments as aforesaid, take upon him and them "respectively, and use in all deeds, letters, accounts, and other writings, to "or in which they respectively shall be party, or parties, or which they "respectively shall sign, the surname of Browne only, and take and use no "other surname; and quarter the arms of Browne, with their own respective "family arms; and also shall and do, within the space of one year next after "they respectively shall so marry, or so become entitled, as aforesaid, apply, "sue for, and endeavour to obtain an act of parliament, or a proper license "from the crown, or take such other means as may be requisite or proper to "enable or authorize him, or them, respectively, to take and bear the said "surname and arms: and that in case any such person and persons shall "refuse or neglect to take such surname and arms, and to take and use the "steps, or means, which shall be requisite or proper to enable and authorize "him or them so to do, within the said space of one year,—then, if the person "so refusing or neglecting shall be the husband of the said *A.* the limitation "hereinbefore contained to the use of the said *A.* shall cease, determine, and "be utterly void; and any annual sum, which by virtue of the power for that "purpose hereinbefore contained, the said *A.* shall limit, or appoint, to the "use of, or in trust for, or for the benefit of such husband so refusing or "neglecting, and the powers, or remedies, and terms of years which she shall "limit, or create for securing the same, shall cease, determine, and become "utterly void; and that if the person so refusing or neglecting shall be "any other than the husband of the said *A.* the limitation hereinbefore con- "tained of the said manors and other hereditaments, to the use of him or "them so refusing, or neglecting, shall cease, determine, and become utterly "void: and that the same manors, and other hereditaments shall, in such "cases, immediately thereupon, devolve to the person next beneficially entitled "in

away his entry, was, for that he was privy in estate, and for the benefit of the purchasor, and for the safeguard of his warrantie, so as every man's right might be preserved, *viz.* to the demandant for his ancient right, and to the feoffee for the benefit of his warrantie,

Vide Sect. 592. 597. 601. 637. 638. (F.N.B. 217. b.) (6 Rep. 3.)

" in remainder, under the limitations hereinbefore contained, in the same manner, as if the person or persons whose estate shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were dead without issue inheritable under such entail;—without prejudice, nevertheless, to any jointure or jointures, portion or portions, annual sum or annual sums of money, lease or leases, or demise or demises, which, previously to such cesser or determination, shall have been granted or demised of, or charged upon, the said manors and other hereditaments hereby released, or expressed and intended so to be, or any part thereof, in pursuance of any of the powers hereinafter contained: (except as to any annual sum, and the powers, or remedies, and terms of years for securing the same, which shall have been granted, limited, or appointed, by the said *A.* in pursuance of the power hereinafter for that purpose contained.) And it is hereby further agreed and declared between, and by, the parties to these presents, that the cesser or determination of the estate of the said *A.* or of any other tenant for life, by force of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice, any of the contingent remainders hereinbefore limited to her, his, or their son or sons, daughter or daughters, or any other person or persons; but that the remainder limited to the said *C.* and *D.* and their heirs, during the life of the said *A.* or such other tenant for life, shall, after such cesser or determination, take effect, and continue, for preserving such contingent remainders, and giving them effect as they may arise. And that immediately from and after such cesser or determination of such preceding estate for life, and during the suspense and contingency of such then expectant remainder, the said *C.* and *D.* their heirs and assigns, shall receive, pay and apply the rents and profits of the said manors and other hereditaments, which would belong to such tenant for life, if such cesser or determination had not taken place, unto the person or persons, for the intents and purposes, and in the manner, to, for, and in which, the same rents and profits would be, or would have been payable and applicable respectively, under and by virtue of the limitations and provisoes hereinbefore contained, in case such tenant for life was actually dead; so that, immediately from and after such cesser or determination, the issue of the said *A.* or of such other tenant for life, entitled for the time being, under the limitations aforesaid, to the said manors and other hereditaments, in remainder immediately expectant on the decease of the said *A.*, or of such other tenant for life, may be entitled to the rents and profits of the said manor and other hereditaments, for his and their own proper use and benefit respectively, during the life of the parent, as if such parent were dead: and that in case no such issue shall be in existence, then, during the vacancy or contingency of such issue, the person next entitled for the time being, under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments, expectant on the decease of the said *A.* or of such other tenant for life, and failure of such issue of her, or his body, shall and may be entitled to the said rents and profits for his and their proper use and benefit respectively, but without any exclusion of, or prejudice to the estate, interest, or right of any such issue, afterwards coming into existence, but only from the time of the birth of such issue respectively."

On the doctrine particularly applicable to the clauses, forming the subject of this annotation, the cases of Hopkins v. Hopkins, For. 44. 1 Ves. sen. 268. 1 Atkyns,

warrantie, which was founded upon great reason and equitie: which benefit of the warrantie should be prevented and avoided if the entrie of him that right had were lawfull, and thereby also the danger that many times happeneth by taking of possessions was warily prevented by law. But then it may be demanded, seeing that there was no reversion or remainder expectant upon any estate taile at the common law, nor the issue in taile had any remedy by the common law, if the tenant in taile had aliened, then by what law is the alienation of tenant in taile a discontinuance at this day to the issue in taile, or to him in reversion or remainder? Whereunto it is thus ☞ answered, that it is provided by the statute of *W.* 2. ca. 1. *De donis conditionalibus, quòd non habeant illi quibus tenementum sic fuerit datum potestatem alienandi, &c.* Upon these words the sages of the law have construed the said Act according to the rule and reason of the common law, and that in divers and sundry variable manners. For some alienations of tenant in taile, they have adjudged voydable by the issue in taile by action only: some at the election of the issue in taile to avoid it by action, entry, or claime: some are meerely void by the death of the tenant in taile: which severall constructions were made upon the selfe-same words aforesaid.

[327. b.]

30 E. 1. Formedon, 65. 19 E. 2. Formedon, 61. 18 E. 3. 46. 12 E. 4. 3. (Cro. Car. 405.) (1 Roll. Abr. 632.) (Post. 356. a.) (Sid. 83.) (Ant. 301.)

As for example, if tenant in taile make a feoffement in fee, this drives the issue in taile to his action, which is called in law a Discontinuance; and this construction was made, for that at the common law the feoffement of an abbot or bishop, or of the husband seised in the right of his wife, did worke a discontinuance, and did drive the successor and the wife to their action, and foreclosed them of their entrie; and as the entrie of the issue was taken away, so consequently of them in reversion and remainder.

18 E. 3. 12. 19 E. 3. Bre. 468. 24 E. 3. 28. 36 Ass. 8. 22 E. 2. Discon. 50. 5 E. 4. 3. 4 H. 7. 17. 33 E. 3. Formedon, 47. & 13 H. 7. Pl. Com. 426. Smith & Stapleton's case. (3 Rep. 85.)

1 Atkyns, 581. Doe d. Heneage *v.* Heneage, 4 Term Rep. 13. Carr *v.* lord Erroll, 6 East, 58. 14 Ves. 478. And Stanley *v.* Stanley, 16 Ves. 491, may be usefully consulted.

II. 3. *The injunction of taking a particular name, and using particular arms, is sometimes improperly used*;—As, where lands are settled to the use of *B.* and the heirs of his body, he and they taking, using, and bearing, and continuing to take, use, and bear the name and arms of *A.*; or to the use of *B.* and his heirs, he and they taking, using, and bearing, and continuing to take, use, and bear the name and arms of *A.*—But each of these modes of injunction is very objectionable. The first is nugatory; as *B.* by suffering a common recovery, may acquire the fee simple of the estate, discharged from the condition. The second creates a fee simple conditional, to endure no longer than during such time as *B.* and his heirs comply with the condition, and therefore virtually prevents the alienation of the estate. The introduction of the word "assigns" into the limitation, does not practically remove this objection. If the lands held under the limitation last mentioned, vest in the heir at law of the settler, the condition is determined, as there is no one to take advantage of it. The condition may be also released by such heir at law to the owner of the conditional estate. If, after the condition is broken, the owner of the land levies a fine with proclamations, it may be a bar, after the expiration of the five years, to the right of entry of the heir. Mayor of London *v.* Alford, Cro. Car. 575. 1 Jones, 452. Cromwell's case. 2 Rep. 69. Thomasin *v.* Mackworth, Carter, 75.—[Note 283.]

remainder. Also if an abbot, bishop, or husband in the right of his wife, seised of a rent, or of any other inheritance that lieth in grant, had aliened, it was in the election of the successor, or wife after the death of her husband, to claime the rent, &c. or to bring an action, for that alienation did not worke a discontinuance; and so it is by construction in case of tenant in taile. Lastly, if the abbot, bishop, or husband, had granted a rent newly created out of the land, &c. to another in fee, this had utterly ceased by their death; and so it is also by construction in case of tenant in taile. So as these words *(non habent potestatem alienandi)* doe worke these effects, *viz.* as to lands, that a feoffment barreth not the issue, &c. of his action, but worketh a discontinuance to barre him of his entrie; as to rents or any thing *in esse*, that lie in grant, that the said words doe take away his power to make any discontinuance: as to rents, &c. newly created, that they take away his power to make them to continue longer than during his life. (1 Leo. 66.) (Plowd. 437.)

But there is a diversitie betweene an alienation working a discontinuance of an estate which taketh away an entrie, and an alienation working, divesting or displacing of estates which taketh away no entry. As if there be tenant for life, the remainder to *A.* in taile, the remainder to *B.* in fee, if tenant for life doth alien in fee, this doth divest and displace the remainders, but worketh no discontinuance. And therein it is to be observed, that to everie discontinuance there is necessary a divesting, or displacing of the estate, and turning the same to a right: for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason that such inheritances as lie in grant, cannot by grant be discontinued, because such a grant divesteth no estate, but passeth onely that which he may lawfully grant, and so the estate itselfe doth descend, revert, or remaine, as shall be said hereafter in this Chapter.

A. maketh a gift in taile to *B.* who maketh a gift in taile to *C.* *C.* maketh a feoffment in fee and dieth without issue, *B.* hath issue and dieth, the issue of *B.* shall enter; for albeit the feoffment of *C.* did discontinue the reversion of the fee simple which *B.* hath gained upon the estate taile made to *C.* yet could it not discontinue the right of intaile which *B.* had, which was discontinued before; and therefore when *C.* died without issue, then did the discontinuance of the estate taile of *B.* which passed by his liverie, cease, and consequently the entrie of the issue of *B.* lawfull; which case may open the reason of many other cases. (10 Rep. 95.)

Also note, that a discontinuance made by the husband did take away the entrie only of the wife and her heires by the common law, and not of any other which claimed by title paramount above the discontinuance. As if lands had beene given to the husband and wife, and to a third person, and to their heires, and the husband had made a feoffment in fee, this had beene a discontinuance of the one moitie, and a disseisin of the other moitie: if the husband had died, and then the wife had died, the survivor should have entred into the whole, for hee claimed not under the discontinuance, but by title paramount from the first feoffor; and seeing the right by law doth survive, the law doth give him a remedie to take advantage thereof by entry, for other remedie for that moitie he could not have.

"*In fee or in fee taile.*" And so it is of an estate for life.

Sect.

Sect. 598.

ALSO if tenant in taile be disseised, and he release by his ☞ *deed to the disseisour and to his heires all the right which he hath in the same tenements, this is no discontinuance, for that nothing of the right passeth to the disseisor, but for terme of the life of tenant in taile which made the release, &c.* [328. a.]

(2 Rep. 31.)

Sect. 599.

BUT by the feoffment of tenant in taile, fee simple passeth by the same feoffment by force of the liverie of seisin, &c.

Sect. 600.

BUT by force of a release nothing shall passe but the right which he may lawfully and rightfully release, without hurt or dammage to other persons who shall have right therein after his decease, &c. So there is great diversitie betweene a feoffement of tenant in taile, and a release made by tenant in taile.

OUR author having put examples of estates passing by transmutation of an estate and possession, doth in this and the two Sections following put a diversitie betweene a feoffment and a release or confirmation of a bare right; for it is a rule in law, that the disseisee, or any other that hath a right only by his release or confirmation, cannot make any discontinuance, because nothing can passe thereby but that which may lawfully passe. But otherwise it is of a feoffment in respect of the liverie of seisin, for that it is the most solemne and common assurance in the country, and to be maintained for the common quiet of the realme; and by the feoffment the freehold (which is so much esteemed in law) doth passe by open liverie to the feoffee, and by the release a bare right.

9 E. 4. 18.
12 E. 4. 11.
5 H. 4. 8.
21 H. 6. 58.
(Post.329,330.)

Sect. 601.

BUT it is said, that if the tenant in taile in this case release to his disseisor, and bind him and his heires to warrantie, * *and dieth, and this warrantie descend to* (A) *his issue, this is a discontinuance by reason of the warrantie* († ceo est discontinuance per cause de le garrantie)‡.

THE

* *&c.* added in L. and M. and Roh.

† donques *added in L. and M. and Roh.*

‡ *&c.* added in L. and M. and Roh.

(A) *Should it not be,* "upon his issue," *instead of,* "to his issue"? *See Mr. Ritso's Intr. p.* 113, *where a distinction is taken between a warranty which descends as a beneficium to the heir, and a warranty which descends as an onus upon the heir.*

THE reason why the addition of the warrantie in this case maketh a discontinuance, is that which hath beene said, *viz.* If the issue in taile should enter, the warrantie (which is so much favoured in law) ☞ should be destroyed; and therefore to the end that if assets in fee simple doe descend, he to whom the release is made, may plead the same, and barre the demandant: by which meanes all rights and advantages are saved. And that I may note it once for all, an *(it is said)* with *Littleton* is as good as a *concessum* in a booke case.

[328. b.]

3 H. 4. 9. 22 R. 2. Discon. 50. 12 E. 4. 11. 21 H. 7. 9. 43 E. 3. 8. 15 E. 4. tit. Discon. 30. Vi. Sect. 596 602. 637. 658. (3 Rep. 85.) (Post. 632, 633.)

Sect. 602.

BUT if a man hath issue a sonne by his wife, and his wife dieth; and after hee taketh another wife, and tenements are given to him and to his second wife, and to the heires of their two bodies engendred, and they have issue another sonne, and the second wife dieth, and after the tenant in taile is disseised, and hee release to the disseisor all his right, &c. and bind him and his heires to warrantie, &c. and die, this is no discontinuance to the issue in taile by the second wife, but he may well enter,§ for that the warrantie descendeth to (B) *his elder brother which his father had by the first wife,‖ &c.*

Sect. 603.

(8 Rep. 86.)

IN the same manner is it, where lands are descendible to the youngest sonne after the custome of Burrough-English, which are entayled, &c. and the tenaunt in tayle hath two sonnes, and is disseised, and he releaseth to his disseisour all his right with warrantie, &c. and dieth, the younger sonne may enter upon the disseisor, notwithstanding the warranty, for that the warrantie descendeth to (C) *the elder son: for alwayes the ☞ warrantie shall descend to him who is heire by the common law.*

[329. a.]

BY these two examples in this and the Section next following, it appeareth that a warrantie being added to a release or confirmation, and descending upon him that right hath to the lands, maketh a discontinuance; otherwise it is out of the reason of the law, and worketh no discontinuance, if the warrantie descendeth upon another.

"*With warrantie, &c.*" Here is implied that he doth binde him and his heires to warrant to the releasee and his heires.

"*Alwayes*

§ *&c.* added in L. and M. and Roh. ‖ *&c.* not in L. and M. or Roh.

(B) *Vid. note A. on Sect.* 601. (C) *Vid. note A. on Sect.* 601.

13 H. 4. Garrantie, 94. 19 R. 2. Garrantie, 100. (Post. 376. a.)

"*Alwayes the warrantie shall descend to him who is heire by the common law.*" This is a maxime of the common law, and hereof more shall be said in the Chapter of Warrantie, *Sectione* 718. 735, 736, 737. so as it is not the warrantie only that maketh a discontinuance, but the warrantie and the discent upon him that right hath together.

Sect. 604.

ALSO, if an abbot be disseised, and hee releaseth to the disseisor with warrantie, this is no discontinuance to his successor, because nothing passeth by this release but the right which hee hath during the time that he is abbot, and the warrantie is expired by his privation, or by his death.

(3 Rep. 73.)

THE reason hereof yeelded by *Littleton* is, for that the warrantie is expired by his privation or death.

"*By his privation, or by his death.*" Note, that privation is here resembled to death, and so is translation also. Wherein this diversitie is worthy of observation, that when a bishop, &c. make an estate, lease, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues of the bishopricke, &c. which should maintaine the successor, there the privation or translation of the bishop, &c. is all one with his death. But where the bishop is patron and ordinary, and confirmeth a lease made by the parson without the deane and chapter, and after the parson dieth, and the bishop collateth another, and then is translated, yet his confirmation remaineth good; for the revenues that are to maintaine the successor are not thereby diminished. And the like diversitie doth hold in case of resignation, notwithstanding [*m*] the authoritie to the contrary.

Vide 29 E. 3. 16. (Ant. 300. b.) (Dyer, 356.)

[*m*] 29 E. 3. 16. tit. Garrant. 99.

Sect. 605.

ALSO, if a man seised in the right of his wife be disseised, and he releaseth, &c. with warrantie, this is no discontinuance to the wife, if shee surviveth her husband, but that she may enter, &c. Causa patet.

THIS is evident, unlesse the wife be heire to the husband (as by law she may be), and then it is a discontinuance for the cause aforesaid.

(1 Saund. 261.)

☞ Sect. 606. [329. b.]

ALSO, if tenant in tayle of certaine land letteth the same land to another for terme of yeares, by force whereof the lessee hath thereof possession, in whose possession the tenant in tayle by his deed releaseth all the

the right that he hath in the same land, to have and to hold to the lessee and to his heires for ever; this is no discontinuance, but after the decease of the tenant in tayle, his issue may well enter, because by such release nothing passeth but for terme of the life of the tenant in tayle (pur ceo que per tiel release riens passa forsque pur terme de * la vie de le tenant en le taile).

"*BECAUSE by such release nothing passeth.*" Here is one of the maximes of the common law rehearsed by our author, whereof he doth put divers examples hereafter.

Sect. 607.

(3 Rep. 85. b.)

IN the same manner it is, if the tenant in tayle confirme the estate of the lessee for yeares, to have and to hold to him and to his heires, this is no discontinuance, for that nothing passeth by such confirmation but the estate which the tenant in tayle hath for terme of his life, &c.

"*NOTHING passeth by such confirmation.*" Here is another of the maximes of the common law rehearsed by our author, whereof he putteth examples hereafter. (Ant. 328.)

More shall be said hereof in the next Section following.

Sect. 608.

[330. a.] *ALSO, if tenant in taile after such lease grant the reversion in fee by his deed to another, and ☞ willeth that after the terme ended, that the same land shall remaine to the grantee and his heires for ever, and the tenant for yeares attorne, this is no discontinuance. For such things which passe in such cases of tenant in taile only by way of grant, or by confirmation, or by such release, nothing can passe to make an estate to him to whom such grant, or confirmation, or release, is made, but that which the tenant in taile may rightfully make, and this is but for terme of his life* († et ceo n'est forsque pur terme de sa vie), *&c.*

Sect. 609.

(Ant. 251. b.)

FOR if I lett land to a man for terme of his life, &c. and the tenant for life letteth the same land to another for terme of years, &c. and after my tenant for life grant the reversion to another in fee, and the tenant

* la—son, *L. and M. and Roh.*

† et ceo n'est—&c. est, *L. and M. and Roh.*

tenant for yeares attorne, in this case the grantee hath in the freehold but an estate for terme of the life of his grantor (en cest cas le grantee † n'ad en le franktenement forsque ‡estate pur terme de vie son grauntor), *&c. and I which am in the reversion of the fee simple may not enter by force of this grant of the reversion made by my tenant for life, for that by such grant my reversion is not discontinued, but alwayes remaines unto me, as it was before, notwithstanding such grant of the reversion made to the grantee, to him and to his heires, &c. because nothing passed by force of such grant, but the estate which the grantor hath, &c.* (1)

Sect.

† n'ad—ads, *L. and M. and Roh.* ‡ estate *not in L. and M. or Roh.*

(1) VII. *As to the modes of conveyance which work a discontinuance,* it may be laid down as a general rule, that no alienation which is not made by livery of seisin, or by some mode of assurance equivalent to it, can work a discontinuance. It has been observed before, that the usual mode of conveyance at the common law, was a *feoffment*; that feoffments were formerly made without writing; and that, when writing came into use, the transmutation of the property was effected, not by the writing, but by the livery which it authenticated. *A fine* is often defined to be a feoffment upon record, the conusor's acknowledgment upon record of the right of the conusee to the lands being considered tantamount to actual livery. The fines, therefore, which are said to be executed in contradistinction from those which are said to be executory, give the conusee the immediate possession of the land; and those which are called executory enable him to recover it immediately, by an *habere facias seisinam.*—*A common recovery* is the judgment of a court of record, that the demandant shall recover against the tenant; upon which he may immediately sue out the *habere facias seisinam.* Considering, therefore, fines and recoveries only as common assurances, the acknowledgment upon record in the former, and the judgment to recover in the latter, are supposed to equipoise the notoriety of livery. Hence both a fine and a common recovery are of force to work a discontinuance. With respect to *releases,*—where the person whose estate is discontinued releases to the alienee, his release must be considered as operating *per mitter le droit.* Now it has been observed in a former place, that releases by persons disseised, may be made either to the disseisor, his feoffee, or his heir: and that in all these cases, the possession is in the releasee, the right in the releasor, and that the union of the right to the possession completes the title of the releasee, the notoriety of the disseisin countervailing the livery. But this can only be understood of those cases where the releasor has the fee simple. In both cases the possession of the disseisor is equally notorious; but where the releasor, as in the instance brought by Littleton, has only a partial estate in the lands, he has not in him a right to the fee simple of the land, and cannot, of course, transfer, or cede it to another. Hence, though the release of a disseisee, who before the disseisin was seised in fee-simple, completes the title of the disseisor; the release of a disseisee, who before the disseisin had only an estate tail, does not complete his title, and therefore does not amount to a discontinuance.—With respect to *conveyances which operate by the statute of uses*; it is clear that there cannot be a discontinuance, where the possession remains with the party; for, in those cases, the possession is not disturbed, nor can there be any livery of seisin, or any thing tantamount to it;—but it is equally clear, that if the uses are raised by a transmutation of the possession, that transmutation may produce a discontinuance.

[330. b.]

☞ Sect. 610. (Ant. 328, 329.)

IN the same manner is it, if tenant for terme of life by his deed confirme the estate of his lessee for yeares, to have and to hold to him and his heires, or release to his lessee and his heires, yet the lessee for yeares hath an estate but for terme of the life of the tenant for life, &c.

"*FOR such things which passe in such cases of tenant in taile, &c.*" Here is rehearsed another ancient maxime of the common law touching grants; and hereby it appeareth that a feoffment in fee (albeit it be by *parol)* is of a greater operation and estimation in law, than a grant of a reversion by deed, though it be inrolled, and attornement of the lessee for yeares of (A) a release, or a confirmation by deed, for the reasons aforesaid. And this is manifested by the examples which our author here in these three Sections putteth.

Sect. 611.

BUT otherwise it is when tenant for life maketh a feoffment in fee, for by such a feoffment the fee simple passeth. For tenant for yeares may make a feoffment in fee, and by his feoffment the fee simple shall passe, and yet he had at the time of the feoffment made but an estate for terme of yeares, &c. (1)

"*BUT*

(A) *Here* "of" *seems printed by mistake instead of* "to." *See Mr. Ritso's Intr. p.* 191.

discontinuance. This, in fact, is only repeating what has been observed before; for it is not the creation or limitation of the use, but the operation upon the possession, that produces the discontinuance.—Upon these grounds, therefore, a bargain and sale, a covenant to stand seised, and a lease and release, cannot work a discontinuance; but a feoffment executed, a fine levied, or a recovery suffered to uses, have that power. See page 272. a. note 1. VI.—But, if a warranty is annexed to a bargain and sale, covenant to stand seised, or release, it may produce a discontinuance. This will be better understood after perusing our author's chapter on Warranty. At present it is sufficient to observe, from lord chief-baron Gilbert's Ten. 120, that a release with warranty works a discontinuance; for at common law the warranty was a voluntary covenant of the force of a feudal contract, repelling the warrantor from claiming the land, and obliging him to defend it; and though the statute takes away the force of such covenants, that they shall not bar the issue, yet the issue must claim in the method the statute prescribes, viz. by action; and therefore it works a discontinuance, since the issue, in such case, cannot re-continue but by action only.—[Note 284.]

(1) What possession is required in the feoffor to make his feoffment an *actual disseisin*

(Post. 367. a.) " *BUT an estate for terme of yeares, &c.*" Here it is implied, that albeit the feoffment made by lessee for yeares be a feoffment between the feoffor and feoffee, and that by this feoffment

disseisin of the freehold, not merely a disseisin which is such at the election of the party, has been a subject of much discussion; and it is therefore supposed, that the following attempt at a full investigation of the very abstruse, but not useless, learning upon the subject, will not be unacceptable to the reader. By the doctrine of the feudal law, no person who had an estate of less duration and extent than for his own life, or for the life of another man, was considered to be a freeholder; and none but a freeholder was considered to have the possession of the land. It is true, that estates were sometimes held for terms of years. In that case, the possession of the termor was considered to be the possession of the freeholder;—but still the termor held the possession, though he held it for the freeholder; and the freeholder, by trusting the termor with it, exposed himself to lose it, by the termor's negligence or treachery. If the termor left the possession vacant; if he permitted himself to be disseised of it; if he undertook to alien it either by act *in pais*, or by matter of record; if he claimed the fee; or if he affirmed it to be in a stranger;—in all these cases the freeholder exposed himself to the loss of the possession, as much as if they were his own acts. Thus the termor held the possession, but he was said to hold it *nomine alieno*, in contradistinction to the freeholder himself, who was said to hold it *nomine proprio*. Hence Britton expressly defines an estate of freehold to be " the possession of the soil by the freeholder;" and the author of the Doctor and Student says, " that the possession of the land " is called in the law of England the franktenement or freehold." Brit. c. 32. Doct. and Stud. dial. 2. c. 22. So nearly synonymous in those days was the possession to the freehold. In this manner, the possession of the termor differed from that of a mere bailiff, who had no possession. The same principles obtained with respect to the transfer of the freehold. Nothing further was necessary than a delivery of the possession, or, as it is called by our law-writers, livery of seisin. The freehold could be transferred by no other means. But here a difference is to be observed with respect to the effect of the livery of a termor for years (such as was mentioned before), and the livery of a mere bailiff. On account of the solemnity, upon which the entry of the termor into the lands was grounded; the connection between him and the reversioner, and his actually holding the possession of the land (though he held it for the freeholder), the livery of the former was a transfer of the possession; but the livery of the latter was absolutely without effect. In process of time, involuntary alienation, or alienation arising from attachment for debt, was admitted. This produced the estates of tenants by elegit, by statute-merchant, and statute-staple. Long leases for years also came into use, and more settled and accurate notions were had of tenancies by sufferance and at will. All these were considered to be in the same situation as the termor for years. Their possession was held to be the possession of the immediate freeholder: but as they *had*, or rather *held*, the possession, and were in by the act of the freeholder in some cases, and by his privity or forbearance in all, they were considered to be *in* as of the seisin of the fee. It sometimes happened that persons had the possession who had not the right; such were tenants by disseisin, deforcement, abatement, or intrusion. Still, as they had the possession, they might, by livery of it, transfer it to another. Thus, by the old feudal law, on the one hand, the freehold could not be transferred but by livery of seisin; on the other, livery of seisin could not be made by any person who had the possession, without transferring the freehold. This transfer of the fee was called a feoffment. No writing was necessary for this purpose; and when charters came into use, the transfer of the fee was supposed to be produced

feoffment the fee simple passeth by force of the livery, yet is it a disseisin to the lessor. And here it is worthy to be observed, that

produced (as has been already observed), not by the charter, but by the livery which it authenticated. But the material variation with respect to the form of transferring property by livery was, that originally it was usual to make the feoffment on the land before the peers of the court, who subscribed the charter of feoffment with their names, and the entry of the feoffee upon the land was afterwards recorded in the lord's court: but in progress of time, the feoffment was allowed to be good, though it were attested by strangers only; and the recording of the feoffee's entry was dispensed with. This, undoubtedly, lessened, very considerably, the solemnity and notoriety of feoffments; and we have an opinion of the highest authority, delivered with much consideration and infinite ability, in a case of the highest moment, that it had a very great effect on their operation and efficacy, with respect to the circumstance before us.—The case alluded to is that of Taylor on the demise of Atkyns *v.* Horde and others, 1 Burr. 60. 5 Bro. Par. Ca. 247. Cow. 689.—As a minute and accurate statement and examination of the doctrines laid down in that case will serve greatly to illustrate the point now under consideration, they shall be presented here to the reader. The case, so far as it relates to the points in question, was, that sir Robert Atkyns was tenant for life, remainder to dame Ann Atkyns, his wife, for life; remainder to sir Robert Atkyns (his eldest son by a former marriage) in tail male; remainder to Mr. John Tracy, and his younger brothers successively, in tail male; remainder to Mr. Richard Atkyns and his heirs. Upon the death of sir Robert the father, dame Ann his widow entered upon the lands. In Trinity term 1710 an ejectment was brought in the court of common pleas, against her ladyship, by John Phillips, upon the several demises of sir Robert Atkyns the son, and of Joseph Walker, to whom several terms of years attendant upon the inheritance had been assigned, in trust for sir Robert the son. A verdict was found for the plaintiff, and he recovered *terminum suum prædictum*, and had an *habere facias possessionem*. It is to be observed, that no account of the case states the grounds upon which this verdict was found for the plaintiff. Most probably it was merely in consequence of the terms of years which had been assigned to him. On the 1st of January 1710, John Phillips, the plaintiff, surrendered the terms to sir Robert the son; and on the 17th of the same month sir Robert made a feoffment of the estates in question, with livery of seisin, to James Earle and his heirs. In the deed of feoffment it was declared, that the feoffment was made that James Earle might become perfect tenant of the freehold, in order for the suffering of a common recovery; which recovery, it was thereby declared, should enure to the use of sir Robert Atkyns the son and his heirs. The recovery was suffered in Hilary term 1710. Sir Robert died on the 9th of November 1711, without issue, and intestate. His nephew, Mr. Robert Atkyns, was his heir at law. In Hilary term 1711 an ejectment was brought against him by lady Atkyns; and in Easter term 1712 a general verdict was given for her. She died in the month of October following. Upon her death, Mr. Robert Atkyns entered, and continued in possession of the estate till the 16th of March 1753, when he died, leaving issue only two daughters; Ann, the wife of Mr. Horde; and Elizabeth, the wife of Mr. Chamberlayne. The death of sir Robert Atkyns the son without issue necessarily brought into question the validity of the recovery suffered by him; for if it were good, it destroyed his estate tail, and all the remainders expectant upon it; and Mr. Robert Atkyns, his nephew, and after his decease Mrs. Horde and Mrs. Chamberlayne, his only children, became entitled to the estates as his heirs at law. But if it were not a good recovery, then, upon the decease of dame Ann Atkyns, Mr. John Tracy became seised in tail of the lands devised by the testator's will, with the several

that our author saith, that tenant for terme of yeares may make a feoffment; whereupon it followeth, that the feoffor may thereunto

several remainders over.—In the year 1752, an ejectment was brought against Mr. Robert Atkyns, and Mr. and Mrs. Horde, and Mr. and Mrs. Chamberlayne, by Cyprian Taylor, on the demise of Mr. John Tracy, who, in consequence of a direction contained in sir Robert Atkyns the father's will, had taken the name of Atkyns. The jury found a special verdict. The case was argued four times before the judges of the court of king's bench. A point arose, whether, supposing the recovery to be bad, the plaintiff's ejectment, not having been brought within twenty-one years after his title accrued, was not barred by the statute of limitations. The court was of opinion it was barred by that statute. The case afterwards went to the house of lords: all the judges were ordered to attend: their opinion was asked upon the point arising from the statute of limitations; it agreed with that of the judges of the court of king's bench: the judgment of the court was therefore affirmed. Afterwards, Mr. John Tracy Atkyns and all his brothers died without issue; and then, supposing the recovery to be void, Mr. Edward Kinsey Atkyns, the then heir at law of Mr. Richard Atkyns, became entitled to the estate. He claimed under a new title, and was not therefore bound by the statute of limitations. An ejectment was delivered by him in Hilary term 1777. This brought the question of the validity of the recovery once more before the court. It is to be observed, that though, when the case came before the court upon the ejectment brought by Mr. John Tracy Atkyns, the matter went off on the point arising from the statute of limitations, yet the questions arising upon the validity of the recovery were most elaborately argued by the bar: and lord chief-justice Mansfield, when he gave the judgment of the court, entered into a very minute discussion of them, and gave his opinion very fully and decisively upon them all: so that what was said upon this subject, when the case came before the court in 1777, was, in general, only a repetition of what was said upon it on the former occasion. As lord Mansfield's speech in the report given of it by sir James Burrow, contains the most methodical and comprehensive state of the arguments and opinions intended to be discussed in this place, it is here particularly referred to.—His lordship stated the question to be, Whether Earle was a good tenant of the freehold? He observed, that to prove he was a good tenant of the freehold, it was necessary to show, either that sir Robert Atkyns, by the entry under the judgment in ejectment in 1710, acquired the freehold by disseisin; or that, supposing he did not acquire the freehold, he acquired the possession, and by his feoffment vested an estate of freehold in Earle. His lordship denied both of these positions. As to the first, he laid it down, that the disseisin to be effectual in this case, must be an actual disseisin, not a disseisin which was merely such at the election of the party. No case, therefore, or other authority from the books respecting disseisins, was applicable to the present case, if it did not relate to an actual disseisin. He then proceeded to explain the nature of an actual disseisin. He defined seisin to be a technical term, to denote the completion of that investiture, by which the tenant was admitted into the tenure: disseisin, therefore, must mean the turning the tenant out of his tenure, and usurping his place and feudal relation. He observed, that originally no tenant could alien without license of the lord; and that, when the lord consented to the alienation, the only form of conveyance was by feoffment, before the peers of the court, with the lord's concurrence, and with the ceremonies of homage and fealty. That a disseisin differed from a dispossession. It was something more. The effect of it was to make the disseisor tenant to every demandant, and freeholder *de facto*, in spite of the true owner. That, on the one hand, the lord must know upon whom to call as his tenant; on the other hand, the stranger must know against whom to bring his præcipe. A dispossession, therefore, did not amount to

unto annex a warrantie, whereupon the feoffee may vouch him: but of this you shall reade more in the Chapter of Warranties, Sect. 698.

Sect.

to a disseisin, if it were not forcible, that is, against the will of the real owner; and if it were not such as, both with respect to the lord and to strangers, introduced the dispossessor into the tenure. These, he said, were the consequences of an actual disseisin. A disseisin by election was attended by none of these circumstances. In that case, the disseisor was neither tenant to the lord nor the stranger;—he was merely a disseisor at the will of the disseisee, who might, if he thought the process of assise a more eligible remedy than any of those to which he might have recourse, without disclaiming his seisin, resort to it, and, for that purpose, choose to be considered as disseised. From this description of the nature and consequences of the two different kinds of seisin, his lordship inferred, that sir Robert's entry was not an actual disseisin. Supposing it a real proceeding, a termor might recover against the disseisor, or against the feoffee of the lessor; the possession he recovered enured to himself, or for his own benefit during his term:—subject to that, it enured to or for the benefit of the persons who had the right to the freehold; that is, to the lessor, if he continued the owner of the fee; to his alienee, if he had infeoffed; to the heir or feoffee of his disseisor, if he had been disseised and his entry taken away.—Then, suppose the proceeding to be merely fictitious, the judgment only entitled the party to recover the possession, without prejudice to the right. Now, by the special verdict, it appears he had no right to the possession: he had therefore a possession without prejudice to the right. He was not *in* as particular tenant; there was no privity of seisin; he had only a naked possession.—But, says his lordship, the case is still stronger: the true owner cannot even elect to make a person in possession under a judgment in ejectment, a disseisor: the entry is not *injustè & sine judicio*, but under authority of a court of justice. The true owner might enter upon a disseisor. But after a judgment in ejectment, an actual entry would not be permitted. Upon this reasoning his lordship establishes his first position, That Sir Robert Atkyns did not acquire, by his entry, an actual estate of freehold by disseisin. This brought his lordship to the second question, Whether the feoffment to Earle vested an estate of freehold in him by disseisin? Here his lordship concluded, from the principles laid down by him in his discussion of the first question, that the feoffment did not amount to an actual disseisin, but was such merely at the will of dame Atkyns. In this part of the question he says, that except the special case of fines with proclamation, which, he observed, stands upon distinct grounds, and the construction of the stat. of 4 Hen. VII. c. 24, for the sake of the bar, he could not think of a case where the true owner, whose entry is not taken away, might not elect, by choosing a possessory remedy, to be deemed as not having been disseised. The judges of the king's bench, in the opinion delivered by them in 1774, express themselves still more strongly on this head. They say, that "where the books speak of feoffments "in fee by tenants for years, and that the fee simple passes thereby, it is to "be understood of those feoffments of old, attended with livery, and actual "transmutation of the possession from one man to another; that feoffments, "from having been the only conveyance of land, for a long term of years, "have languished into mere form, and are nothing now more than a common "conveyance; that their grandeur and efficacy is lost; and that without "actually transferring of the estate from one man to another, they mix with "the community of all other assurances: that the name of these feoffments, "and the remembrance of them, remains, and survives them, however imperfectly, after the practice of making them, and consequently their solemnity,

"is

" is quite at an end." Lord Mansfield afterwards considered the case in a third point of view, which was, That a tenant in tail in remainder could not, by the established law of the land, suffer a common recovery without the consent and concurrence of the immediate tenant of the freehold. Now, says his lordship, the law will never permit that to be effected by wrong, unfair, or indirect means, which cannot be effected by right, fair, and direct means: but sir Robert could not by right, fair, or direct means, suffer a common recovery in the life of dame Ann, without her concurrence; he never had her concurrence; it follows, that his recovery must have been covinous, and therefore void. Upon these grounds, the court were of opinion, 1st, that sir Robert Atkyns the son by his entry under the verdict in 1710, was not an actual disseisor, and therefore had not in him any actual estate of freehold: 2dly, that his feoffment to Earle gave Earle an estate of freehold only at the election of dame Atkyns, but did not give him an actual estate of freehold: and, 3dly, that the whole transaction was fraudulent, and therefore void.—The doctrine upon which the first of these points turns is not immediately the subject of the present inquiry. But some of the principles laid down by the court in giving their opinions on the 2d and 3d points will be investigated in this place.

The great point for the decision of the court was, *What estate in the lands a feoffor must have to give the feoffment efficacy.*—It seems to be admitted by the court, in the case referred to, that, *originally*, no greater estate was required to be in the feoffor than mere possession. This they attribute to the solemnities originally attending both the admission of tenants into the tenure, and the transfer of the fee. But it seems to be their opinion, that, since most, if not all, of these solemnities have been dispensed with, the peculiar efficacy of a feoffment has been lost. This has certainly been the case in one very remarkable instance. Lord chief baron Gilbert, in his Treatise of Tenures, p. 43. observes, that lord Coke says, " that the feoffee of the disseisor that comes " in by title, after a year and a day was expired, was anciently held to have " right of possession, and to put the disseisee to his writ of entry, because the " feoffee came in by title; and for quiet of purchasers, this non-claim for a " year and a day was held a dereliction. Hence, writs of entry against the " feoffee in the *per* and *cui*. But this was not held so in respect of disseisors, " because they themselves being the wrong-doers, had no law in their favour, " lest it should encourage such injuries. But afterwards, as feoffments became " more secret, and nothing paid to the lord, then they thought it too hard such " feoffments should alter the right of possession, and therefore they con- " strued the feoffee, that came in by his own act, to be a wrong-doer, and not " to alter the right of possession; but the heir, for the reasons aforesaid, was " left as before." But it will be difficult to find another instance in which feoffments have lost their efficacy. The arguments brought to prove that they have lost their efficacy in creating an estate of freehold, when it is not in the feoffor at the time of the feoffment, are, 1st, that livery is not made now with the solemnity with which it was made formerly:—2dly, that the passages in the books which speak of feoffments by tenants for years, and others having estates less than freehold, creating estates of freehold in the feoffee, by disseisin, are to be understood as referring only to a disseisin by election.

As to the first argument,—It seems to be every where admitted, that the feoffments we are speaking of, *once* had the operation and efficacy in question; and that this operation and efficacy is ascribed to them in numberless passages in our law books: so that the great, if not the only, difficulty is to show, that, at the time when it is universally agreed feoffments had this operation and efficacy, they were made with no other forms and solemnities than those with which they are made now. It is certain, that the custom of making livery before the peers of the court, and recording the entry of the feoffee in the records of the lord's court (if it were ever absolutely necessary), was dispensed with very soon after the Conquest, and was fallen completely into disuse at

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so early a period as that of Henry II.; so that in this reign, and from thence to the present time, no other ceremony in making feoffments was used than that which is now practised, of the feoffor and feoffee coming upon the land, either in person or by attorney, and there the feoffor, in the presence of witnesses (all other persons being out of the land) delivering the possession of it to the feoffee. The form of making feoffments in the reign of Henry II. is minutely described in Bracton, lib. 2. cap. 18. fol. 39. b. *Item, non valet donatio, nisi subsequatur traditio, ... tunc demum, cum donator plenam fecerit seisinam donatorio per se si præsens fuerit, vel per procuratorem & literas, si absens fuerit, ita quòd charta donationis & literæ procuratoriæ coram vicinis, ad hoc specialiter convocatis, legantur in publico, & etiam cum donator corpore & animo recesserit à possessione.* This is the account given by Bracton of the mode of making feoffments in his time. He makes no mention of the presence of the *pares curiæ* being necessary; or of its being necessary to record the entry of the feoffee in the lord's court; or of any other ceremony besides those now practised. Hence we find that the account given by sir William Blackstone, book 2. chap. 20. p. 309–315. Archbold's ed. of the present mode of making feoffments, is no more than a transcript of the passage cited above from Bracton. The next thing to be shown is, that as the ceremony of making feoffments has been the same during all this period, the courts of judicature, and the writers upon our laws, have, during all this period, agreed in ascribing to them the effect and operation in question. Their language in this respect is perfectly uniform, that no freehold is required in the feoffor, and that however tortious or slender his possession may be, his feoffment, necessarily and unavoidably, gives an estate of freehold to the feoffee. Nothing can be more decisive on this subject than the following passages transcribed from Bracton:—*Poterit autem res esse omnino aliena et ex toto, quantùm ad jus & proprietatem, & feodum, & liberum tenementum, usum-fructuum, & nudum usum; & aliquis posuerit se in seysinam, per disseysinam, vel per intrusionem, cum forte invenerit rem vacantem. Et si talis, dum ita fuerit in seysina, donationem fecerit, valebit quantum ad ipsum, & feoffatum suum, & alios, qui jus non habent, ut prius dictum est, donec per illum, qui jus habet, revocetur. Item poterit esse aliena, quantùm ad omnia prædicta, et alicujus in possessione existentis, quoad nudum usum, vel quoad hoc, quod servitutem habeat in re, quoad usum fructuum percipiendum, sive ad certum terminum vel ad voluntatem. Item quoad hoc, quod habeat custodiam, vel curam, vel hujusmodi; in quibus casibus, si dum sic fuerit in seysina, quali quali, donationem fecerit, statim fit res data accipientis, quoad dantem & accipientem, & quoàd alios, qui jus non habent. Sed quoad verum dominum, nunquam erit liberum tenementum, nisi ex longa & pacifica seysina, & unde si incontinenti post tale feoffamentum posset verus dominus ponere se in seysinam, omnes quoscunque tenere posset exclusos à possessione. Sed quid dicetur de eo qui nullam omnino seisinam habuit, nec aliquam juris scintillam, si donationem fecerit de re quam alius tenet, per se ipsum vel per alium nomine suo, non faciet rem accipientis, cum ipse nihil teneat, quia non potest plus juris ad alium transferre quam ipse habet, nec plus valebit ista donatio quam valeret, si aliquis transiens per aliquod manerium ab aliquo possessum, diceret socio suo viatori, do tibi tale manerium quod talis possidet, quia nihil aliud esset dicere, quam dare ei plenam pugnatam ex nihilo, cum possessio non sit vacua,* Bract. lib. 2. c. 14. fol. 31. a. 31. b.—So in another place: *Item licet liberum tenementum non habuerit, donationem potest facere quis, dum tamen in seisina fuerit aliquâ justâ de causâ, sicut ad terminum annorum, vel ratione custodiæ. Idem erit, si nullam justam causam habuerit, ut si per intrusionem vel disseisinam; et cum sit in seisina alijs donare poterit, licet non cum effectu et aliis per donationem facere liberum tenementum, quod quidem ipse non habuerit.*—Ibid. lib. 2. c. 5. § 4. fol. 11. b.—It seems to be clear from these passages, that in Bracton's time, every person who had the possession, however slender his possession might be, as termor for years, tenant at will, or guardian; or however tortious his possession might be, as a disseisor or intruder; was nevertheless considered to be

be *in* the seisin of the fee, and might by livery transfer it to another. Bracton frequently repeats this doctrine, and illustrates it by many examples in the course of the second book.—Such is the account given by Bracton of the operation of feoffments; and as the account given by him of the *form* of feoffments has been contrasted with the account given of it by sir William Blackstone, the reader is desired to contrast the above account given by him of the *operation* of feoffments with the account given of it by sir Edward Coke, ant. 48. b. and 49. a. He expresses himself to the same effect in his 2d Inst. fol. 413. Commenting on the statute of Westminster 2. cap. 25. he observes, that though the act speaks of an alienation by feoffment by a tenant for years, yet it extends to tenants by statute-merchant, statute-staple, tenant at will, and tenant by sufferance; because all these have a possession. But he observes, that it is otherwise of a bailiff, for he has no possession at all.—Several other authorities will be offered to prove this point in a subsequent part of this note; one more authority only shall be mentioned here. Mr. Knowler, in his argument for the defendant in the case above referred to, seems, with reason, to lay great stress upon it. It is 10 Ed. IV. 8, 9. In trespass, the defendant said, that one *M.* was seised in his demesne as of fee, and leased to him for his life. The plaintiff said, that long before *M.* had any thing in the land, *D.* was seised in fee, and leased to *E.* for life; that *D.* died, and thereupon the reversion descended upon *Jane* his daughter, who married *M.*; that *M.* granted the reversion to the defendant for life; that the tenant attorned; that *M.* died, and then *Jane* granted the reversion to the plaintiff, and the tenant attorned; whereupon he (the plaintiff) entered, and was seised till the defendant made the trespass without this, that *M.* whom the defendant supposes to have leased to him, was seised in his demesne as of fee. It is to be observed, that the leases mentioned here, being for lives, were necessarily created by livery. The question before the court therefore was, Whether want of seisin in a feoffor was a good plea? All the judges held it was not; and that the plaintiff should have pleaded generally *ne lessa pas.* And Littleton expressly says, that if a man pleads a feoffment, it is no plea to say that the feoffor had nothing at the time; he can only plead *n'enfeoffa pas.*—Here then we have the most decisive evidence, that from the reign of Henry II. to the present time, the courts of judicature and the writings of the professors of the law are perfectly agreed, in considering feoffments as made with the same ceremonies, and attended with the same efficacy and operation. It follows from this, that it can be no argument against their having the efficacy and operation contended for in the particular instance now in question—that at a period anterior to tha tmentioned here, they were made (if that really was the case) with more notoriety and ceremony than they are now.

As to the second argument,—That the passages in the books which speak of tenants for years and others having estates less than of freehold, creating estates of freehold in the feoffee by disseisin, are to be understood as referring only to a disseisin by election;—lord Mansfield, on his entering into this part of the argument, observes, that the precise definition of what constituted that disseisin, which made the disseisor the tenant to the demandant's *præcipe*, though the right owner's entry was not taken away, was once well known, but that it is not now to be found. Most unquestionably there are many cases in which it would now be difficult, perhaps impossible, to say with certainty, whether they amounted to an actual disseisin, according to the doctrine of the old law; yet surely many cases may be stated, which by the most conclusive and satisfactory reasoning may be shown to be actual disseisins, according to that law. Perhaps the following observations may serve to establish a general rule for distinguishing those acts which amount to actual disseisins, from those which are such only at the election of the party. By a disseisin at the election of the party, is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised, may, if he pleases,

pleases, consider as *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election, is no disseisin till the party in question, by his election, makes it such. It follows therefore, that every act which is said by the writers to produce an immediate disseisin, necessarily implies an actual disseisin. Now we find, that the disseisins produced by feoffments instantly gave the feoffee, against every person but the disseisee, an *immediate* estate of freehold, with all the rights and incidents annexed to it. To this effect Bracton writes, lib. 2. ch. 5. § 3. fol. 11. b. *Item valida poterit esse donatio* statim ab initio *inter quasdam personas, et invalida et suspensa quantum ad alias personas, ut si quis rem alienam dederit alicui, ut supra dictum est.* Hence we find every where, that the wife of the feoffee became *immediately* entitled to her dower; the husband of the feoffee became *immediately* entitled to his curtesy; and the descent upon the heir of the feoffee *immediately* took away the entry of the disseisee. This is the constant language of the books, when they speak generally of disseisins. Now the books make no difference, whether the feoffment is made by a person seised of an estate of freehold, or by a person having only the bare possession, as tenant for years, at will, or by sufferance. The description given by Bracton in the passages cited from him, answers every notion given by lord Mansfield of an actual disseisin. Bracton says, that immediately upon the feoffment the estate becomes the property of the feoffee, as between him and the feoffor, and every other person, except the rightful owner, that a long and uninterrupted possession of a certain duration, will make the title of the feoffee good even against the rightful owner; that, to prevent this, the donor must restore his own seisin.—Here then is what his lordship so justly considers as necessarily requisite to form an actual disseisin—a person who has expelled the tenant from his fee, and usurped his feudal place and relation; a tenant to the *præcipe* of every demandant, though the true owner's right of entry upon him is not taken away. If the feoffee in this case were only a disseisor at the election of the disseisee, it would follow, that he was not a disseisor till the right owner made him such by his election, and therefore, that the fee would not be in him, if the rightful owner did not elect to make him a disseisor. According to this doctrine, if the feoffee of tenant for years, or any other person making a feoffment without an estate of freehold in him, died in the life of the rightful owner of the estate, the estate would not be subject to dower or curtesy, nor would the entry of the rightful owner be taken away. But we find, that in all cases in which our law-writers treat of disseisins made by feoffments, they consider it as a matter of course, that the estate of the feoffee, immediately, became an estate of freehold, with all the qualities and rights of a freehold estate annexed to it. A similar argument lies from the relation in which such a feoffee stood with respect to strangers. Bracton observes, that he immediately acquired the seisin of the fee as against strangers; which could not be, if he were only a disseisor at the election of the party. It has been observed before, that the books make no difference between feoffments made by persons having estates of freehold, and feoffments made by persons having estates less than freehold. Bracton expressly mentions guardians, tenants for years, by sufferance, at will, by disseisin, or intrusion, as persons whose feoffments are attended with the effect described above. So does sir Edward Coke, in the passage cited from the second Institute. So Perkins, sect. 222. "If lessee for years enfeoff a stranger, the lessor being "upon the land, yet the land shall pass by the feoffment; but perhaps, if he "continues upon the land, claiming the same after the feoffment, this counter-"vails an entry for a forfeiture: and the reason why it passed by such a "feoffment, is because the lessor had nothing to do, to meddle with the pos-"session of the land during the term." So Dyer, 362. b. A termor for 1,000 years made a feoffment, by the words *dedi, concessi, et feoffavi.* It was made a doubt, whether the lands passed by the feoffment, so that the lessor might enter for the forfeiture; or whether the term passed by the first words. The very doubt shows that it was taken for granted, that without those words the

the freehold would vest in the feoffee. In the margin of that case, in the edition of 1688, it is said, that in the case of Read and Morpeth *v.* Errington (reported in Cro. Eliz. 321.) it was held, that the lessee for years might make a feoffment, notwithstanding the presence of the lessor; and that it was a forfeiture of the lease; for though the lessee had the possession and might dispose of it, yet the lessor might enter for the forfeiture. Thus, in the case of Blundell *v.* Baugh, sir William Jones, 315. the judges held, that when tenant at will makes a lease for years rendering rent, and the lessee enters and pays rent, that is no disseisin, but at the election of the first lessor; for, say they, it never shall be a disseisin, unless there be the claim of a stranger by entry to have the freehold, or unless the owner of the land waves the occupation of the land, or brings an action, or otherwise declares his intention that he takes it by disseisin. Here the two kinds of disseisin are contrasted in the most direct and positive manner. The judges also, in the case of Blundell *v.* Baugh, cited Matthew Taylor's case, 34 Eliz. C. B. Tenant at will, or for years, makes a feoffment in fee, and dies, his wife brings dower against the feoffee, who pleaded *ne unque seisie que dower:* but the whole court was against him; for in the instant the fee was gained. In Cro. Jac. 615. and ant. 31. b. that doctrine is controverted, on the ground that the seisin of the feoffor was but momentary: but this proves the position attempted to be established here; for if the feoffment in this case only gave a freehold at the election of the reversioner, the feoffor had no seisin. The same doctrine seems to be laid down very expressly by lord Hardwicke, 2 Ves. sen. 481. Having occasion to mention a fine levied by tenant at will, he says, "If they "meant a wrong thereby, they must have taken another method; as this could "not work a disseisin on the trustees, and turn their estate to a right, while "they were tenants at will to the trustees. This way indeed they might "do it, according to the distinction taken in several cases, particularly in "Dormer and Parkhurst, if they executed a feoffment on the land; because "it is a feoffment on livery, which is a notoriety to the trustees, and puts it "on them to make entry to avoid." In the same manner, 3 Atk. 339. his lordship says, "If a man enters on my tenant, he does not gain such a pos-"session to levy a fine thereon, unless he continues in possession: for a wrong-"doer to gain a possession by disseisin, must not step on the land, and "withdraw and leave the rightful owner in possession, which would be "sufficient to gain a seisin on a feoffment, but not to levy a fine."—In every stage of our law, the most modern as well as the most ancient, the peculiar operation of a feoffment, as to the divesting of estates, destruction of contingent remainders, and extinction of powers, has been recognized. Citations and arguments to prove the point before us might be easily multiplied; but they shall be concluded here, by some observations upon the allowed effect of a fine levied by a tenant for years, or even by a tenant at sufferance, who has previously made a feoffment. No point of our law is more clearly settled, than that, unless some one of the parties to a fine has an estate of freehold in the lands, of which it is levied, it is totally void, as to all strangers, and may be avoided at any time by the plea, *quod partes finis nihil habuerunt.* Now, supposing a tenant for years to make a feoffment, and the feoffee afterwards to levy a fine, it is clear that the fine would be without effect, unless the feoffment gave him an estate of freehold. In the case of Whaley *v.* Tancred, 1 Vent. 241. sir Thomas Raymond, 219. 2 Lev. 52. it was settled, that where a fine is levied in this manner, the fine will bar the lessor at the end of five years after the expiration of the term. This would never be the case unless the feoffment had previously created an estate of freehold.—In the case of Doe *v.* Prosser, Cowp. 217. lord Mansfield expressed himself as follows:—"It is very true that "I told the jury, they were warranted by the length of time in this case, to "presume an *adverse* possession and *ouster* by one of the tenants in common, of "his companion; and I continue still of the same opinion. Some ambiguity "seems to have arisen from the term "*actual ouster*," as if it meant some act "accompanied by real force, and as if a turning out by the shoulders were "necessary.

" necessary. But that is not so. A man may come in by a rightful possession, and yet hold over *adversely* without a title. If he does, such holding over under circumstances will be equivalent to an *actual ouster*. For instance, length of possession during a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title. But if tenant *pur autre vie* hold over for twenty years after the death of *cestuy que vie*, such holding over will in *ejectment be a complete bar* to the remainder-man or reversioner; because it was *adverse* to his title. So in the case of tenants in common: the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant: nor indeed is a *refusal* to *pay* of *itself* sufficient, *without denying* his *title*. But if upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and *ouster* enough." By the adverse possession mentioned in this case, his lordship never could mean a disseisin at the election of the party. What is there to distinguish it from an actual disseisin?—Upon the whole, therefore, it is submitted to the learned reader's consideration, 1*st*, that, as feoffments have not been made from the reign of Henry the 2d. to the present time, with any other solemnities than those with which they are made at present, every operation and efficacy which has been constantly and uniformly allowed or ascribed to them by the courts of judicature, or writers of authority cotemporary with or subsequent to that monarch's reign, down to the present time, ought, notwithstanding the objection that they are not now made with some of the solemnities with which they are said to have been made in their very earliest institution, to be allowed and ascribed to them now: 2*dly*, that by the passage cited from Bracton, and the other authorities cited or referred to in the course of this note, it appears, that the disseisin produced by feoffments must be understood to be an actual disseisin, and not a disseisin merely at the election of the party: 3*dly*, that in many of these authorities it is most expressly mentioned, and that in all of them it must be implied, that however slender, bare, or tortious, the possession of the feoffor is, his feoffment necessarily and unavoidably vests the freehold in the feoffee, till the disseisee by entry or action restores his possession: 4*thly*, (to apply this abstruse and antiquated learning to the present subject matter of business) that copyholders, tenants for years, by *elegit*, statute-merchant, statute-staple, at will, or by sufferance, are all considered to have the possession of the estate, and that they may by feoffment vest an actual estate of freehold in the feoffee: 5*thly*, that a fine may be levied of, or a common recovery suffered upon, this estate of freehold: 6*thly*, that the feoffment so executed, the fine so levied, and the recovery so suffered, are immediately good against every person except the rightful owner: and 7*thly*, that in process of time they become good against the owner himself.—To ascertain the exact period of time when such feoffments, fines, and recoveries, will be a bar to the rightful owner, would be too great an extension of this note, the length of which already requires an apology.

As to the opinion of the court,—That the feoffment of sir Robert Atkyns was founded in fraud, and was therefore void; it is to be observed, that however that reasoning applied to the particular case before the court, it does not apply to the general question discussed in this note, which presupposes previous possession in the feoffor, free from every circumstance of fraud; either fair and innocent, or acquired by the open and notorious circumstances of disseisin, abatement, intrusion, or deforcement. Sir Robert Atkyns acquired his possession by the entry made by him under the verdict obtained by him in 1710. He lost it by the verdict given for dame Ann Atkyns in 1712. It may, therefore, be said (and the fact really was), that he obtained the verdict given for him in 1710, and consequently the possession under it, by a *pretended* title. He had not a fair or innocent possession. He did not acquire his possession

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Sect. 612.

ALSO, if tenant in taile grant his land to another for terme of the life of the said tenant in taile, and deliver to him seisin, &c. and after by his deed hee releaseth to the tenant and to his heires all the right

by disseisin, intrusion, abatement, or deforcement; it did not descend upon him; it did not come to him by act of law; he was not in the seisin of the fee by virtue of any gift or demise from the freeholder: he obtained his possession by the judgment of a court of law, under the colour of a pretended title. Thus, in the language of the law, his original possession was founded in fraud, practice, and stratagem. And to use an expression of the judges, 3 Rep. 78. a. "the common law does so abhor fraud and covin, that all acts, as well judicial "as others, which of themselves are just and lawful, yet being mixed with fraud "and deceit, are in judgment of law wrongful and unlawful."—From the reports of the case of Taylor *v.* Horde, it appears that lord Mansfield laid great stress on the resolution of the judges in Fermor's case. In this case, Thomas Smith being seised in fee of several lands, and holding others by copy of court-roll, and others for a term of years, and others at will (all of them lying in the same vill), made a feoffment with livery of all those held by copy, for years, and at will, to one Chappell, for life, and afterwards levied a fine. The question was, Whether the fine was a bar to the owners of the fee, at the expiration of the first five years? It appeared that Smith continued in possession of the land, and paid the rents. See 3 Rep. 77. 2 Anderson, 176. Cary, 20. The judges were of opinion, that the feoffment was fraudulent. Upon an examination of the different reports of the case, it will be found, that his *continuing in the possession* of the land, *and paying rent after* he made the feoffment, were the chief circumstances which induced the court to consider the feoffment to be fraudulent. The same may be observed of the case of White *v.* Bacon, Saville, 126. The continuing in the possession of the land after the conveyance has always been considered in our law as a badge of fraud. Fermor's case therefore only proves, that if a tenant for years, after making a feoffment, continues in the possession of the land, and pays rent for it, the possession acquired by him under the feoffment is fraudulent; and therefore a fine, and every other act which derives its effect from that possession, is void. But Fermor's case does not apply to the general question, of the operation of a fine levied by tenant for years, who has previously executed a feoffment, when the case is not affected by circumstances of fraud. The case mentioned before in this note of Whaley *v.* Tancred is directly in point, that a fine so levied by lessee for years is a bar to the lessor after five years from the expiration of the lease. And with respect to the feoffor's remaining in the possession, if by the deed declaring the uses of the fine it is expressed that the fine should enure to his use, the possession will be invested in him by the statute of uses.—The editor begs to conclude with an observation of lord Hardwicke (2 Atk. 631.) which seems to him to sanction, in some measure, the general reasoning contained in this note:—"If it is a mere legal title, and a man has purchased an "estate which he sees himself has a defect upon the face of the deeds, yet the "fine will be a bar, and not affect him with notice so as to make him a trustee "for the person who had the right, because this would be carrying it much too "far; for the defect upon the face of the deeds is often the occasion of the "fine's being levied." The doctrine contended for in this note seems to the editor to receive some countenance from the arguments and decision in Goodright *v.* Forrester, 8 East's Reports, 552.—[Note 285.]

[331. a.] ☞ *right which hee hath in the same land; in this case the estate of the tenant of the land is not enlarged by force of such release, for that when the tenant had the estate in the land for terme of the life of the tenant in taile, hee had then all the right which tenant in taile could rightfully grant or release* * *: so as by this release no right passeth, inasmuch as his right was gone before.*

Sect. 613.

(1 Saund. 26. 3 Rep. 84.)

ALSO, if tenant in taile by his deed grant to another all his estate which hee hath in the tenements to him entailed, to have and to hold all his estate to the other, and to his heires for ever, and deliver to him seisin accordingly; in this case the tenant to whom the alienation was made hath no other estate but for terme of the life of tenant in taile. And so it may bee well proved that tenant in taile cannot grant nor alien, nor make any rightfull estate of freehold to another person, but for terme of his owne life only, &c. (1)

THE

* *&c.* added in L. and M. and Roh.

(1) The livery, in this case, is *secundum formam chartæ*; and therefore, according to sir Edward Coke's doctrine, ante 48. a. its operation and effect are restrained to the quantity and quality of the effectual estate contained in the deed. Thus, says he, if a man makes a lease for years by deed, and delivers seisin according to the form and effect of the deed, yet he has but an estate for years, and the livery is void. The expression in the text, that tenant in tail cannot grant, or alien, or make any rightful estate of freehold to another person, but for the term of his own life, is not to be understood literally, that the grantee has but an estate for life, and that his estate is *ipso facto* determined by the death of the tenant in tail: all that is meant by it is, that his estate is certain and indefeasible, no longer than the life of the tenant in tail; for, upon the death of the tenant in tail, it is defeasible by the issue, either by action, or by entry or claim on the land, at his election. Still it has a continuance till it is so defeated by the issue. In note 1, ante 326. b. it has been explained upon what principle, in the case of a tenant in tail conveying by feoffment, it was held, that the statute *de donis* did not absolutely nullify the alienation, but only took away the entry of the issue, and reduced him to his remedy by formedon. Upon similar principles, in the case of a tenant in tail conveying by bargain and sale, release, covenant to stand seised, or any other mode of conveyance operating by way of grant, it has been held, that the statute does not nullify the conveyance, but reduces the issue in tail to his entry; or, if he prefers it, to his action, to avoid it. Thus, the grantee hath a base fee; his wife is entitled to her dower during the continuance of the fee; and if the grantee commits waste, the tenant in tail, having no reversion, has no right of action against him. 3 Rep. 84. b. 10 Rep. 96. See Machel *v.* Clarke, 2 Salk. 619. Farresley, 18. Com. 119. 2 Lord Raym. 778. Goodright on the demise of Tyrrell *v.* Mead and Shilson, 3 Burr. 1703. The passage, therefore, in Littleton, must be understood in this qualified sense, otherwise it is inaccurate. This was observed by lord chief justice Holt in the case of Machel *v.* Clarke, and by lord chief justice Hobart in the case of Sheffield *v.* Ratcliff, Hob. Rep. 338, 339.—[Note 286.]

(Post. 342. b. 345. a. Ant. 263. b.)

THE meaning of *Littleton* in both these cases, in this and in the Section next preceding is, that having regard to the issue in taile, and to them in reversion or remainder, tenant in taile cannot lawfully make a greater estate than for terme of his life; and therefore this release or grant is no discontinuance. But in regard of himselfe, this release or grant leaveth no reversion in him, but puts the same in abeiance, so as after this release or grant made he shall not have any action of waste, &c.

13 H. 7. 10. a. Brooke, Release, 95.

"*Grant to another all his estate.*" *Vid. Sect.* 650. Action of waste, &c. there is implied that he shall not enter for a forfeiture, if after the release or grant the lessee maketh a feoffment in fee.

Sect. 614.

FOR if I give land to a man in taile, saving the reversion to my selfe, and after the tenant in taile enfeoffeth another in fee, the feoffee hath no rightfull estate in the tenements for two causes. One is, for that by such feoffment my reversion is discontinued, the which is a wrong and not a rightfull act. Another cause is, if the tenant in taile dieth, and his issue bring a writ of formedon *against the feoffee, the writ and also the declaration shall say, &c. that the feoffee by wrong him deforces, &c.* Ergo *if he deforceth him by wrong, he hath no right estate.*

(F.N.B.211.b.)

HERE *Littleton* proveth, that the feoffee of tenant in taile hath no rightfull estate, having ☞ respect to two persons; the one is to the donor, whose reversion is divested and displaced; and the other to the issue in taile, who is driven to his action to recover his right.

[331. b.]

"*By wrong him deforces.*" [*n*] *Deforciare* is a word of art, and cannot be expressed by any other word; for it signifieth, to withhold lands or tenements from the right owner; in which case either the entrie of the right owner is taken away, or the deforceor holdeth it so fast, as the right owner is driven to his reall *præcipe*, wherein it is said, *unde A. eum injustè deforceat*, or the deforceor so disturbeth the right owner, as he cannot enjoy his owne: and therefore it is said, *Per hoc autem quod dicitur in brevi ultimæ præsentationis deforceant, videtur quibusdam quòd querens innuat per hoc quòd deforceans sit in seisinâ, sicut in brevi de recto, sed reverâ non est ita, sed satis deforceat qui possessorem uti seisina non permiserit omninò vel minùs commodè impediat præsentando, appellando, impetrando, secundum quod dicitur de disseisitore, satisfacit disseisinam, qui uti non permisit possessorem vel minùs commodè licèt omninò non expellat.* In this case that *Littleton* putteth, the discontinuee being in by wrong, is no disseisor, abator, or intrudor, but a deforceor; and hereof commeth Deforcement, and thus did antiquitie describe it: [*o*] *Deforcement, come si ascun enter en auter tenement tant come le veray seignior est al market, ou ailors, et retorne, et ne poet aver entre eins est celuy deforce et debotue.* And for that at the first the withholding was with violence and force, it was called a deforcement of the lands or tenements;

[*n*] Bract. li. 4. fol. 238. Flet. lib. 5. cap. 11.

Bract. & Flet. ubi supra.

[*o*] Mir. cap. 2. sect. 25. (5 Rep. 85. 2 Inst. 350.)

ments: but now it is generally extended to all kinde of wrongfull withholding of lands or tenements from the right owner. There is a writ called a *quòd ei deforceat*, and lieth where tenant in taile, or tenant for life, loseth by default, by the statute he shall have a *quòd ei deforceat* against the recoveror, and yet he commeth in by course of law (1). Westm.2. cap.4.

Sect. 615.

ALSO, if land bee let to a man for terme of his life, the remainder to another in taile, if he in the remainder will grant his remainder to another in fee by his deed, and the tenaunt for life attorne, this is no discontinuance of the remainder.*

[332. a.]

☞ Sect. 616.

ALSO, if a man hath a rent service or rent charge in taile, and hee grant the sayd rent to another in fee, and the tenant attorne, † this is no discontinuance, &c.

Sect.

* *&c.* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

(1) Sir William Blackstone, in his account of a deforcement, 3 Com. c. 10. observes, that it is *nomen generalissimum*; being a much larger and more comprehensive expression than any of the former, and signifying the holding of any lands or tenements to which another person has a right; so that it includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath a right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of those injuries. A deforcement may also be grounded on the non-performance of a covenant real: as if a man seised of lands covenants to convey them to another, and neglects or refuses so to do, but continues possession against him, this possession being wrongful is a deforcement. And hence, in levying a fine of lands, the person against whom the fictitious action is brought upon a supposed breach of covenant, is called a deforceant. Mons. Houard, *Anc. Loix des François, tom.* 1. p. 654. mentions, that Du Cange refers to the laws of Alfred and other kings of England precedent to the Conquest, for an explanation of the word Deforcement; but that he ought to have observed, that it was not introduced into the Latin translation of those laws till after the introduction of the Norman customs into England; that deforce is an old French word, and that *fortia* is taken for force in the 28th formula of Marculphus.—[Note 286 *.]

Sect. 617.

ALSO, if a man bee tenaunt in taile of an advowson in grosse, or of a common in grosse, if he by his deed will graunt the advowson or common to another in fee, this is no discontinuance; for in such cases the grauntees have no estate but for terme of the life of tenant in taile that made the grant, &c.

Bract.l.2.fo.3.& fo. 366. 378. Brit. fo. 187. Mir. c.2. sec.17. Flet.lib.3. ca.15. (Post. 335.)

BY the cases in these three Sections it appeareth, that if a remainder or a rent service, or a rent charge, or an advowson, or a common, or any other inheritance that lieth in grant, be granted by tenant in taile, it is no discontinuance, as formerly hath beene said.

[p] 5 E. 3. 58. 21 E. 3. 37, 38. 43 E. 3. 1. b.

[p] Note, here is an advowson named by *Littleton*, as a thing that lieth in grant, and passeth not by liverie of seisin.

11 H. 6. 4. 5 H. 7. 37. 18 H. 8. 16 El. Dy. 323. b.

Sect. 618.

AND note, that of such things as passe by way of grant, by deed made in the countrie, † and without livery, there such grant maketh no discontinuance, as in the cases aforesayd, ‡ and in other like cases, &c. || And albeit such things bee graunted in fee, by fine levied in the king's court, &c. yet this maketh not a discontinuance, &c.

[d] 6 E. 3. 56. 32 E. 3. Discont. 3. 33 Ass. 8. 4 H. 7. 17. 21 H. 7. 42. 15 H. 7. 19. 21 H. 6. 52, 53. 5 E. 4. 3. 21 E. 4. 5. 22 R. 2. Discon. 56. 38 H. 8. Discon. 35. Brooke. 19 E. 3. Bre. 468. Pl. Com. 435. 18 Ass. p. 2.

HERE is the generall reason yeelded of the precedent cases and the like; for that it is a maxime in law, that a grant [d] by deed of such things as doe lie in grant, and not in liverie of seisin, do worke no discontinuance (1). But the particular reason is, for that of such things the grant of tenant in taile worketh no wrong, either to the issue in taile, or to him in reversion or remainder; for nothing doth passe but onely during the life of tenant in taile, which is lawfull, and every discontinuance worketh a wrong, as hath beene said.

If

† *and without livery there — &c. where*, L. and M. and Roh.

‡ *and in—or*, L. and M. and Roh.

|| *And* not in L. and M. or Roh.

(1) VIII. *That nothing which lies in grant can be said to be discontinued.*— The term discontinuance is used to distinguish those cases where the party, whose freehold is ousted, can restore it by action only, from those in which he may restore it by entry. Now, things which lie in grant cannot either be divested or restored by entry. The owner, therefore, of any thing which lies in grant, has in no stage, and under no circumstances, any other remedy but by

[332. b.] [q] ☞ If tenant in taile of a rent service, &c. or of a reversion, or remainder in taile, &c. grant the same in fee with warrantie, and leaveth assets in fee simple, and dieth, this is neither barre nor discontinuance to the issue in taile; but he may distraine for the rent or service, or enter into the land after the decease of tenant for life. But if the issue bringeth a formedon in the discender, and admit himselfe out of possession, then he shall be barred by the warrantie and assets.

[q] 33 E. 3. Formed. 47. 13 H. 7. 10. 36 Ass. 8. 4 H. 7. 17. (3 Rep. 84, 85. 9 Rep. 51. a.)

[r] Tenant in taile of a rent disseisseth the tenant of the land, and maketh a feoffment in fee with warrantie and dieth, this is no discontinuance of the rent, but the issue may distreyne for the same; and albeit the warrantie extend to the rent, yet by the rule of *Littleton* it lieth not in discontinuance: and where the thing doth lie in liverie, as lands and tenements, yet if to the conveyance of the freehold or inheritance no liverie of seisin is requisite, it worketh no discontinuance. [s] As if tenant in taile exchange lands, &c. or if the king being tenant in taile, grant by his letters patents the lands in fee, there is no discontinuance wrought.

[r] 3 H. 7. 12. (Mo. 634.) 9 E. 4. 22. (1 Roll. Abr. 632. Sir Edw. Seymour's case. 10 Rep. 95.)

[s] 38 H. 8. Paten. Br. 101. Pl. Com. 233. Li. 1. f. 26. Alton Wood's case. (Ant. 251. b.)

"*By fine.*" Of a thing that lieth in grant, though it be granted by fine, yet it worketh no discontinuance; and this is regularly true.

48 E. 3. 23. (2 Sid. 65.)

[t] If tenant in taile make a lease for yeares of lands, and after levie a fine, this is a discontinuance; for a fine is a feoffment of record, and the freehold passeth. But if tenant in taile maketh a lease for his owne life, and after levie a fine, this is no discontinuance, because the reversion expectant upon a state of freehold which lieth onely in grant passeth thereby (1).

[t] 15 E. 4. tit. Discont. 30. 6 H. 56, 57. (1 Rep. 76. 1 Roll. Rep. 188. 1 Sid. 83.)

Sect.

by action; consequently the distinction in question can never be applicable to him. It is true, that the books often mention both disseisins and discontinuances of incorporeal hereditaments; but these disseisins and discontinuances are only at the election of the party, for the purpose of availing himself of the remedy by action.—Some observations on disseisins of this description are inserted in note, page 330. b.—[Note 287.]

(1) It is frequently said in our law-books, that a fine has no operation upon any estate or interest, which is not previously divested or turned to a right; but this expression, considered strictly, is inaccurate. By turning to a right, it is generally meant, that the person whose possession is usurped, *cannot restore it by entry*, and can only recover it by action. See note 1, ant. 239. a. But in the present case, the expression, turned to a right, must be understood in a more general sense. The import of it is, that the parties to the fine, or some of them, have in them at the time of their levying the fine, or acquire by it, a possession, adverse to, and inconsistent with, the estate or right intended to be barred; the real owner, therefore, at the time of levying the fine, or by its operation, is disseised of his possession, but the right still remains in him. In this general sense, his possession may be said to be turned to a right; but this right may be such as enables him to restore his possession by mere *entry*, without his resorting to an action. See 2 Atk. 631. In another sense it is inaccurate, as it seems to imply, that the turning to a right is produced by the operation of the fine; but, generally speaking, this is not the case. Every disseisin, intrusion, or abatement, turns the estate to a right, in the sense in which that expression is explained before. If the disseisor, intruder, or abater, afterwards levies a fine, it operates by the statute, after a non-claim of five

Sect. 619.

[† *NOTE, if I give land to another in taile, and hee letteth the same land to another for terme of yeares, and after the lessor graunteth the reversion to another in fee, and the tenant for yeares attorne to the grantee, and the terme expireth during the life of the tenant in tayle, by which the grauntee enter, and after the tenant in taile hath issue and die; in this case this is no discontinuance, notwithstanding the grant be executed in the life of the tenant in taile, for that at the time of the lease made for yeares, no new fee simple was reserved in the lessor, but the reversion remained to him in taile, as it was before the lease made.**]

*THIS is added to *Littleton*, and not in the originall, and therefore I purposely omit it: yet is the case good in law, because neither the lease for yeares, nor the grant of the reversion, divesteth any estate.

☞ Sect. 620. [333. a.]

† *BUT if the tenant in taile make a lease for terme of the life of the lessee, &c. in this case the tenant in tayle hath made a new reversion of the fee simple in him* (en cest case le tenant en le tayle ad ‡ fait un novel reversion de ‖ fee simple en luy); *because when he made the lease for life, &c. he discontinued* § *the tayle, &c. by force of the same lease, and also hee discontinued my reversion, &c. And it behoveth that the reversion of the fee simple be in some person in such case: and it cannot be in me which am the donor, inasmuch as my reversion is discontinued*; ergo, *the reversion of the fee ought to be in the tenant in tayle, who discontinued my reversion by lease, &c. And if in this case the tenant in tayle grant by his*

† *Note,—also*, L. and M. and Roh. —No part of this Section within crotchets is in L. and M. or Roh.

† In L. and M. and MSS. this Section begins thus: *If I give land to another in tail, and he letteth the same land to another for terme of life, &c.*

‡ en *added in L. and M.*

‖ de—en, *L. and M.*

§ *the tayle, &c. by force of the same lease, and also hee discontinued*, not in L. and M. or Roh.

years, as a bar to the right of the person whose estate is disseised, intruded upon, or abated. But its operation in these cases is merely as a bar, the ouster of the possession or divesting of the right being previously effected by the disseisin, intrusion, or abatement. In some cases, however, it does not operate only as a bar. As if tenant for life levies a fine, it is a forfeiture of his estate; and if the reversioner does not enter within five years after the forfeiture, or at the farthest within five years after the death of the tenant for life, he is barred of his remedy to recover. Whaley and Tancred, 1 Ventris, 241.—[Note 288.]

his deed this reversion in fee to another, and the tenant for life attorne, &c. and after the tenant for life dieth, living the tenant in taile, and the grantee of the reversion enter, &c. in the life of the tenant in taile, then this is a discontinuance in fee; and if after the tenant in tayle dieth, his issue may not enter, but is put to his writ of formedon. *And the cause is, for that he which hath the grant of such reversion in fee simple, hath the seisin and execution of the same lands or tenements, to have to him and to his heires in his demesne as of fee, in the life of the tenant in tayle.*

* [*And this is by force of the grant of the said tenant in tayle.*

"FOR *terme of the life of the lessee, &c.*" Here is implied, or for terme of another man's life (1). (1 Roll. 633.)

"*A new reversion of the fee simple.*" Which must be understood of a fee simple determinable upon the life of the lessee, which our author here calleth a fee simple; for if the lessee dieth the donee is tenant in taile againe, as hee was before; and that is the reason that if in that case hee granteth over the reversion and dieth; and after the death of tenant in taile the lessee dieth; the entry of the issue is lawfull, because by the death of the lessee the discontinuance is determined; and consequently the grant made of the reversion gained upon that discontinuance is void also. 15 E. 4. tit. Discont. 30. (Cro. Car. 156.)

If tenant in taile maketh a lease for three lives according to the statute of 32 *H.* 8, that is no discontinuance of the estate taile or of the reversion, because it is authorised by act of parliament, whereunto every man in judgement of law is partie. 32 H. 8. cap. 28.

And yet in some cases the freehold may be discontinued and not the reversion. [*u*] As if the husband and wife make a lease for life by deed (2) of the wife's land, reserving a rent, the husband dieth; this was a discontinuance at the common law for life; and yet the reversion was not discontinued, but remained in the wife. Otherwise it is ☞ if the husband had made the lease alone. [*u*] 38 E. 3. 32. 18 Ass. 2. 18 E. 3. 54. 22 H. 6. 24. (8 Rep. 71.)

[333. b.]

"*And after the tenant for life dieth, &c.*" The like law it is if the tenant for life surrender to the grantee, or if the grantee recover in an action of waste, or enter for the forfeiture. 21 H. 6. 52. 15 E. 4. tit. Discont. 30.

"*Hath*

* No part of this or of the following Section within crotchets is in L. and M. or Roh.

(1) IX. It has been observed before, that no conveyance by tenant in tail can operate as a discontinuance, unless it is created by livery, or by that which, in the eye of the law, is tantamount to it.—Littleton now proceeds to lay down, that to make a discontinuance, the conveyance must be *of such an estate as in its original creation may, by possibility, endure beyond the life of the tenant in tail.* When the estate so created is at an end, the discontinuance also is at an end.—[Note 289.]

(2) *Nota, a proviso on 32 Hen. VIII. that the lease shall be made in both their names, where the inheritance is in the woman. And see Cro. Car. 22. Smith v. Trender, where there is a quære, whether it ought to be so where the inheritance is in both.*—Lord Nott. MSS.—[Note 290.]

32 E. 3. Discont. 2. †3 E. 3. Entr. Cong. 31. 3 H. 4. 9. 22 R. 2. Discont. 50. 34 Ass. 6. Pl. 4. 38 Ass. 6. p. 6. 43 Ass. 6. 48. 18 E. 3. 43. 21 H. 6. 52. 15 E. 4. tit. Discontinuance, 30. Brooke, tit. Discont. 3, and 14. 4 H. 7. 17. 21 H. 7. 11.

"*Hath the seisin and execution.*" And here it is to be observed, that when the reversion in this case is executed in the life of tenant in taile, it is equivalent in judgement of law to a feoffment in fee, for the state for life passed by liverie.

[*w*] 21 H. 6. 52, 53.

[*w*] If tenant in taile make a lease for life, the remainder in fee, this is an absolute discontinuance, albeit the remainder be not executed in the life of tenant in taile, because all is one estate, and passeth by one livery. And so note a diversitie betweene a grant of a reversion, and a limitation of a remainder. *B.* tenant in taile maketh a gift in taile to *A.* and after *B.* releaseth to *A.* and his heires, and after *A.* dieth without issue; the issue of the first donee may enter upon the collaterall heire, because *A.* had not seisin and execution of the reversion of the land in his demesne as of fee, as *Littleton* here speaketh. But if tenant in taile make a lease for the life of the lessee, and after releaseth to him and his heires, this is an absolute discontinuance; because the fee simple is executed in the life of tenant in taile.

[*y*] 34 E. 1. Quare impedit. 179. 22 E. 3. 6. 17 E. 3. 3. 33 E. 3. Quare imp. 196. 23 Ass. 8. 50 E. 3. 26. (Ant. 298. Post. 349. b. F. N. B. 32. (1 Roll. Abr. 632. 1 Rep. 76.)

[*y*] If tenant in taile of a mannor whereunto an advowson is appendant, maketh a feoffment in fee by deed (as it ought to be) of one acre with the advowson, and the church becommeth void, and the feoffee present, tenant in taile dieth, the church becommeth void; the issue shall not present untill he hath re-continued the acre. But if the feoffee had not executed the same by presentment, then the issue in taile should have presented. And so was it at the common law, of the husband seised in the right of his wife, *mutatis mutandis.*

36 Ass. 8. 42 E. 3. 20. 22 R. 2. Discont. 50. (Sect. 601.638.) 21 H. 6. 52, 53. Brooke, tit. Discont. 3. 21 H. 7. 11. Lib. 1. fol. 85. Lib. 10. fol. 96, 97. (W. Jones, 210. Cro. Car. 156.)

If a fine be levied to a tenant in taile, and he granteth and rendreth the land to him and his heires, and die before execution, this is no discontinuance. Otherwise it is, if it had beene executed in the life of tenant in taile.

If tenant in taile make a lease for life of the lessee, and after grant the reversion with warrantie, and dieth before execution, this is no discontinuance; because the discontinuance was (as hath beene said) but for life, and the warrantie cannot enlarge the same (1).

[*] 15 E. 4. Discont. 30. Vide Sect. 642.

"*And this is by force of the grant of the said tenant in tayle.*" Hereupon *Littleton* himselfe is of the same opinion, [*] as it appeareth he was in our bookes; that if tenant in taile make a lease for life, and grant the reversion in fee, and the lessee attorne, and that grantee granteth it over, and the lessee attorne, and then the lessee for life dieth, so as the reversion is executed in the life of

(1) All this is a consequence of the doctrine laid down in the last page. If the remainder or reversion is created at the same time as the particular estate, it necessarily must be created by the same livery. If it is created at a subsequent time, then to continue the discontinuance after the determination of the particular estate, the reversion or remainder must be executed in possession during the life of the tenant in tail. The entry of the reversioner or remainder-man in this case is tantamount to a second livery.—[Note 291.]

of tenant in taile, yet this is no discontinuance, but that after the death of tenant in taile the issue may enter; because (as *Littleton* here saith) he is not in of the grant of the tenant in taile, but of his grantee.

If at this day tenant in taile make a lease for life, and after by deed indented and inrolled according to the statute he bargaineth and selleth the reversion to another in fee, and the lessee dieth, so as the reversion is executed in the life of tenant in taile; albeit the bargainee is not in the *per* by the tenant in taile, yet inasmuch as he claimeth the reversion immediately from him, which is executed in his lifetime, this is a discontinuance. And so it is, and for the same cause, if tenant in taile had granted the reversion to the use of another and his heires. If tenant in taile maketh a lease for life, and after disseiseth the lessee for life, and maketh a feoffment in fee, the lessee dieth, and then tenant in taile dieth; albeit the fee be executed, yet for that the fee was not executed by lawfull meanes, (as in all the cases of *Littleton* it appeareth it ought to be) it is no discontinuance.

[334. a.] ☞ Sect. 621.

(Post. 335. b. mesme le case.)

IN the same manner shall it be, if in the case aforesaid the tenant for terme of life after the attornement to the grantee had aliened in fee, and the grantee had entred by forfeiture of his estate, and after the tenant in tayle had died, this is a discontinuance, causâ quâ suprà.]

THIS is added in this place, but in the originall it commeth in after in this Chapter *.

21 H. 6. 52, 53. 15 E. 4. Discont. 30.

Sect. 622.

(Sir W. Jones, 209. Cro. Car. 156.)

BUT in this case, if tenant in taile that grants the reversion, &c. dieth, living the tenant for life, and after the tenant for life dieth, and after hee to whom the reversion was granted enter, &c. then this is no discontinuance, but that the issue of the tenant in tayle may well enter upon the grantee of the reversion; because the reversion which the grantee had, &c. was not executed, &c. in the life of the tenant in taile, &c. And so there is a great diversitie when tenant in tayle maketh a lease for yeares, and where he maketh a lease for life; for in the one case hee hath a reversion in tayle, and in the other case hee hath a reversion in fee (1).

OF

* But it does not appear in this Chapter in L. and M. or Roh. nor in MSS.

(1) See the note on the following Section.

OF this sufficient hath beene said before, and is of itselfe manifest, and needeth no explication.

18 Ass. 6.
21 H. 6. 53.

Like law was at the common law of a husband seised of land in right of his wife, *mutatis mutandis.*

☞ Sect. 623.

[334. b.]

FOR if land bee given to a man and to his heires males of his body engendred, who hath issue two sonnes, and the eldest sonne hath issue a daughter and dieth, and the tenant in tayle maketh a lease for yeares and die, now the reversion descendeth to the younger sonne, for that the reversion was but in the taile, and the youngest sonne is heire male, &c. But if the tenant had made a lease for life, &c. and after died, now the reversion descendeth to the daughter of the elder brother, for that the reversion is in the fee simple, and the daughter is heire generall, &c.* (1)

This is evident also, and needeth no explanation.

Sect. 624.

ALSO, if a man be seised in taile of lands devisable by testament, &c. and hee deviseth this to another in fee, and dieth, and the other enter, &c. this is no discontinuance, for that no discontinuance was made in the life of the tenant in taile, &c.

9 E. 4. 22.
28 H. 6. 14.
Vid. 18 E. 3. 8.
(Cro. Car 405.
1 Roll. Abr. 633.)

THIS is manifest, and needeth no explanation: only this is to be observed, that no discontinuance can be made by tenant in taile, but such as is made and taketh effect in his life-time, which is here implied in the *(&c.)*

Sect. 625.

ALSO, if land be given in taile, saving the reversion to the donor, and after the tenant in taile by his deed enfeoffe the donor, to have and to hold to him and to his heires for ever, and deliver to him seisin accordingly,

* *and the tenant in tayle maketh a lease for yeares and die,* not in L. and M. or Roh.

(1) The estate of the lessee for years not being created by livery, does not displace the possession, and consequently does not disturb the descent of the inheritance upon the issues inheritable to the estate. It is otherwise where the lease is for life. That is created by livery, and therefore displaces the possession, and gives the tenant in tail a tortious estate in fee simple, in reversion immediately expectant upon the life estate of his donee;—that reversion must therefore descend on the daughter as heir general.—[Note 292.]

accordingly, &c. this is no discontinuance, because none can discontinue the estate taile, unlesse he discontinueth the reversion of him who hath the reversion, &c. or remainder, if any hath the remainder, &c. And inasmuch as by such feoffment made to the donor (the reversion then being in him) his reversion was not discontinued nor altred, &c. this feoffment is no discontinuance, &c.

AND of this opinion is *Littleton* [*a*] in our bookes, and saith that so it was adjudged. [*a*] 9 E. 4. 24. b.

[335. a.] "*Enfeoffe the donor, &c.*" This must be understood where the reversion of the donor is immediately ☞ expectant upon the estate of the donee; [*b*] for if a man make a gift in taile the remainder in taile, reserving the reversion to himselfe: in this case if the donee enfeoffe the donor, this is a discontinuance, because there is a meane estate; and so doth *Littleton* here put his case of a reversion immediately expectant upon the gift in taile. Also it is to be intended of a feoffment made to the donor solely or only; for if the donee enfeoffe the donor and a stranger, this is a discontinuance of the whole land. Lib. 1. fol. 140. in Chudlye's case. (1 Roll. Abr. 634.) [*b*] 41 Ass. 2. 41 E. 3. 2. (1 Rep. 146. b.) (Ant. 42. a.) 28 H. 8. Dier, 12.

But if tenant for life make a lease for his owne life to the lessor, the remainder to the lessor and an estranger in fee: in this case, forasmuch as the limitation of the fee should worke the wrong, it enureth to the lessor as a surrender for the one moytie, and a forfeiture as to the remainder of the stranger; for he cannot give to the lessor that which he had before, as our author here saith; and as to the remainder to the stranger, it is a forfeiture for his moytie, and when the lessor entreth, he shall take the benefit of it. But if two joyntenants be, and one of them enfeoffe his companion and a stranger, and make livery to the stranger; this shall vest only in the stranger, because the livery cannot enure to his companion. (1 Rep. 76. b. Sid. 361.) (Dyer, 12. b.) (Ant. 169. a. 186. a. 193. b. 200. b. 2 Roll. Abr. 86. 403. 1 Rep. 100. b. 4 Leo. 23.)

"*None can discontinue the estate taile, unlesse he discontinueth the reversion, &c. or remainder, &c.*" And therefore for this cause, if the reversion or remainder be in the king, the tenant in taile cannot discontinue the estate taile. [*c*] But tenant in taile, the reversion in the king, might have barred the estate taile by a common recovery, untill the statute of 34 *H.* 8. ca. 20. which restraineth such a tenant in taile; but that common recovery neither barred nor discontinued the king's reversion (1). 40 Ass. 36. 21 Ass. 36. 18 E. 3. 45. F. N. B. 142. a. Pl. Com. 555. [*c*] 33 H. 8. tit. Taile, Br. 41. Pl. Com. ubi supra.

Note, the reversion may be revested, and yet the discontinuance remaine. [*d*] As if a feme covert be tenant for life, and the husband make a feoffment in fee, and the lessor enter for the forfeiture; here is the reversion revested, and yet the discontinuance remained at the common law. [*d*] 27 Ass. p. 60. 29 Ass. 43. 11 Ass. 11. 16 Ass. 11. 18 E. 3. 45. (Ant. 333. b. Post. 336.)

Sect.

(1) See Stone v. Newman, 3 Cro. 427.

(1 Roll. Abr. 633.)

Sect. 626.

IN the same manner is it, where lands are given to a man in taile, the remainder to another in fee, and the tenant in taile enfeoffe him that is in the remainder, to have and to hold to him and to his heires; this is no discontinuance, causâ quâ suprà (2).

"*THE remainder to another.*" Here it appeareth that (as hath beene said in case of a reversion) the remainder must be immediately expectant upon the estate taile.

Sect.

(2) X. *As to discontinuances made to, or with the concurrence of, the remainder-man or reversioner:*—The feoffment of tenant in tail *to* the immediate remainder-man or reversioner in fee, has the operation of a surrender. In this light it cannot be considered to pass a greater estate than the grantor may lawfully convey: it does not, therefore, work a discontinuance. But if it is made to a stranger, *the mere concurrence of the remainder-man or reversioner* does not prevent the discontinuance, either with respect to the issues in tail, or his own remainder or reversion, even though the tenant in tail die without having issue. Thus, in Baker *v.* Hacking, 3 Cro. 387. 405. *J. C.* being tenant in tail, with the immediate reversion in fee to *R. C.* both of them joined in a feoffment to *A.* for life. *R. C.* made his will and died; and then *J. C.* died without issue. It was admitted, that if it were a discontinuance of the reversion, the devisor, not being seised, had no power to devise. Sir Geo. Croke was of opinion, that as there was no issue of the tenant in tail, his feoffment was no discontinuance of the reversion: he considered it as the lease of the tenant in tail during his life, and afterwards, the lease of the reversioner; and that the reversioner's joining showed it was not the intention of the parties to displace his estate. But the three other judges held it to be a discontinuance, on the ground that the effect of a discontinuance is immediate, and does not depend on the tenant in tail having or not having issue.—They were also of opinion, that if the reversion in fee, instead of being in a stranger, had been in the tenant in tail himself, the feoffment would have been a discontinuance, as well of his own reversion as of the estate of the issue in tail.—But where the tenant for life and reversioner join in the conveyance, each of them is considered to pass his own estate: the tenant for life, the freehold; the reversioner, the inheritance. Hence if tenant for life, remainder in tail, remainder in fee, join in a fine, it is no discontinuance to the remainder-man in fee. This was resolved in Peck *v.* Channell, 1 Cro. 827, 828. on the ground, that none shall make a discontinuance but he who is seised of an estate tail in possession.—[Note 293.]

[335. b.] ☞ Sect. 627.

*ALSO, if an abbot hath a reversion, or a rent service, or a rent charge, and he will grant * this reversion, or rent service, or rent charge, to another in fee, and the tenant attorne, &c. this is no discontinuance.*

Of inheritances that lie in grant, sufficient hath beene said before.

Sect. 628.

IN the same manner where an abbot is seised of an advowson, or of such things which passe by way of grant without liverie of seisin, &c.

HERE it appeareth (as hath beene said) that an advowson doth not lie in liverie, but in grant.

Sect. 629.

(Ant. 234. a.)

ALSO, if tenant in tayle letteth his land to another for life, and after he granteth in fee the reversion to another, and the tenant attorne, and after the tenant for life alien in fee, and the grauntee of the reversion enter, &c. in the life of the tenant in taile, and after the tenant in taile dieth, his issue shall not enter, but is put to his writ of formedon, *because the reversion in fee simple which the grauntor* (A) *had by the graunt of the tenant in tayle, was executed in the life of the same tenant in tayle, and therefore it is a discontinuance in fee, &c.*

Of this sufficient hath beene said before.

[336. a.] ☞ Sect. 630.

(1 Roll. Abr. 631.)

AND note, that some make discontinuances for terme of life. As if tenant in tayle make a lease for life, saving the reversion to him as long as the reversion is to the tenaunt in tayle, or to his heires; this is no

* *this reversion, or rent service, or rent charge—one of them,* L. and M. and Roh. but as above in MSS.

(A) *Here "grantor" seems printed by mistake instead of "grantee;" for, in this case, the tenant in tail is the grantor. See Mr. Ritso's Intr. p.* 113.

no discontinuance but during the life of tenant for life, &c. And if such tenant in taile giveth the lands to another in tayle, saving the reversion, then this is a discontinuance during the second tayle, &c.

THIS is manifest, and hath beene handled before, and needeth no explanation; onely this is to be observed, where *Littleton* putteth hereafter cases of discontinuances by feoffement, &c. he hath a double entendment. First, by feoffement, or by any other conveyance which may make a discontinuance. Secondly, *(&c.)* implieth a discontinuance by a gift in taile, or a lease for life, &c.

Sect. 631.

BUT where the tenant in tayle maketh a lease for yeares or for life, the remainder to another in fee, and delivereth liverie of seisin accordingly, this is a discontinuance in fee, for that the fee simple passeth by force of the liverie of seisin, &c.

This is evident also, and hereof sufficient hath beene spoken before.

Sect. 632.

*AND it is to be understood, that some such discontinuances are made upon condition, &c. and for that the conditions be broken, &c. or for other causes, according to the course of law, such estates are defeated, then are the discontinuances defeated, and shall not by force of them take any man from his entrie, &c. * As if the husband be seised of certaine land in right of his wife, and maketh a feoffement in fee upon condition, and dyeth, if the heire after enter upon the feoffee for the condition broken, the entrie of the wife was congeable upon the heire, for that by the entry of the heire the discontinuance is defeated, as is adjudged.*

"*DISCONTINUANCES made upon condition, &c.*" Here is to be understood a diversitie betweene a condition in deed, whereof *Littleton* here speaketh, and a condition in law, whereof somewhat hath beene said before in this chapter, (Ant. 335. a.) ☞ viz. where the feme is tenant for life, and the husband maketh a feoffement in fee, and the lessor entreth for the condition in law. [336. b.]

"*The conditions be broken, &c.*" Here is implied, or any cause given either by disabilitie of the feoffees, or by any condition

* The remaining part of the above Section is not in L. and M. or Roh. nor in Pynson, or MSS. But in all, the case of the grandfather, father, and son, Sect. 637, is here inserted, with some small variation.

dition performed on the part of the feoffor, or otherwise, whereby the state is in any sort avoided.

"*As if the husband be seised of certaine land in right of his wife, &c.*" Here it appeareth, that for the condition broken, the heire of the husband may enter; for albeit no right descend from the husband to his heire, yet the title of entry by force of the condition which the husband created upon the feoffement, and reserved to him and his heires, doth descend to his heire: and *Littleton* saith truly, that so it hath been adjudged. (2 Rep. 59.) 4 H. 6. 2. 9 H. 7. 24. b. Lib. 8. fol. 43. 44. Whittingham's case.

"*Upon the heire.*" *Nota*, when the heire in this case hath entred for the condition broken, and hath avoided the feoffement, the estate of the heire vanisheth away, and presently the estate vesteth in the feme or her heires, without any entry or claime by her or them; for the heire entreth in respect of the condition, upon the reall contract, and not of any right, as hath beene said; and if the husband himselfe had re-entred, the state had vested in his wife: and therefore where *Littleton* and our bookes say, that the wife shall enter upon the heire, the meaning is, that after the entry of the heire she may re-enter. (Ant. 12. b. 46. b. 202. a.) Whittingham's case, ubi supra.

Sect. 633.

ALSO, if a woman inheritrix hath a husband who is within age, and hee being within age maketh a feoffement of the tenements of his wife in fee, and dieth, it hath beene a question, if the wife may enter or not, &c. And it seemeth to some, that the entrie of the wife after the death of her husband, is congeable in this case. For when her husband made such feoffment, &c. he might well enter, notwithstanding such feoffment, &c. during the coverture; and he could not enter in his owne right, but in the right of his wife: ergo, *such right as hee had to enter in the right of his wife, &c. this right of entrie remayneth to the wife after his decease.*

THE reason here rendred by *Littleton* is, for that the husband cannot enter in his owne right, but in the right of his wife; and the heire of the husband cannot enter, for no right or title descends unto him, and the wife in this case shall take benefit of the nonage of her husband, and enter into the land. Whittingham's case, ubi supra.

If an infant be tenant for another man's life, and make a feoffement in fee, and *cesty que vie* dieth, the infant himselfe shall not enter, because he hath no right at all.

[337. a.] ☞ If the husband within age take to wife feme tenant in taile generall, and the husband make a gift in taile and dieth within age, in this case the wife may enter, as *Littleton* here holdeth, or the heire of the husband in respect of the new reversion descended unto him may enter. But if the heire enter, presently thereupon his estate vanisheth. If tenant in taile being within the age of one and twenty yeeres make a feoffment in fee, and after is attainted of felony and dieth, the entry of the issue is not lawfull; for his entry is not lawfull in respect of his estate only, but of his blood also which

is

is corrupted; and therefore in that case he is driven to his *formedon.*

(8 Rep. 43.) 14 E. 3. Bre. 281. 14 E. 3. Dum fuit infra ætatem, 6. F. N. B. 192. (1 Roll. Abr. 634.)

If husband and wife be both within age, and they by deed indented joyne in a feoffment reserving a rent, the husband dieth, the wife may enter, or have a *dum fuit infra ætatem.* But if she were of full age, she shall not have a *dum fuit infra ætatem,* for the nonage of her husband, albeit they be but one person in law.

Sect. 634.

AND it hath beene said, that if two joyntenants being within age make a feoffement in fee, and one of the infants die, and the other surviveth; in as much as both the infants might enter joyntly in their lives, this right accrueth all to him which surviveth, and therefore hee that surviveth may enter into the whole, &c. And also the heire of the husband which made the feoffment within age cannot enter, &c. because no right descendeth to such heire in the case aforesaid, for that the husband had never any thing but in right of his wife, &c.*

21 E. 3. 50. 18 E. 2. Bre. 831. 6 E. 3. 4. 9 H. 6. 6. 19 H. 6. 6. 39 H. 6. 42. 34 H. 6. 31. F. N. B. 192. See of this in the Chapter of Joyntenants(A) (8 Rep. Whitingham's case.)

"*MAY enter into the whole, &c.*" And the reason hereof is implied in this *(&c.)* for that they may joyne in a writ of right, and therefore the right shall survive. But they cannot joyne in a *dum fuit infra ætatem,* because the nonage of the one is not the ☞ nonage of the other. In this case, if one joyntenant had made a feoffment in fee and died, the right should not have survived, for the joynture was severed for a time. If two joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the infant shall enter, or have a *dum fuit infra ætatem* but for the moitie.

[337. b.]

Sect. 635.

(F. N. B. 192. a. 5 Rep. 27. 29. 6 Rep. 3. 9 Rep. 84. b. 8 Rep. 42.)

AND also when an infant makes a feoffment being within age, this shall neither grieve nor hurt him, but that hee may well enter, &c. for it should be against reason that such feoffment made by him that was not able to make such a feoffment shall grieve or hurt another, to take them from their entry, &c. And for these reasons it seemeth to some, that after the death of such husband so being within age at the time of the feoffment, &c. that his wife may well enter, &c.

Bract. fol. 14. Britt. fol. 88. a. Fleta, li. 3. c. 3. (Post. 350. b. 380. b.)

"*BUT that he may well enter, &c.*" Here is implied, that he might enter either within age, or at any time after full age, and likewise after his death his heire may enter. *Meliorem enim conditionem facere potest minor deteriorem nequaquam.*

Nota,

(A) *Vid. ante* 188. a. *& note* 4 *there.*

Nota, A speciall heire shall take advantage of the infancie of the ancestor. As if tenant in taile of an acre of the custome of borow English make a feoffment in fee within age, and dieth, the youngest sonne shall avoid it; for he is privie in bloud, and claimeth by discent from the infant.

And so if tenant in taile to him and the heires females of his bodie make a feoffment in fee and dieth within age, having issue a sonne and a daughter, the daughter shall avoid the feoffment. And so note, that a cause to enter by reason of infancie is not like to conditions, warranties, and estoppels, which ever descend to the heire at the common law. (8 Rep. 54. Ant. 12. a.)

The residue of this Section upon that which hath beene said is evident.

Sect. 636.

ALSO, if a woman inheritrix taketh husband, and they have issue a sonne, and the husband dieth, and she takes another husband, and the second husband letteth the land which he hath in right of his wife to another for terme of his life, and after the wife dieth, and after the tenant for life surrendereth his estate to the second husband, &c. quære, *if the sonne of the wife may enter in this case upon the second husband during the life of tenant for life,* * *&c. But it is cleere law, that after the death of the tenant for life, the son of the wife may enter; because the discontinuance, which was only for terme of life, is determined, &c. by the death of the same tenant for life*†.

"SURRENDER (1)," *sursum redditio*, properly is a yeelding up an estate for life or yeares to him that hath an immediate estate in reversion or remainder, wherein the estate for life or yeares may drowne by mutuall agreement betweene them (2). (Ante, 218. b. Perk. 581. 2 Roll. Abr. 494.)

Note,

* *&c.* not in L. and M. or Roh. † *&c.* added in L. and M. and Roh.

(1) A *surrender* differs from a release in this respect, that the release operates by the greater estate's descending upon the less:—a surrender is the falling of a less estate into a greater. As there is necessarily a privity of estate between the surrenderor and the surrenderee, no livery of seisin is necessary to perfect a surrender. See 2 Bla. Com. Ch. 20.—In Thompson *v.* Leach, 2 Salk. 618. the court held, that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and that, though it be true, that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied; that a gift imports a benefit; that an assumpsit to take a benefit may well be presumed; and that there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property; or sealing of a bond to another in his absence should be the obligee's bond, immediately without notice.—[Note 294.]

(2) This doctrine, that to give a surrender legal effect, the surrenderee must

(Ant. 218. b.) ☞ Note, there be three kinde of surrenders, viz. a surrender properly taken at the common law, which is here before described, and whereof *Littleton* [338. a.] speaketh.

have the immediate estate in remainder or reversion expectant on the estate of the surrenderor, evidently applies to the common case of a tenant for life, with remainder to trustees during his life to preserve contingent remainders. It is now settled beyond doubt, that the estate of the trustees is a vested estate of freehold. It must therefore necessarily prevent a surrender from the tenant for life to the ulterior remainder-man. In cases of limitations to the father for life, remainder to his sons successively in tail, it was the practice formerly, particularly where it was intended to suffer recoveries with single voucher, to make the father convey his estate to the son. This was sometimes done by surrender. To this there could be no objection, where there was no limitation to trustees to preserve. But in those cases, where such a limitation was introduced, the deed necessarily failed to operate as a surrender, for the reason above mentioned. It has, however, been contended, that, though in this case the deed was void as a surrender, it would operate as a covenant to stand seised. That, an assurance, where there is a proper consideration, will operate as a covenant to stand seised, though the words used in the deed point at a different mode of assurance, is placed beyond doubt by many authorities both ancient and modern. But between those cases and that now under consideration, there is this striking difference; that, in all those cases the estate vested in the party would be the same both in quantity and quality, whether the deed operated in the mode imported by the language of the deed, or in any other mode. But in the case under consideration, if the deed operated by way of surrender, the party would take one kind of estate; if it operated by way of covenant to stand seised, he would take another. For if it could operate by way of surrender, the father's life estate would be immediately extinguished, and the son would become tenant in tail in possession: if it operated by way of covenant to stand seised, the father's life estate would immediately, by the statute of uses, be transferred to the son, and he would become tenant for life of his father, remainder to trustees to preserve, remainder to himself in tail, Then supposing him to die without issue in the father's lifetime, if the deed operated by way of surrender, the person entitled in remainder next expectant upon the estate tail of the son would be entitled to enter immediately: but if the deed operated by way of covenant to stand seised, there would be an estate of special occupancy during the father's life, and the next remainder man would not be entitled to take until the father's decease. To this it may be replied, that the object of the parties was, that the son should by virtue of the deed become seised of the lands for a particular purpose. It is found, that it cannot have that effect if its mode of operation be that which the parties themselves intended, but that, if the deed is held to operate in another mode, it will accomplish the object of the parties. The courts therefore, it may be said, conformably to their usual practice of effectuating the intent of parties, when it can be done, will construe the deed to operate in that mode of assurance in which it can take effect, and consequently consider the deed to operate by way of covenant. It is observable, that when the tenant to the præcipe in a recovery is made by bargain and sale, it sometimes happens that the bargain and sale is not inrolled. But frequently in these cases the lands are out upon leases for years, or in the hands of tenants at will; where this is the case there seems room to contend, that the deed, though void as a bargain and sale for want of inrolment, may operate as a grant of the reversion expectant on these particular estates.—[Note 294*.]

speaketh (1). Secondly, a surrender by custome of lands holden by copy, or of customary estates, whereof you have read before, *Sect.* 74, and a surrender improperly taken (as appeares before, *Sect.* 550), of a deed. And so of a surrender of a patent, and of a rent newly created, and of a fee simple to the king.

(9 Rep. 75. 2 Eliz. Dier, 176. 14 H. 7. 3. 27 Ass. 37. 49 E. 3. 2. 11 H. 4. 2. 12 H. 4. 21. 13 H. 4. 13.

A surrender properly taken is of two sorts, viz. a surrender in deed, or by expresse words, (whereof *Littleton* here putteth an example) and a surrender in law wrought by consequent by operation of law. *Littleton* here putteth his case of a surrender of an estate in possession, for a right cannot bee surrendered. And it is to be noted, that a surrender in law is in some cases of greater force than a surrender in deed. As if a man make a lease for yeares to begin at *Michaelmasse* next, this future interest cannot be surrendred, because there is no reversion wherein it may drowne; but by a surrender in law it may be drowned. As if the lessee before *Michaelmasse* take a new lease for yeares either to begin presently, or at *Michaelmasse*, this is a surrender in law of the former lease. *Fortior & æquior est dispositio legis quam hominis* (2).

14 H. 8. 15. 37 H. 6. 17. 21 H. 7. 6. 40 E. 3. 24. 31 Ass. 26. 50 E. 3. 6. 44 Ass. 3. 35 H. 8. Dier, 37. 8 Ass. 20. 4 Ma. Dier, 141. 11 Eliz. Dier, 280. 6 H. 7. 9. 37 H. 6. 17. 21 H. 7. 6. 14 H. 7. 4.

Lib. 6. f. 69. Sir Moyle Finche's case. (5 Rep. 11. 1 Leo. 323. 4 Rep. 53.) (10 Rep. 67. 6 Rep. 69. Cro. Jac. 84. 2 Roll. Abr. 494. Ant. 47. b. Dyer, 58.) 19 H. 6. 33. 27 Ass. 46. 14 H. 7. 4. 1 H. 6. 1. Pl. Com. 541.

Also there is a surrender without deed, whereof *Littleton* putteth here an example of an estate for life of lands, which may be surrendered without deed, and without livery of seisin; because it is but a yeelding, or a restoring of, the state againe to him in the immediate reversion or remainder, which are alwayes favoured in law. And there is also a surrender by deed; and that is of things that lie in grant, whereof a particular estate cannot

(1) By the stat. 29 Cha. II. c. 3. sect. 3. no leases, &c. either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, shall be *surrendered*, unless it be by deed or note in writing, signed by the party *surrendering* the same, or his agents thereunto lawfully authorized by writing, or by act and operation of law. Upon this statute it was held, by lord chief-baron Gilbert, in Magennis *v.* Mac-Cullogh, Gilb. Ca. in Eq. 236. that a lease for years cannot be surrendered by cancelling of the indenture without writing; because the intent of that statute was to take away the manner they formerly had of transferring interests to lands by signs, symbols, and words only; and therefore, as a livery and seisin on a parol feoffment, was a sign of passing the freehold before the statute, but is now taken away by the statute; so the cancelling of a lease was a sign of a surrender before the statute, but is now taken away, unless there be a writing under the hand of the party. In Farmer d. Earl *v.* Rogers, 2 Wils. p. 27. it was held, that the statute does not make a deed absolutely necessary to a surrender; for it directs it to be made either by deed or *note* in *writing*; and when it is made by a note in writing, there is no occasion for any stamp-duty, it not being a deed. But see 55 Geo. III. c. 184. sch. part 1, under the head Surrender.—[Note 295.]

(2) For the first lease and the second cannot subsist together, and the parties, by making a contract of as high a nature for the same thing, tacitly consented to dissolve the former; for without the dissolution of that, the lessor could not grant to the lessee that interest which was already passed from the lessor to the lessee by the first lease. *Note to the 11th edition.*—[Note 296.]

cannot commence without deed, and by consequent the estate cannot be surrendred without deed. But in the example that *Littleton* here putteth, the estate might commence without deed, and therefore might bee surrendred without deed. And albeit a particular estate be made of lands by deed, yet may it be surrendred without deed, in respect of the nature and qualitie of the thing demised, because the particular estate might have beene made without deed; and so on the other side (A). If a man be tenant by the courtesie, or tenant in dower of an advowson, rent, or other thing that lies in grant; albeit there the estate begin without deed, yet in respect of the nature and qualitie of the thing that lies in grant it cannot be surrendred without deed. And so if a lease for life be made of lands, the remainder for life; albeit the remainder for life began without deed, yet because remainders and reversions, though they be of lands, are things that lie in grant, they cannot be surrendred without deed. See in my Reports plentifull matter of surrenders.

(Ant. 225. b. Cro. Car. 399. 2 Roll. Abr. 498.)

(10 Rep. 66, 67.)

"*Quære, if the sonne of the wife may enter, &c.*" Here *Littleton* maketh a *quære*. So as grave and learned men may doubt, without any imputation to them; for the most learned doubteth most, and the more ignorant for the most part are the more bold and peremptory.

It is holden of some, that after the surrender the issue in taile during the life of tenant for life may enter; for that having regard to the issue, the state for life is drowned, and consequently the inheritance gained by the lease is by the acceptance of the surrender vanished and gone: as if tenant in taile make a lease for life, whereby he gaineth a new reversion (as hath ☞ beene said) if tenant for life surrender to the tenant in taile, the estate for life being drowned, the reversion gained by wrong is vanished and gone, and he is tenant in taile againe against the opinion *obiter* of *Portington*, 21 *H.* 6. 53.

[338. b.]

21 H. 6. 53.

(Ant. 185. 8 Rep. 145.)

But herein are two diversities worthy of observation. The first is, that having regard to the parties to the surrender, the estate is absolutely drowned, as in this case betweene the lessee and the second baron. But having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendred hath in consideration of law a continuance (1). As if a reversion be granted with warrantie, and tenant for life surrender, the grantee shall not have execution in value against the grantor, who is a stranger during the life of tenant for life; for this surrender shall worke no prejudice to the grantor who is a stranger.

45 E. 3. 13. 5 H. 5. 9. 9 E. 4. 18.

So if tenant for life surrender to him in reversion being within age, he shall not have his age; for that should be a prejudice to a stranger, who is to become demandant in a reall action.

40 E. 3. 13. 9 E. 4 18. 1 H. 6. 1. 24 E. 3. 77.

If

(A) *Here the sense appears to require a comma only after the word* "side;" *and perhaps there should be a period after the preceding words* "because the particular estate might have been made without deed." *See Mr. Ritso's Intr. p.* 116, 117.

(1) On the surrender of terms of years by one termor for years to another termor for years, see Hughes *v.* Robotham, 1st Cro. 302.

If tenant for life grant a rent charge, and after surrender, yet the rent remaineth, for to that purpose he commeth in under the charge. *Causâ quâ suprà.* (5 H. 5. 8. 26 Ass. 38. 7 H. 6. b. (6 Rep. 79. 7 Rep. 38. Ant. 184. b.)

If a bishop be seised of a rent charge in fee, the tenant of the land enfeoffe the bishop and his successors, the lord enter for the mortmaine, he shall hold it discharged of the rent; for the entrie for the mortmaine affirmeth the alienation in mortmaine, and the lord claimeth under his estate; but if tenant for life grant a rent in fee, and after infeoffe the grantee, and the lessor enter for the forfeiture, the rent is revived, for the lessor doth claime above the feoffment. But if I grant the reversion of my tenant for life to another for terme of his life, and tenant for life attorne, now is the waste of tenant for life dispunishable (2). Afterwards I release to the grantee for life and his heires, or grant the reversion to him and his heires; now albeit the tenant for life be a stranger to it, yet because he attorned to the grantee for life, the estate for life which the grantee had shall have no continuance in the eye of the law as to him, but he shall be punished for waste done afterward. (Ant. 234.) 48 E. 3. 16. (Mo 94.)

The second diversitie is, that for the benefit of an estranger the estate for life is absolutely determined. As if he in the reversion make a lease for yeares, or grant a rent charge, &c. and then the lessee for life surrender, the lease or rent shall commence *maintenant*. So in the case of *Littleton*, first, betweene the lessee and the second husband, the state for life is determined; and secondly, for the benefit of the issue it shall be so adjudged in law. Here note a diversitie, when it is to the prejudice of a stranger, and when it is for his benefit. (Plo. Com. 198.)

If a man maketh a lease to *A.* for life, reserving a rent of 40 shillings to him and his heires, the remainder to *B.* for life, the lessor grant the reversion in fee to *B.* *A.* attorne, *B.* shall not have the rent, for that although the fee simple doe drowne the remainder for life betweene them, yet as to a stranger it is *in esse*; and therefore *B.* shall not have the rent, but his heire shall have it.

A master of an hospitall being a sole corporation, by the consent of his brethren makes a lease for yeares of part of the possessions of the hospitall; afterwards the lessee for yeares is made master, the terme is drowned; for a man cannot have a terme for yeares in his owne right and a freehold in *auter droit* to consist together (as if a man lessee for yeares take a feme lessor to wife) (3). [*a*] But a man may have a freehold in his owne right and a terme in *auter droit*: and therefore if a man lessor take the feme lessee to wife, the terme is not drowned, but he is possessed of the terme in her right during the coverture [*b*]. So if the lessee make the lessor his executor, the terme is not drowned. *Causâ quâ suprà* (4). (4 Leo. 37. Hob. 3.) Adjudge Mich. 16 & 17 Eliz. int. Turner pl. & Gray def. in ejectione firmæ in communi banco, Rot. 945. Sir Francis Fleming's case. [*a*] 6 H. 4. 7. Pl. Com. 418. [*b*] 32 H. 8. Br. Surrender, 52. (2 Cro. 275. Mo. 54.)

But

(2) See note 2, ante, 218. b.

(3) *Cont.* Lichden v. Winsmore, 1 Roll. Abr. 934. and lady Platt v. Sleap, Cro. Jac. 275; and see Mr. Sugden's treatise on Vendors and Purchasers, 4th ed. p. 336.

(4) Mergers were never favoured in courts of law, and still less in courts of equity. Hence, even in a very early period of the equitable jurisdiction of the court of chancery, it was admitted, that a fine or feoffment to lessee for years

But if it had beene a corporation aggregate of many, the making of the lessee master had not extinguished the terme, no more than if the lessee had beene made one of the brethren of the hospitall.

* Sect. 637.

[*NOTE, that an estate taile cannot bee discontinued, but there where hee that makes the discontinuance was once seised by force of the taile, unlesse it be by reason of a warranty, &c. As*] *if there be grandfather, father, and son,* † *and the grandfather is tenant in taile, and is disseised by the father who is his son, and the father maketh a feoffment of this without warranty and die, and afterwards the grandfather dies, the son may wel enter upon the feoffee, because this was no discontinuance, inasmuch as the father was not seised by force of the entaile at the time of the feoffment, &c. but was seised in fee by the disseisin of the grandfather.*

Vide Sect. 658. (1 Roll. Abr. 634.)

"*ONCE.*" Here it is to bee observed, that it is not necessary that the tenant in taile bee ever seised of an estate taile at the time when the discontinuance of the whole estate is begun: as if tenant in taile make a lease ☞ for life, whereby he gaineth, as hath beene said, a fee simple by wrong; in this case if he grant the reversion in fee, and the lessee dieth, the whole estate is discontinued; and yet at the time of the grant (by which the discontinuance continueth) hee was not seised by force of the taile: and therefore *Littleton* materially [339. a.]

* The part of this Section within crotchets is not either in L. and M. or Roh. or MSS. and the remainder of this Section in those copies immediately follows (with a small variation) that part of the work which is distinguished by Sect. 632.

† *and the grandfather is tenant in taile, and is disseised by the father who is his son,* not in L. and M.

to the use of a stranger, did not extinguish the term; because the *cestui que use* had no method to compel the execution of it, but through the medium of the court of chancery; and the court would not compel him to execute it to his own prejudice during the continuance of the term. The statute of uses expressly saves the rights of the feoffee to the use; this preserves him the benefit of any terms which may be vested in him. Even where a termor for years was made a tenant to the *præcipe*, it was determined, that the momentary freehold vested in him, for the purpose of making him tenant, did not extinguish the term. Sir John Ferrers and sir John Curson *v.* sir Richard Fermor and others, Cro. Jac. 643. It has by some been said dangerous to make feoffees or releasees to uses, trustees for terms of years, if they are also trustees for preserving contingent remainders; for if they should have occasion to enter for the forfeiture of the tenant for life, it may be made a question, whether, at least in law, that would not be a merger of their term. The profession have lately been favoured by Mr. Preston, with a complete and profound treatise on the abstruse doctrine of *Merger*, in the third volume of his *Treatise* on Conveyancing. It is hoped that they will soon be favoured by the same learned gentleman with a new edition of his valuable *Essay on the Quantity of Estates.*—[Note 297.]

materially added this word *(once)*, that is, that hee was once seised by force of the estate taile: and seeing that (as hath beene said) a discontinuance is a privation, the rule of law agreeth well with the rule of philosophie, that *omnis privatio præsupponit habitum*, and therefore he cannot discontinue that estate which he never had. Vide Sect. 592. 596, 597. 601. 640. 658.

"*Unlesse it be by reason of a warranty, &c.*" For in many cases a warrantie added to a conveyance is said to make a discontinuance *ab effectu*, although he that made the conveyance was never seised by force of the estate taile, because it taketh away the entrie of him that right hath, as a discontinuance doth. As if tenant in taile be disseised and dieth, and the issue in taile release to the disseisor with warrantie; in this case the issue was never seised by force of the taile; and yet this hath the effect of a discontinuance by reason of the warrantie, and the reason hereof appeareth before in this Chapter. 9 E. 4. 19. 12 E. 4. 11. 21 E. 4. 97.

"*The son may wel enter.*" But if the father that made the feoffment had survived the grandfather, he should never have entred against his own feoffment; but albeit the father had survived, yet after his decease the sonne should have entred, for the reason here yeelded by *Littleton*. But if the feoffment had beene with warrantie, then it had wrought the effect of a discontinuance: and therefore *Littleton* saith *without warrantie*. 15 E. 4. Discont. 30. & Entr. Cong. 21. 21 E. 4. 97. 9 E. 4. 19. 39 H. 6. 45. 21 H. 6. 52. 12 E. 4. 11. 1 Mar. Dier, 98. (Ant. 265.)

Sect. 638.

ALSO, if tenant in taile make a lease to another for terme of life, and the tenant in tayle hath issue and dieth, and the reversion descendeth to his issue, and after the issue granteth the reversion to him descended, to another in fee, and the tenant for life attorne and die, and the grantee of the reversion enter &c. (et le tenant a terme de vie attourna * et devie, et le grantee del reversion enter, &c.) *and is seised in fee in the life of the issue, and after the issue in tayle hath ☞ issue a son and dieth, it seems that this is no discontinuance to the son, but that the son may enter, &c. for that his father, to whom the reversion of the fee simple descended, had never any thing in the land by force of the entaile, &c.*

[339. b.]

OF this opinion is *Littleton* in our bookes. 15 E. 4. Discont. 30. 43 Ed. 3. 6. 21 H. 6. 52. 4 H. 7. 17. (1 Roll. Abr. 634.) (4 Leo. 39. 160. 156.)

"*The grantee of the reversion enter, &c.*" Here it is to be understood and observed, that in this case of the grant of the reversion *Littleton* doth not say *without warranty*; because if a warrantie had been added, it had wrought no discontinuance, for that (as hath beene said) the discontinuance in judgement of law was but for life: but when the addition of a warrantie doth worke a discontinuance, then *Littleton* saith, *without warranty*, as you may observe often in this Chapter. 21 H. 6. 52, 53. (Ant. 333.)

Sect.

* et devie, et le grantor del reversion enter, &c.—&c. et puis le tenant a terme de vie morust, et celuy en le reversion entra, &c. *L. and M. and Roh.*

Sect. 639.

FOR if a man seised in the right of his wife, letteth the same land to another for terme of life, now is the reversion of the fee simple to the husband, &c. And if the husband dieth, living his wife and the tenant for life, † *and the reversion descend to the heire of the husband, if the heire of the husband grant the reversion to another in fee, and the tenant attorne, &c. and afterwards the tenant for life dieth, and the grantee of the reversion in this case enter:* ‡ *in this case this is no discontinuance to the wife, but she may well enter upon the grantee, &c. because the grantor had nothing at the time of the graunt, in the right of his* (A) *wife, when hee made the graunt of the reversion.*

14 E. 3. Discont. 5. 18 Ass. p. 2. 18 E. 3. 54. 38 E. 3. 32. 22 H. 6. 24. 21 H. 6. 52, 53. 15 E. 4. Discont. 30.

"*FOR if a man seised in the right of his wife, letteth, &c.*" Here *Littleton* putteth his case where the baron onely makes a lease for life; for if he and his wife joyne in a lease by deed, there the reversion is not discontinued. See before, *Sect.* 620. More need not to be said hereof, in respect the like case of tenant in taile hath been explained before.

(1 Roll. 634.)

☞ Sect. 640. [340. a.]

AND so it seemeth, that men which are inheritable by force of an entaile, and never were seised by force of the same entaile, that such feoffements or grants by them made without clause of warrantie, is no discontinuance to their issues after their decease, but that their issues may well enter, &c. albeit they which made such graunts in their lives were forebarred to enter by their owne act, &c.

(10 Rep. 95.)

Sect. 641.

AND if tenant in taile hath issue two sonnes, and the eldest disseiseth his father, and thereof maketh a feoffment in fee without clause of warrantie, and die without issue, and after the father die, the youngest son may well enter upon the feoffee; for that the feoffment of his elder brother cannot be a discontinuance, because he was never seised by force of the same tayle. For it seemeth to be against reason, that by matter in fact, &c. without clause of warrantie, a man should discontinue a § *deed* (B) *&c. that was never seised by force of the same taile* *.

Vide Sect. 592. 596, 597. 601. 658.

NOTE, there also in these two Sections appeareth, that (as hath beene said before) a warrantie, though he were never seised

† *and* not in L. and M. or Roh.
‡ *in this case* not in L. and M. or Roh.
§ *deed—taile,* L. and M.
* *&c.* added in L. and M. and Roh.

(A) *Here "his" seems to be printed by mistake instead of "the." For it is not the husband who is here spoken of, but the heir of the husband. See Mr. Ritso's Intr. p.* 113.

(B) *Here the sense appears to require the word "tail" instead of the word "deed." See lord Coke's observation above, and Mr. Ritso's Intr. p.* 113.

seised by force of the taile, may worke the effect of a discontinuance.

"*A man should discontinue a deed, &c.*" This is mistaken, and should be, *a man should discontinue a taile*; and so is the originall.

[340. b.]

☞ Sect. 642.

†*NOTE, if there be lord and tenant, and the tenant giveth lands to another in* ┼ *taile, the remainder to another in fee, and after the tenant in taile makes a lease to a man for a terme of life, &c. saving the reversion, &c. and after granteth the reversion to another in fee, and the tenant for life attorne, &c. and after the grantee of the reversion die without heire, now the same reversion commeth to the lord by way of escheat. If in this case the tenant for life dieth, and the lord by force of his escheat enter in the life of tenant in taile, and after the tenant in taile dieth, it seemeth in this case that this is no discontinuance to the issue in taile, nor to him in the remainder, but that he may well enter, because the lord is in by way of escheat, and not by the tenant in tayle. But otherwise it should bee, if the reversion had beene executed in the grantee in the life of tenant in tayle, for then had the grantee been in the tenements by the tenant in tayle,* ‡ *&c.*

THE reason of this case is here rendred (as before it was in this Chapter), that albeit the reversion be executed in the lord by escheat in the life of tenant in taile, yet because he is not in by the tenant in taile but by escheat, it worketh no discontinuance. But if it had beene executed in the life of tenant in taile in the grantee which was in by tenant in taile, then the lord by escheat should have taken advantage of it. But of this sufficient hath beene said before in this Chapter.

Vide Sect. 620.

Lib. 1 fol. 136. Lib. 3. fol. 62, 63.

Sect. 643, 644, & 645.

ALSO, if a parson of a church, or vicar of a church, alien certaine lands or tenements parcell of his glebe, &c. to another in fee, and die or resigne, &c. his successor may well enter, notwithstanding such alienation, as is said in a Nota 2 H. 4. Termino Mich. *which beginneth thus.*

Sect. 644.

NOTA quod dictum fuit pro lege, *in a writ of account brought by a master of a college against a chaplaine* (en un briefe de accompt port per un master d'un college * vers un chapleine) *that if a parson, or vicar, grant certaine land which is of the right of his church to another and die, or changeth, the successor may enter, &c. And I take the cause to bee,*

† *Note—Also,* L. and M. and Roh.

┼ *taile, the remainder to another in,* not in L. and M. or Roh.

‡ *&c.* not in L. and M. or Roh.

* vers un chapleine—d'un chapel, *L. and M. and Roh.*

bee, for that the parson, or vicar, that is seised, &c. as in right of his church, hath no right of the fee simple in the tenements, but (A) *the right of the fee simple abideth in another person* (et jeo croy que la cause est, pur ceo que le parson, ou vicar, que est seisie, &c. come en droit de son esglise, n'ad pas droit de fee simple en les tenements, ¶ et (B) le droit de fee simple de ceo demurt en ascun auter person); *and for this cause his successour may well enter, notwithstanding such alienation, &c.*

Sect. 645.

FOR a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapiter, and the fee simple abideth in him and in his chapiter (Car un evesque poit aver breve de droit de † tenements de droit de son esglise, pur ceo que le droit est en son chapiter, et le fee simple demurrant en luy et en son chapiter). *And a deane may have a writ of right, because the right remaynes in him.* ‡*And an abbot may have a writ of right, for that the right remaynes in him and in his covent. And a master of an hospitall may have a writ of right because the right remaineth in him and in his confreres, &c. And so of other like cases* (et sic de aliis § casibus consimilibus ‖). *But a parson or vicar cannot have a writ of right, &c.*

"*PARCELL of his glebe, &c.*" In whom the fee simple of the ☞ glebe is, is a question in our bookes. [*a*] Some hold that it is in the patron; but that cannot be for two reasons. First, for that in the beginning the land was given to the parson and his successors, and the patron is no successor. Secondly, the words of the writ of *juris utrùm* be, *si sit libera eleemosina ecclesiæ de D.* and not of the patron. Some others doe hold that the fee simple is in the patron and ordinary; but this cannot be, for the causes above-said; and therefore, of necessitie, the fee simple is in abeyance, as *Littleton* saith. And this was provided by the providence and wisdome of the law; for that the parson and vicar have *curam* [341. a.]

[*a*] 8 H. 6. 24. 12 H. 8. 8.

Vide Registr. 307. a. 45 E. 3. tit. Eschange. 12 H. 8, 9. (F. N. B. 48, 49. a.) F. N. B. 19. L. (Dyer, 71. a. 2 Roll. Abr. 339.)

¶ et—ne, *L. and M. and Roh.*

† tenements de droit de son esglise, pur ceo que le droit est en son chapiter, et le—*not in L. and M. or Roh.*

‡ *And an abbot may have a writ of right, for that the right remaynes in him*, not in L. and M. or Roh.

§ in *added in L. and M. and Roh.*

‖ &c. *added in L. and M. and Roh.*

(A) *The reader's attention should here be directed to the French words introduced in the latter part of Sect.* 644, *with respect to the various readings of the original French. See also note B. infra.*

(B) *Here, instead of* "et," *the edition of Littleton by Lettou and Machlinia and the Rohan edition, have the word* "ne." *See the reading above under* ¶. *The substitution of the word* "ne" *for* "et" *materially alters the meaning of the concluding part of the sentence, and appears to be requisite to the true sense of the text. For, in what other person does the fee simple abide if it is not in the parson? Lord Coke, in his Comment on Sections* 644, 645, *gives two reasons against the opinion that the fee simple of the glebe is in the patron, or in the patron and ordinary; and then concludes in these words;* "and therefore, of necessitie, the fee simple is in abeyance, as *Littleton* saith." *Consequently lord Coke may be supposed to have understood Littleton in the sense indicated by the Rohan edition, which was the edition preferred by lord Coke. See Mr. Hargrave's first Address to the public at the beginning of the work.*

curam animarum, and were bound to celebrate divine service, and administer the sacraments; and therefore no act of the predecessor should make a discontinuance to take away the entry of the successor, and to drive him to a reall action, whereby he should be destitute of maintenance in the meane time. Upon consideration of all our bookes I observe this diversitie: that a parson or vicar, for the benefit of the church and of his successor, is in some cases esteemed in law to have a fee simple qualified; but to doe any thing to the prejudice of his successor in many cases, the law adjudgeth him to have in effect but an estate for life. *Causæ ecclesiæ publicis causis æquiparantur:* and *Summa ratio est quæ pro religione facit.* And *Ecclesia fungitur vice minoris, meliorem facere potest conditionem suam, deteriorem nequaquam.* Bracton, lib. 4. fol. 226. Brit. fol. 143.

As a parson, vicar, archdeacon, prebend, chantery priest, and the like, may have an action of waste, and in the writ it shall be said, *ad exhæredationem ecclesiæ, &c. ipsius B.* or *præbendæ ipsius A.* F. N. B. 55. D. & 57. E. F. 10 H. 7. 5.

[341. b.] And the parson, &c. that maketh a lease for life, shall have a *consimili casu* during ☞ the life of the lessee, and a writ of entrie *ad communem legem* after his death, or a writ *ad terminum qui præteriit*, or a *quòd permittat* in the *debet*, and none can maintaine any of these writs, but a tenant in fee simple or fee tayle. F. N. B. 49. L. M. N. 20 E. 3. tit. Juris utrum. Temps E. 3. Juris utrum, 14. 1. 14 E. 3. ibid. 4. F. N. B. 50.

30 E. 3. 26. 21 E. 3. 11. tit. Entrie, 10. F. N. B. 206 F. Registr. 237. 4 E. 4. 2. 8 E. 3. tit. Entrie, 3. 7 H. 3. 54, 55. (Ant. 67. a.)

And a parson, &c. may receive homage (A), which tenant for life cannot doe. *Temps E.* 1. *Incumbent*, 19.

[c] Likewise a parson, &c. shall have a writ of mesne, and a *contra formam feoffumenti.* [c] F. N. B. 49. L. 50. a.

But a parson cannot make a discontinuance, as *Littleton* here teacheth; for that should be to the prejudice of his successor to take away his entrie, and to drive him to a reall action.

Also if a parson, &c. make a lease for yeares, reserving a rent, and dieth, the lease is determined by his death; as if tenant for life had made a lease, no acceptance of the rent by the successor can make it good. Also in a reall action a parson, vicar, archdeacon, prebend, &c. shall have aid of the patron and ordinarie, as tenant for life shall have. So as it is evident, that to many purposes a parson hath but in effect an estate for life, and to many a qualified fee simple, but the entire fee and right is not in him; and that is the reason that hee cannot discontinue the fee simple that he hath not, nor ever had; for, as it hath beene said, *Omnis privatio præsupponit habitum.* And for the same cause he cannot have a writ of right right, nor a writ of right in its nature; as a writ of right *sur disclaimer* of customes and services, *ne injustè vexes, rationabilibus divisis, quo jure*, and the like. (1 Roll. Abr. 476. 479. 488. Cro. Car. 38. 5 Rep. 81. 2 Roll. Abr. 63. 334.) 20 E. 3. tit. Aid, 30. 25 E. 3. 54. 8 E. 3. 45. 8 H. 6. 24. 11 H. 6. 9. 6 E. 3. 45. 43 Ass. Pl. 13. F. N. B. 129. (Plo. 538.)

But here it appeareth by *Littleton*, that such bodies politike or corporate as have a sole seisin, and may have a writ of right, for that the fee and right is in them, (albeit they cannot absolutely convey away their lands, &c. without assent of others), may make a discontinuance; as a bishop, an abbot, a deane, a master of an hospitall, and the like. But this is to bee understood where a deane (2 Cro. 200. Ant. 325. b. Plo. 356. Doc. Pla. 27. 271.)

(A) *Vid. ante* 67. a. *contra*; *and Mr. Hargrave's note* 1, *there.*

a deane or a master of an hospitall, &c. are solely seised of distinct possessions: for if the bodie that is seised be aggregate of many, as the deane and chapiter, master and confreres, &c. then the feoffment of the deane or master is so farre from a discontinuance as it is a disseisin.

44 E. 3. 11.
11 H. 4. 68.
9 E. 4. 16.
13 E. 3. 7.
6 E. 3. 11.
5 E. 2. Aid, 167.
12 H. 4. 11.
32 E. 3 Aid, 39.
38 E. 3. 19.
14 E. 3.
Juris utrum, 4.

And these that have the fee and right in them shall not have aid in respect of their high and large estate, albeit any of them be presentable: but a deane that is collative shall have aid of the king.

And it is to be observed, that the remedie is ever agreeable to the right: and therefore the bishop, deane, master of an hospitall, that hath college and common seale, or the like, shall have a writ of right right, which is the highest remedie, for that they have the highest estate.

☞ Here *Littleton* citeth the booke case, *Mich.* 2 *H.* 4. as an authoritie whereupon he groundeth his opinion. And it is to be observed, that the yeares of *H.* 4. were published before *Littleton* did write. [342. a.]

Vide Sect. 527. 593, &c.
1 Eliz. c. 18.
13 Eliz. c. 10.
1 Jacobi, cap. 3.

But at this day, the bishop, deane, master of an hospitall, or the like, that have the fee and right in them, as hath beene said, cannot discontinue; neither can they or any parson, vicar, archdeacon, prebend, or any other having any ecclesiasticall living, with assent of deane and chapiter, patron and ordinary, or the consent of any others, make any lease, gift, grant or conveyance, estate, charge or incumberance to binde his successor other than for terme of one and twentie yeares, or three lives in possession, whereupon the accustomed rent or more shall be reserved. These be excellent lawes, and have beene well expounded for the maintenance of religion and the good of God's church; for otherwise it is to bee feared that holy church would lose more than it would gaine in these dayes.

Lib. 1. fol. 46.
Lib. 4. fol. 76. & 20. Lib. 5. fol. 9 & 14.
Lib. 6. fol. 37.
Lib. 7. fol. 8.
Lib. 11. fol. 67.
37 H. 8.
31 H. 8.
32 H. 8.
37 H. 8.
1 E. 6, &c.

But where *Littleton*, in this and other Sections, makes mention of masters of hospitals, the reader must know, that since *Littleton* wrote, there hath beene a great alteration made by divers acts of parliament concerning hospitals.

"*Master of an hospitall.*" These points concerning hospitals were resolved [*d*] by the justices.

[*d*] Pasc. 24 Eliz. the Lord Cheneye's case.
Lib. 2. fo. 48, 49. Evesque de Canterburie's case.
(2 Sid. 48.)

First, that no hospitall was given to the crowne by the statute of 27 *H.* 8. nor any hospitall is within the statute of 31 *H.* 8. of monasteries, but only religious and ecclesiasticall hospitals, and that no lay hospitall was within those statutes.

Secondly, if upon the foundation of any lay hospitall, or after it was ordained, that one or divers priests should be maintained within the hospitall to celebrate divine service to the poore, and to pray for the soule of the founder, and all christian soules, or the like; and that the poore of such hospitall should make the like orisons, yet such an hospitall is not within the said statutes; for the hospitall is lay, and not religious; and all or the most part of antient lay hospitals were founded or ordained after the like sort; and the makers of those statutes never intended to overthrow workes of charitie, but to take away the abuse.

Lib. 1. f. 24. Porter's case.

Thirdly, that no hospitall was given to the king by the statute of 37 *H.* 8. but in two cases, where the donors, founders or patrons, &c. had entred and expulsed the priests, wardens, &c. betweene the fourth day of Februarie, *Anno* 27 *H.* 8. and the five and twentieth of December, *Anno* 37 H. 8. or where king *Henry* the eighth, by commission according to that act, should enter

enter and seise the same; but that determined by the death of that king.

Fourthly, that the statute of 1 *E.* 6, extended not to any hospitall whatsoever, either lay or religious, as by the same appeareth. Porter's case, ubi supra. Lib. 4. 111. 113, 114. 116, in Lambert's case.

And I was of counsell with the lord *Cheney* in this case, which, seeing it may doe good for maintenance of charitable uses, I thought good summarily to report it. To this I will adde, *Panis pauperum vita pauperum*; *qui defraudat eos vir sanguinis est.* Ecclesiasticus, c. 34. ver. 22. (8 Rep. 131. a.)

Nota, Of hospitals, some are corporations aggregate of many; as of master or warden, &c. and his confreres: some, where the master or warden hath only the estate of inheritance in him, and the brethren or sisters power to consent, having college and common seale: some, where the master or warden hath the state in him, but hath no college and common seale; and such a master or warden shall have a *juris utrùm:* and of these hospitals some bee eligible, some donative, and some presentable. 14 E. 3. Juris utrum, 4.

Sect. 646. (F. N. B. 48.)

BUT the highest writ that they can have is the writ of juris utrùm, *which is a great proofe that the right of fee is not in them, nor in any others, &c. But the right of the fee simple is in abeiance, that is to say, that it is only in the remembrance, intendment and consideration* [342. b.] *of the law,* * *&c. for it seemeth to me,* ☞ *that such a thing* † *and such a right which is sayd in divers bookes to be in abeyance, is* § *as much to say in Latine (scilicet),* Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est, et consistit in consideratione et intelligentiâ legis, et quod alii dixerunt, talem rem aut tale rectum fore in nubibus. ‡ *But I suppose, that they meane by these words* (in nubibus, &c.), *as I have said before* ‡.

"*IN abeiance.*" (1) That is, in expectation, of the French word *bayer*, to expect. For when a parson dieth, wee say 24 E. 3. 63. Vi. Sect. 648, 649, 650, 651.

Vide Sect. 1. (Hob. 338. Ant. 263. b. 2 Roll. 339. Post. 335. a. 1 Rep. 66.)

that

* *&c.* not in L. and M. or Roh.
† *and—in*, L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.
‡ *But I suppose that they meane by these words* (in nubibus, &c.) not in L. and M. or Roh.
‡ *&c.* added in L. and M. and Roh.

(1) In the course of these notes, frequent mention has been made of the necessity which there was at the old law, that there should always be an immediate tenant of the *freehold*, and of the reasons on which this necessity was grounded; but these reasons did not apply, in the same degree, against the suspense of the *inheritance*. Hence, though for the reasons before mentioned, it was an established maxim, that the freehold never could be in suspense, or, as it is generally called, in abeyance, it was admitted that the inheritance might. But this suspense or abeyance of the inheritance could not but be considered with a very jealous eye; for though fiefs, in their original constitution, were not hereditary; still, when they had once become hereditary, the consequences of their

that the freehold is in abeyance, because a successor is in expectation to take it; and here note the necessitie of the true interpretation of words.

If

their becoming such were so numerous, and affected materially so many other parts of the feudal system of real property, that, though it was always admitted that the inheritance might be suspended, it was agreed, that the suspense of it should be discountenanced and discouraged as much as possible, and allowed upon none but the most pressing and urgent occasions. The chief reasons of the aversion of the old law to the suspension of the inheritance are set forth in two late masterly and profound publications, sir William Blackstone's Argument on the Case of Perryn and Blake, and Mr. Hargrave's Observations on the Rule in Shelley's case.—To these reasons, the modern law has added her discouragement of every contrivance, which tends to render property unalienable beyond the limits settled for its suspense; it being clear, that no restraint upon the alienation of property would be more effectual than the admission of a suspense of the inheritance.—The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the *support* of a contingent remainder; and they influence, in some degree, the doctrines respecting the *destruction* of *contingent* remainders. Mr. Fearne's excellent Essay on these subjects makes any further investigation of them here quite unnecessary; but perhaps the reader will not be displeased with the following short discussion of a subject, intimately connected with them;—*the suspension and extinction of powers*, deriving their effect from the statute of uses, or the statute of wills.

I. A power *may be defined a right reserved by a person to himself, or given to him by another, to devest land from those, on whom it is settled, by the instrument, containing the power, and to vest it in others.*—When it may be exercised indiscriminately in favour of any object, the party has the complete dominion of the land; such a power may therefore be termed *a power of ownership:* when the objects, in whose favour it may be exercised are confined, it may be termed *a limited power*, and, in most cases, partakes of the nature of a trust, delegated to the party to be exercised, more or less, at his discretion, for their benefit, and is therefore a power charged with a trust, more or less discretionary. A power to appoint land in settlement, or any proportion of it, or to charge it with the payment of a given sum to any person, is a power of ownership; a power of jointuring, and a power to appoint land to or among any description of persons, as the party's own children, or the children of another, or to charge it with the payment of a sum of money to such children, is a limited power, and a species of trust, exerciseable, more or less, at the party's discretion, for their benefit; and therefore a power charged with a trust.

II. Powers over real property,—(to which this annotation is altogether confined),—may be distinguished into *powers collateral*, and *powers relating to the estate of the donee of the power in the land. A collateral power* is, where a power is given to a person who has no estate or interest in the land. Such is the power of sale given to persons who have neither an estate for preserving contingent remainders, nor any other estate or interest in the land. *Powers relating to the estate of the donee of the power in the land* may be subdivided into *powers appendant to an estate*, which the donee of the power hath in the land, subject to it, and *powers in gross*. A power is said to be *appendant to the estate of the party*, when the use or estate, to be created by the power, takes effect in possession during the continuance of an estate which the donee hath in possession or remainder, and therefore wholly

or

If tenant *pur terme d'auter vie* dieth, the freehold is said to be in abeyance untill the occupant entreth. If a man make a lease for life, the remainder to the right heires of *I. S.* the fee simple

or partially overreaches it. Such is the power usually given in settlements, to tenants for life to execute leases: such also are the powers of sale and exchange, usually given to trustees for preserving contingent remainders. *Powers in gross* are, when the person to whom they are given, hath an estate in the lands, but the estate to be created under or by virtue of the power, is not to take effect till after, and therefore does not overreach the estate of the donee of the power. Such is the power of jointuring usually given in settlements. But where a person takes distinct estates under the same settlement, the same power is sometimes a power appendant in respect to one estate, and a power in gross in respect to the other. Thus, where land is limited to the use of *A.* for life; remainder to his sons successively in tail, with remainder to the heirs of his body, with a power to jointure and to create a term for securing the jointure; these powers, in respect to *A.*'s estate for life, are powers in gross; and, in respect to his remainder in tail, are powers appendant.

III. *As to the suspense or extinguishment of powers collateral to the land,*—it is said, that the release, fine, feoffment, or common recovery of the donee of such powers, will not extinguish or destroy them. See ante 265. b. Albanie's case, 1 Rep. 110. b. Digges's case, 1 Rep. 173. a. Moore, 605. The reason, why a release does not extinguish them, is shown to be (ante 265. b.) 1st. that collateral powers are not in the nature of rights or titles, and cannot therefore, from their nature, be released. 2dly, That, where powers are given or reserved to any person, having any estate or interest, either present or future, in the land, the exercise of these powers is considered as advantageous to him; and there is no reason why he should not be allowed to depart with or exclude himself from the benefit of them: but that, when they are given to strangers, they are intended for the benefit of some third person; and therefore the extinction of them is supposed to be injurious to some person intended to be benefited by them. With respect to their not being destroyed by feoffment, fine, or recovery, every man, it is said, is estopped from claiming any estate contrary to his own feoffment; but if a stranger, with a power of revocation, makes a feoffment, levies a fine, or suffers a recovery, and afterwards revokes, the person claiming the estate under the revocation is in immediately by, and makes his title immediately from, the original settler or devisor, and not by or from the feoffor, conusor, or recoveree: he is not therefore bound or estopped by any act of the feoffor, conusor, or recoveree. Thus, if a person devised that his executors should sell his land, and died, and his executors made a feoffment; it was held that the executors might sell against their own feoffment, because the power to sell was merely collateral to the right to the land, and the purchaser took nothing by the feoffment.

IV. *As to powers relating to the estate of the donee of the power in the land.*—Such of those powers as are in the nature of powers *appendant to the estate*, may, it is agreed, be extinguished by the release, feoffment, fine, or common recovery of the donee of the power. These powers also are liable to be extinguished or suspended by any of the conveyances which are said not to operate by transmutation of the possession, as bargains and sales, leases and releases, and covenants to stand seised: for whoever has any estate in the land, may convey that estate to another; and it would be unjust that he should afterwards be admitted to avoid, or to do any thing in derogation from his own grant.—Any assurance of this nature, therefore, which carries with it the whole

simple is in abeyance untill *I. S.* dieth. And so in the case of the parson, the fee and right is in abeiance, that is, in expectation, in remembrance, entendment, or consideration of law, 1. *In consideratione*

whole of the grantor's estate, is a total destruction of the powers appendant to that estate; and by parity of reason, any such assurance as carries with it only a part of the estate, (as a term for years, or an estate for life), suspends, during the continuance of that estate, the exercise of the power, or, at least, the estate to be raised by it; and any such assurance, which induces only a charge upon the estate, (as a grant of a rent), necessarily subjects the estate created by the power to that charge. It should, however, be observed, that, in cases where a power is in the nature of a trust, a question may arise, whether a release of the power be not a breach of trust, and, on that account, inoperative.

V. As to such of the powers relating to *the estate of the donee of the power in the* land as are said to be *powers in gross*:—As the estates raised by them do not fall within the compass of the estate to which they are said to relate, there does not seem to be any reason why any alteration in that estate should affect them. Hence, if tenant for life, with a power to jointure an after-taken wife, conveys his life estate by bargain and sale, lease and release, or covenant to stand seised, this conveyance will not affect the power of making a jointure. If he even makes a conveyance in fee by any of these assurances, as it is not their operation to pass a greater estate than the grantor has a right to convey, the power in gross is not affected by it; but, if he conveys by fine, feoffment, or recovery, as these assurances not only pass the estate of the grantor, but convey a tortious fee, they necessarily disturb the whole inheritance. They therefore may operate in extinction of the power. A power in gross may also be released to any of those in remainder:—and if the whole fee is in the terre-tenant, subject to the power; as where an estate is limited to *A.* for life, remainder to such uses as he shall by deed or will appoint, and in default of such appointment to *A.* in fee; there if *A.* conveys the whole fee by lease and release, his power of appointment, notwithstanding it is in the nature of a power in gross, is totally extinguished. See Penne *v.* Peacock & ux. Ca. Temp. Talbot, 41.

VI. It should be observed, that in mentioning above the effect of a feoffment, fine, or common recovery, the expression is, that powers *may* be extinguished by those conveyances:—*But it is not intended to express, either with respect to powers appendant or powers in gross, that such conveyances necessarily and unavoidably extinguish such powers, in all cases.*

VI. 1. On the contrary, the cases of Bullock *v.* Thorne, Moore, 615. and Smith on the demise of Richards *v.* Clyfford, 1 Durn. and East, 738. seem to show, that *such conveyances will not have this effect,* if *they are accompanied by a deed, which directs them to operate, as a confirmation of the subsisting uses, and either declares no other uses, or declares none inconsistent with such subsisting uses.*—As where land is limited to *A.* during his life, with a limitation to trustees and their heirs, during his life, in trust to preserve contingent remainders, remainder to his sons successively in tail male; and, for default of such issue, to the right heirs of *A.*; and powers of leasing, jointuring and charging with portions, are given to *A.*, and powers of sale and exchange are given to trustees to be exercised with *A.*'s consent;—at a subsequent period, *A.* covenants to levy a fine, and directs it to operate, in the first place, for confirming the uses antecedent to the limitation of the reversion, and the powers collateral or relating to those estates; and, in the next place, for conveying and limiting the reversion to uses, which he proceeds to declare of the same:—it is apprehended

consideratione sive intelligentiâ legis, because it is not in any man then living; and the right that is in abeiance is said to be *in nubibus*, in the clouds, and therein hath a qualitie of fame whereof the poet speaketh:

Ingrediturque solo, et caput inter nubila condit. Virg. 4. Æneid.

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hended that the fine will operate neither to divest the uses, nor to destroy the powers, nor to forfeit the estate of the tenant for life, but, as a confirmation and further assurance of those uses, estates and powers.

VI. 2. And the cases of the Earl of Leicester, 1 Vent. 278. and Herring *v.* Brown, 1 Vent. 368. 371. appear to show, that, where a tenant for life has a power of appointment; and, by a deed executed in the manner prescribed for the exercise of the power, *covenants* to *levy a fine, and directs it to operate to uses warranted by the powers*, the fine will not destroy the power, but operate, in concurrence with the deed, as an exercise of it. Hence, if tenant for life has a power of jointuring by deed executed by him in the presence of and attested by two or more witnesses; and by deed, so executed and attested, covenants to levy a fine, and directs it to operate as a confirmation of his life estate, and after his decease to the use, intent and purpose that *B.* his intended wife, may, if she survive him, receive a jointure rent-charge during her life, and, subject to the same, to the subsisting uses; and the fine is levied accordingly:—it is apprehended, that the fine, thus directed in its operation, will be a legal exercise of the power, and operate at the same time, as a further assurance of the uses subsisting or capable of taking effect under the deed creating the power.

VI. 3. It may further be generally asserted, that, in all cases where a fine or common recovery can be so connected with a prior deed, as to make with it *one entire assurance*, the fine or recovery will operate *not to suspend or extinguish but to strengthen and establish the powers contained in that deed.* As, where a tenant in tail, supposing himself seised in fee, conveys the land to several uses in strict settlement, and limits powers of all or any of the descriptions which have been mentioned; and afterwards, on discovering the mistake, levies a fine or suffers a recovery, and directs it to operate to the uses of the settlement, a court would consider the settlement, the fine or recovery, and the deed declaring the uses, as forming one assurance, and that the powers were therefore established by the fine or recovery.

VII. It should also be observed, that *any contract entered into by the donee of a power, with which an exercise of the power would be inconsistent, prevents, at least in equity, a valid exercise of it.* Thus, where a tenant for life has a power to charge an estate with a sum of money, for his own benefit, and to create a term for securing it, and covenants for a valuable consideration, not to exercise these powers, a subsequent exercise of them would be a breach of his contract, and therefore void in equity.

VIII. It even may be thought doubtful *whether it would not be void also at law.* This leads to the discussion of a point of great importance, but which doth not appear to the writer to have received the attention it deserves,—whether in conveyances which derive their effect from the statute of uses, the use is executed by the statute in any case, in which the party is not entitled *bonâ fide* to the trust; or in other words, whether there can be a *cestui que use*, under the statute, in any case, where the party to whom the use is limited, would not have been *cestui que trust*, while uses remained in their fiduciary state, at common law. To bring this suggestion to the test, let it be supposed that lands are conveyed by *A.* to *I. S.* and his heirs, to the use of *A.* for life, remainder to *I. S.* and his heirs during the life of *A.* in trust to preserve the contingent remainders; and after the decease of *A.* to the use of the sons of *A.* successively in tail male; and for default of such issue, to the right heirs of *A.*; and that before the birth of any son to *A.*, *A.* and *I. S.* for a valuable

consideration, convey the lands, by bargain and sale inrolled, to *C.* and his heirs—*C.* having notice of the settlement. It is generally considered that, in such a case, the bargain and sale would operate as a valid conveyance of the legal fee of the land to *C.*; and that the only remedy of the issue male of *A.* would be a bill in equity, upon which the court would direct a reconveyance. Now, if, previously to the statute of uses, *A.* and *I. S.* had, in the proposed case, conveyed the lands by bargain and sale to *C.* and his heirs, the bargain and sale would have been, in respect to the sons of *A.* wholly inoperative. For, before the statute, the effect of a bargain and sale was only to transfer the trust, by substituting one *cestui que* trust for another. But, in the case which has been mentioned, *I. S.* notwithstanding the conveyance to *C.* would have continued trustee for the sons of *A.* and accountable for the rents to them. Now, the statute of uses (27 Hen. 8. c. 10.), enacted that, "when any person "should be seised of land to the use, confidence, or trust of any other person "or body politic, the person or corporation, entitled to the use in fee simple, "fee tail, for life, or years, or otherwise, should from thenceforth stand and "be seised or possessed of the land, of and in the like estates, as they had "in the use, trust or confidence." It seems to follow, that, in the proposed case, to entitle *C.* to the benefit of the statute, and bring the conveyance to him within its operation, it must be shown that *I. S.* was seised "to the use, con-"fidence or trust of *C.*" and that *C.* was entitled to the "use, trust or confi-"dence" of the land. But the sons of *A.* were entitled to the benefit of the use, trust and confidence; and *C.* had no title to them against the sons of *A.* It may be thought to follow, that, in the case which had been proposed, the statute of uses would not operate, and the conveyance of *A.* and *I. S.* to *C.* would be equally void at law, as it is allowed to be void in equity, with respect to the issue male of *A.* If this doctrine be founded, it must be attended with extensive consequences.

IX. This leads to the consideration of the effect, which *conveyances by the person, seised for the time of the land, have on collateral powers vested in other persons.*

IX. 1. As, where a tenant for life under a settlement containing the usual powers of sale, executes a feoffment, levies a fine, or suffers a recovery. A necessary effect of such a conveyance is, to divest the whole fee, and vest it in the feoffee, conusee or recoveror. This, therefore, makes it necessary to consider, what from that circumstance, independently of any other, its effect would be in suspending or extinguishing the power of sale. To arrive at a conclusion on this point, it might be found necessary to ascertain, with precision, the nature of the estate of trustees for preserving contingent remainders, —particularly, whether it vests in them in possession in the instant of the commission of the act of forfeiture by the tenant for life, or waits for its so vesting in them in possession, till the trustees determine the estate conveyed by the tenant for life, by their entry. This case sometimes occurs in practice;—as, where a person considering himself seised in fee simple, conveys to the use of himself for life, with a limitation to trustees and their heirs during his life for preserving contingent remainders; remainder to the use of his sons successively in tail, and for default of such issue to the use of his own right heirs. Having issue an only son, they levy a fine to the use of a purchaser. It is afterwards discovered that, at the time of the execution of the settlement, the father was tenant in tail with remainders over: and the father and son join in suffering a common recovery, to the use of a purchaser in fee. It might be contended in such a case, that, if the legal freehold vested in the trustees, immediately on the levying of the fine, the recovery suffered by the father and son, would be void, for want of a tenant to the præcipe; but that the recovery would not be subject to this objection, if, to vest the legal freehold in the trustees, their previous entry was necessary.—The writer is not apprised of any judicial authority, which leads to a certain conclusion in this case.—In respect to the effect of a fine, feoffment or recovery of a tenant for life, on a power vested in a third person, he thinks there

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ALSO, if a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is voide,

there is strong ground to contend, that if the estate waits for its vesting in the trustees, for their entry, the power is suspended by the feoffment, fine or recovery, till it is restored by the entry of the trustees; but that it is unaffected by the feoffment fine or recovery, if the estate vests in the trustees immediately on the commission of the act of forfeiture.

IX. 2. *The effect of feoffments, fines or recoveries of tenants in tail, on powers vested in other persons*, depends on other principles; and leads to discussions too numerous and extensive for the present annotation.—It shall be confined to a case, which frequently occurs in practice.—Lands are conveyed to the use of *A.* for life, with a limitation to trustees and their heirs during the life of *A.*, in trust to preserve contingent remainders; with remainders to his sons successively in tail;—and powers are limited to *A.* either to appoint the land to or among his children, or to charge it with portions;—or other powers are limited to him, enabling him to create uses which are to take effect in possession after his decease. In these cases, it frequently becomes necessary to consider, whether, if previously to the execution of these powers, *A.* and his eldest or only son, join in suffering a common recovery, it will have the effect of destroying the power. Now it is the known effect of a common recovery by a tenant in tail to bar, not only estates limited in remainder after the estate tail, but all uses which may take effect, and divest the lands either wholly or partially from him, during the continuance of his estate. If, therefore, after the limitations, which have been mentioned, a proviso had been inserted, directing that, if particular lands devolved to any of the sons, the settled lands should be divested from him, and devolve to others, there is no doubt that a recovery, suffered by the tenant in tail, before this event, would prevent the effect of such a proviso. With great deference to the contrary opinion, it appears to the present writer, that this case and the case now under consideration are, in respect to the effect of the recovery, perfectly parallel. Whether uses arise under a limitation, or by the exercise of a power, they are equally springing or shifting uses if they arise on a deed, and executory uses if they arise on a will. In the proviso, which has been suggested, they arise on an event, in which the settler himself directs them to arise; when they arise under a power, they take effect on an event, on which the settler authorizes the donee of the power to direct their rising: but, in each case, when the event happens, the effect of the use then springing up or vesting, on the uses previously subsisting or capable of coming into existence, is exactly the same:—and thus, in the view of the present writer, both are equally liable to destruction by a recovery.—The reader will observe, that, in the case propounded, the uses, to be created under the power, are supposed to be limited in such manner, that they take effect *after* the death of the tenant for life, and that the estate of the tenant in tail, who suffers the recovery, is the next estate of freehold. Where other estates of freehold are interposed, or where the uses are so limited that they may take effect in the lifetime of the precedent tenant for life, the case is different, and leads to different considerations:—in the opinion of the writer, the uses, in this case, are equally to be barred by a common recovery, and a deed properly prepared to give it the operation.

The principles of the doctrine contained in this annotation may be extended much farther in argument; but it is by no means advisable to do it in practice. On the learning of powers, Mr. Sugden has lately favoured the public with a third edition of his excellent treatise upon that subject.—[Note 298.]

voide, but in abeiance, viz. in consideration and in the understanding of the law, untill another be made parson of the same church; and immediately when another is ‖ *made parson, the freehold in deed is in him as successor* ¶.

"*IF a parson of a church dieth, &c.*" So it is of a bishop, abbot, deane, archdeacon, prebend, vicar, and of every other sole corporation or body politike, presentative, elective, or donative, which inheritances put in abeiance are by some called *hæreditates jacentes*; and some say, *que le fee est en balaunce.*

Bract. li. 1. c. 2. Brit. f. 249.

☞ Sect. 648. [343. a.]

ALSO, some peradventure wil argue and say, that inasmuch as a parson with the assent of the patron and ordinary, may grant a rent charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, ergo *they have a fee simple, or two or one of them have a fee simple at the least* (ou deux ou un de eux avoit fee simple *al meins †). *To this may bee answered, that it is a principle in law, that of everie land there is a fee simple, &c. in some bodie, or* ‡ *otherwise the fee simple is in abeyance* ‖‖. *And there is another principle, that every land of fee simple may bee charged with a rent charge in fee by one way or other. And when such rent is granted by the deed of the parson, and the patron and ordinarie, &c. in fee, none shall have prejudice or losse by force of such grant, but the* § *grantors in their lives, and the heires of the patron, and the successours of the ordinarie after their decease. And after such charge if the parson die* (si le ** parson devie), *his successor cannot come to the sayd church to be parson of the same by the law, but by the presentment of the patron, and admission and institution of the ordinarie* ††. *And for this cause the successour ought to hold himselfe content, and agree to that which his patron and the ordinarie have lawfully done before, &c. But this is no proofe that the fee simple, &c. is in the patron and the ordinarie, or in either of them, &c. But the cause that such graunt of rent-charge* ‡‡ *is good, is, for that they who have the interest, &c. in the sayd church, viz. the patron according to the law temporall, and the ordinarie according to the law spiritual, were assenting, or parties to such charge, &c. And this seemeth to be the true cause why such glebe may be charged in perpetuitie,* ¶¶ *&c.*

(Ant. 10. b.) "*IT is a principle in law, &c.*" *Principium, quod est quasi primum caput,* from which many cases have their originall or beginning, which is so strong, as it suffereth no contradiction; and therefore it is said in our books, that ancient principles of the law [*a*] ought not to be disputed, *Contra negantem principia non est disputandum.* That which our author here calleth a principle, *Sect.* 3, & 90, he calleth a maxime.

[*a*] 11 H. 4. 9.

Sect. 3 & 90.

Here

‖ *made* not in L. and M. or Roh.
¶ *&c.* added in L. and M. and Roh.
* al—an, *L. and M. and Roh.*
† &c. *added in L. and M. and Roh.*
‡ *otherwise* not in L. and M. or Roh.
‖‖ *&c.* added in L. and M. and Roh.
§ *grantors—grantees,* L. and M. and Roh.
** parson *not in L. and M. or Roh.*
†† *&c.* added in L. and M. and Roh.
‡‡ *&c.* added in L. and M. and Roh.
¶¶ *&c.* not in L. and M. or Roh.

Here *Littleton* in answer to an objection alleageth two principles. First,

"*That of everie land there is a fee simple, &c.*" This is *perspicuè verum*, and needeth no explanation. Secondly,

"*Every land of fee simple may bee charged in fee by one way or other.*" Hereby it appeareth, that albeit the right of the fee simple be in abeyance, yet it may be charged by one way or another. And so it may be aliened in fee, albeit the right of the fee be in abeyance, or in consideration of law. And herein is a diversitie worthy the observation to be made, that when the right of fee simple is perpetually by judgement of law in abeyance, without any expectation to come *in esse*, there he that hath the qualified fee, *concurrentibus hiis quæ in jure requiruntur*, may charge or alien it, as in the case of parson, vicar, prebend, &c. But where the fee simple is in abeyance, and by possibilitie may every houre come *in esse*, there the fee simple cannot be charged untill it commeth *in esse* (1). As if a lease for life be made, the remainder to the right heires of *I. S.* the fee simple cannot be ☞ charged till *I. S.* be dead. And so is *Littleton* to be understood, viz. that either it may be charged *in præsenti*, or *in futuro*.

(Lampet's case, 10 Rep. 46. b.)

(2 Roll. 418, 419.)

[343. b.]

"*Every land of fee simple.*" And so it is of lands entailed, for they may be charged in fee also; for the estate taile may be cut off by fine or recovery. Also the estate taile may continue, and yet tenant in taile may lawfully charge the land and binde the issue in taile. As if a disseisor make a gift in taile, and the donee in consideration of a release by the disseisee of all his right to the donee, granteth a rent charge to the disseisee and his heires, proportionable to the value of his right, this shall binde the issue in taile, *Vide Sect.* 1, *Bridgewater's* case (A); which lands, by the rule of *Littleton*, may be charged: and therefore if the owner of those thirteene acres grant a rent-charge out of those thirteene acres generally, lying in the meadow of eightie, without mentioning where they lie particularly; there, as the state in the land removes, the charge shall remove also. But since our author wrote, all ecclesiasticall persons are disabled to charge in fee any of their ecclesiasticall possessions, as before hath beene spoken of at large.

44 E. 3. 21, 22. (Plo.Com. 436.)

Vide Sect. 1. Bridgewater's case, & 59.

"*And when such rent is granted, &c.*" This is an excellent interpretation and limitation of the said principle, viz. that none shall have prejudice or losse by any such grant, but such as are partie or privie thereunto; as the patron and his heires, the ordinary and his successors, and the parson and his successors; which successors of the parson are to be presented by the patron or his heires, and admitted and instituted by the ordinary or his successors. The like is to be said of an archdeacon, prebend, vicar, chauntrie priest, and the like.

Vide Sect. 593. (Doct.and Stud. 50. a.) 31 E. 1. tit. Grant, 90. 8 R. 2. Annuit. 53. (2 Cro. 197.)

"*By the deed of the parson, and the patron, and ordinarie, &c.*" Yet if the parson die, and in time of vacation the patron, of the

(5 Rep. 81.) 16 E. 3. Annuit. 24.

40 E. 3. 30. 3 E. 3. 17. Reg. 38. (Doct. & Stud. 56. b.)

(A) *See ante* 4. *a.* 48. *b.*

assent

(1) On the question, whether the fee simple, during the suspense of a contingent remainder, remains in the grantor, or is in abeyance, see Mr. Fearne's Essay on Contingent Remainders, 6th ed. 351.

assent of the ordinary, or the patron and ordinary grant an annuitie or rent-charge out of the glebe, this shall (as hath beene said) binde the succeeding parsons for ever.

6 E. 3. 4. 55. 7 E. 3. 40, 41. F. N. B. 152. 17 E. 3. 32. 39 E. 3. 17. b. 11 H. 4. 68. 8 H. 3. 23. Vi. Sect. 133. 530. 11 E. 3. Jur. utr. 3. 8 Ass. 29. 31. 13 Ass. 2.

If there be parson, patron, and ordinary, and the parson by the ordinance and assent ☞ of the ordinarie grant an annuitie to another, having *quid pro quo* in consideration thereof, this shall binde the successor of the parson, without the consent of the patron. [344. a.]

14 H. 3. Quar. Imp. 183. 17 E. 3. 12. 64. 14 H. 4. 11. F.N.B.33. c. 16. c. 3. Bre. 660. 13 E. 4. 3. 6 H. 7. 14. Vid. Sect. 530. 22 H. 6. 26. F. N. B. 35. c.

A church parochiall may be donative and exempt from all ordinarie jurisdiction, and the incumbent may resigne to the patron, and not to the ordinarie; neither can the ordinarie visit, but the patron by commissioners to be appointed by him. And by *Littleton*'s rule, the patron and incumbent may charge the glebe; and albeit it be donative by a layman, yet *mere laicus* is not capable of it, but an able clerke *infra sacros ordines* is; for albeit hee come in by lay donation, and not by admission or institution, yet his function is spirituall: and if such a clerke donative be disturbed, the patron shall have a *quare impedit* of this church donative, and the writ shall say, *quòd permittat ipsum præsentare ad ecclesiam, &c.* and declare the speciall matter in his declaration. And so it is of a prebend, chantery, chappell, donative, and the like; and no laps shall incurre to the ordinary, except it be so specially provided in the foundation. But if the patron of such a church, chantery, chappell, &c. donative, doth once present to the ordinarie, and his clerke is admitted and instituted, it is now become presentable, and never shall be donative after, and then laps shall incurre to the ordinary, as it shall of other benefices presentable. But a presentation to such a donative by a stranger, and admission and institution thereupon, is meerely void. And all this was resolved by the whole court of king's bench, for the rectorie parochiall donative of Saint *Burian* in the countie of Cornewall.

Hil. 1 Jac. Coram Reg. rot. 601. inter Wil. Fairchild, pl. & Wil. Gayer, def. in Trespass.

17 E. 3. 40. 6 E. 3. 10. 25 E. 3. ca. Unico de Provisor. Math. Par. pa. 10 & 62.

It appeareth by our bookes, and by divers acts of parliament, that at the first all the bishopricks in England were of the king's foundation, and donative *per traditionem baculi, (id est)* the crosier, which was the pastorall staffe, *& annuli*, the ring whereby hee was married to the church. And king *Henry* the first being requested by the bishop of Rome to make them elective, refused it: but king *John* by his charter bearing date *quinto Juni anno decimo septimo*, granted that the bishopricks should be eligible.

F. N. B, 35. E. 42. A. B. 27 E. 3. 8. & 85. 8 Ass. 29. 8 E. 3. Ass. 150. 18 E. 3. Scire fac. 11. 6 H. 7. 14. 16 E. 3. Briefe, 660. 21 E. 3. 60. Registr. 40. Dyer, 10 Eliz. f. 273.

If the king doth found a church, hospitall, or free chappell donative, he may exempt the same from ordinarie jurisdiction, and then his chancellor shall visit the same. Nay, if the king doe found the same without any speciall exemption, the ordinarie is not, but the king's chancellor, to visit the same. Now as the king may create donatives exempt from the visitation of the ordinarie, so he may by his charter licence any subject to found such a church or chappell, and to ordaine that it shall be donative, and not presentable, and to be visited by the founder, and not by the ordinarie. And thus beganne donatives in England, whereof common persons were patrons.

14 El. ca. 5. 2 H. 5. c. 1. (F. N. B. 35. a.)

(9 Rep. 39. 4 Inst. 338. Ant. 96. a.)

"*Ordinarie.*" *Ordinarius* is hee that hath ordinarie jurisdiction in causes ecclesiasticall, immediate to the king and his courts of common law, for the better execution of justice, as the bishop or any other that hath exempt and immediate jurisdiction in causes ecclesiasticall.

"*Law*

"*Law temporall.*" Which consisteth of three parts, viz. First, on the common law, expressed in our bookes of law, and judiciall records. Secondly, on statutes contained in acts and records of parliament. And thirdly, on customes grounded upon reason, and used time out of minde; and the construction and determination of these doe belong to the judges of the realme. (Ant. 110. 115. b.)

"*Law spiritual, &c.*" That is, the ecclesiasticall lawes allowed by the lawes of this realme, viz. which are not against the common law (whereof the king's prerogative is a principall part) nor against the statutes and customes of the realme: and regularly according to such ecclesiasticall lawes, the ordinarie and other ecclesiasticall judges doe proceed in causes within their conusance. And this jurisdiction was so bounded by the ancient common lawes of the realme, and so declared by act of parliament. (12 Rep. 72. The statute of 25 H. 8. c. 19. 33 H. 6. 34. 32 H. 6. 28.

"*Admission & institution.*" In proprietie of speech, admission is, when the bishop upon examination admitteth him to be able, and saith, *Admitto te habilem.* [*d*] Institution is, when the bishop saith, *Instituo te rectorem talis ecclesiæ cum curâ animarum, & accipe curam tuam & meam.* [*e*] But sometimes in a more large sense, *admissus* doth include *institutus* also: *cujus præsentatus sit admissus*, (*i. e.*) *institutus.* And it is to be observed, that institution is a good plenartie against a common person (but not against the king unlesse he be inducted); and that is the cause that regularly plenartie shall be tried by the bishop, because the church is full by institution, which is a spirituall act: but void or not void shall be tried by the common law. [*d*] Lib. 4. f. 75. & 79. Lib. 6. f. 49. Lib. 7. fo. 46. [*e*] W. 2. cap. 5. 13 E. 1. 22 H. 6. 27. 38 E. 3. 4.

At the common law, if an estranger had presented his clerke, and he had beene admitted and instituted to a church, whereof any subject had beene lawfull patron, the patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the ☞ incumbent was not to be removed: and so it was at the common law, if an usurpation had beene had upon an infant or feme covert, having an advowson by discent, or upon tenant for life, &c. the infant, feme covert, and he in the reversion were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenartie generally was a good plea in a *quare impedit*, or assise of *darreine presentment*: and the reason of this was to the intent that the incumbent might quietly intend and applie himselfe to his spirituall charge. And secondly, the law intended, that the bishop that had cure of soules within his diocesse, would admit and institute an able man for the discharge of his dutie and his owne; and that the bishop would do right to every patron within his diocesse. But at the common law, if any had usurped upon the king, and his presentee had beene admitted, instituted, and inducted, (for without induction the church had not beene full against the king) the king might have removed him by *quare impedit*, and beene restored to his presentation; for therein he hath a prerogative, *quòd nullum tempus occurrit regi* (A); but he could not present, for the plenartie barred him of that; neither could he remove him any way but by action, to the end the church might be the more quiet in the meane time. [*] Neither did the king

[344. b.]

Glanvill. lib. 13. c. 18, 19, 20. Mirror, cap. 5. § 5. Bracton, lib. 4. fo. 238. 240. 244, &c. 291. Flet. lib. 5. c. 11. 16, 17. Brit. f. 222, 223, 224. 5 E. 3. 28. 39. 52. 39 E. 3. 24. 43 E. 3. 25. 45 E. 3. Quar. imp. 139. 10 E. 2. Com. 22. 31 E. 1. Quar. imp. 186. (5 Rep. 57. 97. Lib. 6. 49, 50. b. 6 Rep. Green's case. 2 Cro. 385. F. N. B. 33. b.)

F. N. B. 36. k. 143. a. 35 E. 3. ca. 3. 13 R. 2. ca. 1. 4 H. 4. ca. 21. 1 H. fol. 19.

[*] Li. 6. fo. 51. Li. 7. fo. 19.

3 H. 6. Dam. 17. 34 H. 6. 28. 12 E. 3. Champerty, 9. 18 E. 3. 2. Temps E. 1. Quar. imp. 181.

(A) *This rule, however, is subject to various exceptions. See ante* 119. *a. note* 1.

recover dammages in his *quare impedit* at the common law. But the said statute [a] hath altered the common law in the cases aforesaid; as namely, *Quoad hoc, quòd si pars rea accipiat* (A) *de plenitudine ecclesiæ per suam propriam præsentationem, non propter illam plenitudinem remaneat loquela dummodo breve infra tempus semestre impetretur, &c.* and also hath provided remedy in the other cases, as by the said act appeareth.

[a] W. 2. ca. 5. 13 E. 1.

[g] And if the king doe present to a church, and his clerke is admitted and instituted, yet before induction the king may repeale and revoke his presentation. But regularly no man can be put out of possession of his advowson but by admission and institution upon an usurpation by a presentation to the church, *cùm aliquis jus præsentandi non habens præsentaverit, &c.* and not by collation of the bishop: [h] and therefore if the bishop collate without title, and his clerke is inducted, this shall not put the rightfull patron out of possession: for it shall be taken to be only provisionally made for celebration of divine service until the patron doe present; and therefore he is not driven to his *quare impedit*, or assise of *darreine presentment*, in that case; but an usurpation by collation shall take away the right of collation that is in another (1).

[g] 45 E. 3. 35. 38 E. 3. 4. 25 E. 3. 47. 13 El. Dy. 292. Reg. 302, &c. 18 El. Dy. 348. 14 E. 4. 2. 7 H. 4. 32. 31 E. 1. Quar. imp. 185. W. 2. ub. sup. [h] 17 E 3. 64. (2 Inst. 356. 6 Rep. 29. a. 50. a.)

It is to be observed, that an usurpation upon a presentation shall not only put out of possession him that hath right of presentation, but right of collation also. Therefore at this day the incumbent shall be removed in a *quare impedit*, or assise of *darreine presentment*, if there be not a plenartie by six moneths before the *teste* of the writ: but then the incumbent must be named in the writ, or else he shall never be removed; yet at the common law, if the ordinary refused to admit and institute the clerke of the patron, or when any disturbed him to present, so as he could not preferre his clerke, he might have his *quare impedit*, or assise *de darreine presentment*; and if the church were not full, have a writ to the bishop to admit his clerke: but so odious was symonie in the eye of the common law, that before the statute of *W.* 2. he recovered no dammages. At the common law, if hanging the *quare impedit* against the ordinary for refusing of his clerke, and before the church were full, the patron brought a *quare impedit* against the bishop, and hanging the suit, the bishop admit and institute a clerke at the presentation of another, in this case if judgement be given for the patron against the bishop, the patron shall have a writ to the bishop, and remove the incumbent that came in *pendente lite* by usurpation, for *pendente lite nihil innovetur*, and therefore at the common law it was good policie to bring the *quare impedit* against the bishop as speedily as might be. And it is to be observed, that albeit the clerke that comes in *pendente lite*, by usurpation, shall be removed; yet if the rightfull patron, being a stranger to the writ, present *pendente lite*, and his clerke is admitted and instituted, he shall not be removed; for else by the bringing of such *quare impedit* against the ordinary, the rightfull patron might be defeated of his presentation: and therefore ever after the statute of *Westm.* 2. amongst other things it was enquired *ex officio*, if the church were full, and of

(3 Rep. 30. a. 50. a.)

9 H. 6. 32 & 56. 19 H. 6. 68.

(7 Rep. 27. Cro. Car. 74. Doct. & Stud. 11. b. Lib. 6. 51. Ant. 17. b.)

(10 Rep. 53. 5 Rep. 102. 6 Rep. 51. Hob. 201. 2 Cro. 93.) 18 E. 2. Presentment, 20. 50 E. 3. Encumbent, 10. 21 H. 7. 8. a. & b. 9 Eliz. Dyer, 260. F. N. B. 32. 14 H. 8. 31. 19 E. 2. Dar. Pres. 21. 10 E. 3. 17. 9 H. 6. 31.

whose

(A) *Here "accipiat" seems to be printed by mistake instead of "excipiat." See* 2 *Inst.* 354, *and Mr. Ritso's Intr. p.* 121.

(1) V. stat. 7 Ann. c. 18.

whose presentation, &c. and if the plaintife should have a writ to the bishop, and his clerke admitted, (as in most cases hee ought) yet may the rightfull incumbent have his remedie by law.

And as it was good policie (as hath beene said) to bring a *quare impedit* as speedily as might be against the bishop, so it is good policie at this day to name the bishop in the *quare impedit*, for then he shall not present by laps. But seeing the bishop shall not present by laps because he is named in the writ, what then, after that the time be devolved to the metropolitan, shall not he present by laps, because he is not named? To this it is answered, that he shall not in that case present by laps; for the metropolitan shal never present or collate by laps after six moneths, but when the immediate ordinary might have collated by laps within the six moneths, and had surceased his time. And so it is if the time be devolved to the king, ☞ for the first step or beginning faileth; and in humane things, *Quod non habet principium, non habet finem.* And all these points were resolved [*] in a writ of errour brought by *Richard* bishop of London and *John Lancaster* against *Anthony Lowe* upon a judgement given against them in a *quare impedit* in the common-place for the church of Wimbishe. But now let us heare what our author will say unto us.

30 E. 3. tit. Quar.imp.Stath. 46 E. 3. 15. 9 H. 6. 32. 56. 19 H. 6. 68. L. 5 E. 4. 115. 9 E. 4. 30.

11 H. 4. 80. (Hob. 154.)

[345. a.]

[*] Mich. 3 Jacobi. (6 Rep. 48. b. 2 Cro. 92.)

Sect. 649.

ALSO, if tenant in tayle hath issue and is disseised, and after he releaseth by his deed all his right to the disseisor: in this case no right of taile can be in the tenant in taile, because hee hath released all his right. And no right can be in the issue in taile during the life of his father. And such right of the inheritance in the taile is not altogether expired by force of such release, &c. Ergo, *it must needs be that such right remaine in abeiance,** ut supra, *during the life of tenant in taile that releaseth, &c. and after his decease such right presently is in his issue in deed, &c.*

Sect. 650.

IN the same manner it is, where tenant in taile grant all his estate to another; in this case the grantee hath no estate but for terme of life of the tenant in taile, and the reversion of the taile is not in the tenant in taile, because he hath granted all his estate, and his right, &c. And if the tenant to whom the grant was made make waste, the tenant in taile shall not have a writ of waste, for that no reversion is in him. But the reversion and inheritance of the taile, during the life of the tenant in taile, is in abeiance, that is to say, only in the remembrance, consideration, and intelligence of the law†.

LITTLETON

* *&c.* added in L. and M. and Roh. † *&c.* added in L. and M. and Roh.

(Hob. 338.)

Pl. Com. fol. 562, 563. in Walsingham's case. 14 E. 3. Discont. 5. (Cro. Car. 427-8-9. Ant. 217. a. Dyer, 71. a.) 19 H. 6. 60. 29 Ass. p. Walsingham's case, ubi supra. Ant. 263. b. 299. b. 331. a. 342. b.)

LITTLETON having declared where a fee is in abeyance, and where a freehold and fee is in abeyance by act in law, and where a fee that is in abeyance may be charged; here he putteth two cases where a right of an estate taile may be in abeyance by the act of the partie, which are so clear and evident, as there needs no further proofe or argument, than *Littleton* hath justly and artificially made, albeit some objections of no weight have beene made against it. If tenant in taile of lands holden of the king be attainted of felonie, and the king after office seiseth the same, the estate taile is in abeyance, there said to be in suspence.

Vide Sect. 65. 524, 525, 526. 44 E. 3. 10. 14 Ass. 28. 43 Ass. 8. 5 H. 7. 30. 44 Ass. 28. 44 E. 3. 10.

"*Grant his estate, concedit statum suum.*" State or estate signifieth such inheritance, freehold, terme for yeares, tenancie by statute merchant, staple, *elegit*, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c. as much as he can grant shall passe, as here by *Littleton*'s case appeareth. Tenant for life, the remainder in taile, the remainder to the right heires of tenant for life, tenant for life grant *totum statum suum* to a man and his heires, both estates doe passe.

(Plo. 484.)

"*Right*," *Jus, sive rectum*, (which *Littleton* often useth) signifieth properly, and specially in writs and pleadings, when an estate is turned to a right, as by discontinuance, disseisin, &c. where it shall bee said, *quòd jus discendit et non terra.*

20 H. 6. 9. Vide Sect. 465. Pl. Com. 484. Lib. 8. fol. 153. Altham's case. 39 H. 6. 38.

But (Right) doth also include the ☞ estate *in esse* in conveyances; and therefore if tenant in fee simple make a lease for yeares, and release all his right in the land to the lessee and his heires, the whole estate in fee simple passeth. [345. b.]

(1 Cro. 429.)

And so commonly in fines, the right of the land includeth and passeth the state of the land; as *A. cognovit tenementa prædicta esse jus ipsius, B. &c.* And the statute [*a*] saith, *jus suum defendere*, (which is) *statum suum.* And note that there is *jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus possidendi.*

[*a*] W. 2. cap. 3. Pl. Com. 484. & 487. b.

Vid. Sect. 429. 659, &c. (Post. 347. b.)

Title, properly, (as some say) is, when a man hath a lawfull cause of entry into lands whereof another is seised, for the which hee can have no action, as title of condition, title of mortmaine, &c. But legally this word (Title) includeth a right also, as you shall perceive in many places in *Littleton:* and title is the more generall word; for every right is a title, but every title is not such a right for which an action lieth; and therefore *Titulus est justa causa possidendi quod nostrum est*, and signifieth the meanes whereby a man commeth to land, as his title is by fine or by feoffment, &c. And when the plaintife in assise maketh himselfe a title, the tenant may say, *Veniat assisa super titulum*; which is as much to say, as upon the title which the plaintife hath made by that particular conveyance. *Et dicitur titulus à tuendo*, because by it he holdeth and defendeth his land; and as by a release of a right a title is released, so by release of a title a right is released also. See more hereof in *Fitzherbert* and *Brooke's* Abridgements in the title of *Title.*

6 H. 7. 8. a. Altham's case, ubi supra.

Pl. Com. fol. 374, in seignior Zouche's case; & fol. 487 & 448, in Nichol's case.

Interest. Interesse is vulgarly taken for a terme or chattle reall,

reall, and more particularly for a future tearme; in which case it is said in pleading, that he is possessed *de interesse termini*. But *ex vi termini*, in legall understanding, it extendeth to estates, rights, and titles, that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them: and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple shall passe. And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum statum suum* in lands, all his estates therein passe. *Et sic de cæteris.*

23 H. 8. Taile. Br. 32. 35 H. 8. Grant. Br. 150. Vide 16 Eliz. Dier, 325. b. Titulum.

"*Shall not have a writ of waste, &c.*" So it is if tenant for life be, the remainder in taile, and he in the remainder release to the tenant for life, all his right and state in the land. Hereby it is said in our bookes, that the estate of the lessee is not inlarged, but the release serveth to this purpose, to put the estate taile into abeyance, so as after that he in the remaynder cannot have an action of waste; yet in that case (saving reformation) the lessee for life hath an estate for the life of tenant in taile expectant upon his owne life. But if tenant in fee release to his tenant for life all his right, yet he shall have an action of waste. And if tenant in taile make a lease for his owne life he shall have an action of waste.

43 Ass. p. 13. 41 E. 3. tit. Waste, 83. 11 H. 4. 67. 13 H. 7. 10. Pl. Com. 482. per Dier. 27 H. 8. 20.

42 E. 3. 23. F. N. B. 60. H. 41 E. 3. Waste, 83. 42 E. 3. 18.

[346. a.]

☞ Sect. 651.

(Ant. 342. a. F. N. B. 194.)

ALSO, if a bishop alien lands which are parcell of his bishopricke and die, this is a discontinuance to his successor, because he cannot enter, but is put to his writ of de ingressu sine assensu capituli.

OF this sufficient hath beene said (how the law standeth at this day) before in this Chapter.

Sect. 652.

(Ant. 342. a.)

ALSO, if a dean alien lands which he hath in right of him and his chapter, and dieth, his successor may† enter.‡ But if the deane bee sole seised as in right of his deanry, then his alienation is a discontinuance to his successor, as is said before.*

HEREOF also that which was necessary is before said in this Chapter, and *Littleton*'s owne words are plaine and evident.

22 E. 4. tit. Feoffment & Faits, 29. 21 E. 4. 85, 86.

Sect.

* *which he hath in right of him and his chapter—parcel of his deanry*, L. and M. and Roh.

† *not* added in L. and M. and Roh.

‡ *But may have a writ de ingressu sine assensu episcopi et capituli, &c.* added in L. and M. and Roh. and MSS.

Sect. 653.

ALSO, peradventure some will argue and say, that if an abbot and his covent bee seised in their demesne as of fee of certaine lands to them and to their successors, &c. and the abbot without the assent of his covent alien the same lands to another and die, this is a discontinuance to his successor, &c.

Sect. 654.

BY the same reason they will say, that where a deane and chapter (un dean * en chapter) *are seised of certaine lands to them and their successors, if the deane alien the same lands,* ☞ *&c. this shall be a discontinuance to his successor, so as his successor cannot enter, &c. To this it may be answered, that there is a great diversitie betweene these two cases* (perenter les † deux cases). [346. b.]

(Ant. 342. a.)

Sect. 655.

FOR when an abbot and the covent are seised‡, yet if they bee disseised, the abbot shall have an assise in his owne name, without naming the covent, ⸸ &c. And if any will sue a præcipe quòd reddat, &c. *of the same lands when they were in the hands of the abbot and covent, it behoveth that such action reall be sued against the abbot only without naming the covent‖, because they are all dead persons in law, but the abbot who is the soveraigne, &c. And this is by reason of the soveraignty§; for otherwise he should bee but as one of the other monkes of the covent* (car auterment il serroit forsque come ¶ un de les auters moignes de le covent), *&c.*

Sect. 656.

BUT deane and chapter are not dead persons in law, &c. for every of them may have an action by himselfe in divers cases. And of such lands or tenements as the deane and chapter have in common, &c. if they bee disseised, the deane and chapter shall have an assise, and not the deane

* en—et le, *L. and M. and Roh.*
† dites *added in L. and M. and Roh.*
‡ *&c.* added in L. and M. and Roh.
⸸ *&c.* not in L. and M. or Roh.
‖ *&c.* added in L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.
¶ un *not in L. and M. or Roh.*

deane alone, * *&c. And if another will have an action reall for such lands or tenements against the deane, &c. he must sue against the deane and chapter, and not against the deane alone, &c. and so there appeare th a☞ great diversitie betweene the two cases, &c.*

[347. a.]

THESE are apparent and need no explanation. Saving in the 655 Section mention is made of the *præcipe quòd reddat*, which in this place is intended of a reall action whereby land is demanded, and is so called of the words in every such writ. (10 Rep. 132. F. N. B. 2. e. 131. e. 192. b.)

And the reason of this diversitie betweene the case of the abbot and covent, and deane and chapter is, for that (as hath beene said) the monkes are regular, and civilly dead, and the chapter are secular, and persons able and capable in law. But by the policie of law the abbot himselfe (here termed the soveraigne) albeit he be a monke and regular, yet hath he capacitie and abilitie to sue and be sued, to enfeoffe, give, demise, and lease to others, and to purchase and take from others; for otherwise they which right have should not have their lawfull remedie, nor the house remedie against any other that did them wrong: neither could the house without such capacitie and abilitie stand. And the covent have no other abilitie or capacitie, but only to assent to estates made to the abbot, and to estates made by him, which for necessitie's sake, though they be civilly dead, they may doe. Vid. Sect. 200. 8 E. 3. 27. 11 H. 4. 84. 21 E. 4. 86. 11 H. 7. 12.

Sect. 657.

(Ante 342. a.) (Plo. 22. b.)

ALSO, if the master of an hospitall discontinue certaine land of his hospitall, his successor cannot enter, but is put to his writ of de ingressu sine assensu confratrum et † consororum, &c. *And all such writs fully appeare in the Register, &c.*

THIS must also be understood where the master of the hospitall hath sole and distinct possessions, and not where he and his brethren are seised as a body politike aggregate of many. And here *Littleton* (as divers times before) doth cite the Register.

Sect. 658.

(1 Roll. Ab. 634.)

ALSO, if land be lett to a man for terme of his life, the remainder to another in taile, saving the reversion to the lessor, and after he in the remainder disseiseth the tenant for terme of life, and maketh a feoffment to another in fee, and after dyeth without issue, and the tenant for life dyeth; it seemeth in this case, that hee in the reversion may well enter upon the feoffee, because he in the remainder which made the feoffment, was never seised in taile by force of the same remainder, &c.

HERE

* *&c.* not in L. and M. or Roh.

† *consororum—sororum*, L. and M. and Roh.

Vid. Sect. 637. 592. 596, 597. 601. 640, 641. (10 Rep. 35. 1 Roll. Abr. 634.)

☞ HERE it appeareth, that albeit the feoffor hath an estate taile in him expectant upon an estate for life, yet his feoffement worketh no discontinuance. [347. b.] Wherein *Littleton* doth adde a limitation to that which in this Chapter he had generally said, viz. That an estate taile cannot be discontinued, but where he that maketh the discontinuance was once seised by force of the taile; which is to be understood, when he is seised of the freehold and inheritance of the estate in taile, and not where he is seised of a remainder or reversion expectant upon a freehold; which freehold (as often hath beene said) is ever much respected in law.

Chap. 12. Of Remitter. Sect. 659.

REMITTER is an antient terme in the law, and is where a man hath two titles to lands or tenements, viz. one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, because the elder title is the more sure and more worthie title. And then when a man is adjudged in by force of his elder title, this is sayd a remitter in him, for that the law doth admit him to be in the land by the elder and surer title (per le pluis eigne * et sure title). *As if tenaunt in taile discontinue the taile, and after he disseiseth his discontinuee, and so dieth seised, whereby the tenements descend to his issue or cosine inheritable by force of the taile; in this case, this is to him to whom the tenements descend, who hath right by force of the tayle a remitter to the tayle, because the law shall put and adjudge him to bee in by force of the tayle, which is his elder title: for if he should bee in by force of the discent, then the discontinuee might have a writ of entrie* sur disseisin *in the* per *against him, and should recover the tenements and his dammages,* † *&c. But inasmuch as he is in his remitter by force of the taile, the title and interest of the discontinuee is quite taken away and defeated, &c.* (1)

HERE our author having next before treated of a Discontinuance, very aptly beginneth this Chapter with a description of a Remitter.

(2 Roll. Abr. 422.)

"*Remitter is an antient terme in the law,*" and is derived of the Latine verbe *remittere*, which hath two significations; either, to restore and set up againe, or to cease. Therefore a remitter is an operation in law upon the meeting of an ancient right remediable, and a latter state in one person where there is no follie in him, whereby the ancient right is restored and set up againe, and the new defeasible estate ceased and vanished away. And the

* et sure *not in L. and M. or Roh.* † *&c.* not in L. and M. or Roh.

(1) *As to the general doctrine of remitter:*—In note 1, p. 239. a. notice was taken of the different degrees of title, which a person disseising another of his lands acquires in them in the eye of the law, independently of any interior right;

the reason hereof is, for that the law preferreth a sure and constant right, though it be little, before a great estate by wrong and defeasible; and therefore the first and more ancient is the most

right: That if *A.* is disseised by *B.* while the possession is in *B.* it is a mere naked possession, unsupported by any right; and that *A.* may restore his possession, and put a total end to the possession of *B.* by an entry on the land, without any previous action: but that if *B.* dies, the possession descends on his heir by act of law. That, in this case, the heir comes to the possession of the land by a lawful title, and acquires in the eye of the law an apparent right of possession, which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an action at law. That the actions used in these cases are called possessory actions; but that if *A.* permits the possession to be withheld from him beyond a certain period of time, without claiming it, or suffers judgment in a possessory action to be given against him by default; or, if being tenant in tail, he makes a discontinuance; in all these cases, *B.*'s title is strengthened, and *A.* can no longer recover by a possessory action, and his only remedy there is by an action on the right. That these last actions are called droiturel actions, and that they are the ultimate resource of the person disseised.—Now, if in any of these three different stages of the adverse title, the disseisee, without any default in him, comes to the possession of the estate by a defeasible title, he is considered to be in not as of his new right, but as of his ancient and better right; and consequently, the right of the person, who, supposing the disseisee still to be in as of his defeasible estate, would be entitled to the lands, upon the cesser or determination of that estate, is gone for ever. In these circumstances, the disseisee is said to be *remitted* to his ancient estate. The principal reason for his being remitted is, that the person so remitted cannot sue or enter upon himself; so that in these cases where the possession is recoverable by entry, the remitter has the effect of an entry; and in those cases where it is recoverable by action, it has the effect of a judgment at law. But there is no remitter where he who comes to the defeasible estate, comes to it by his own act, or his own assent. Hence the defeasible estate, to entitle the party to be remitted, must be made to him during infancy or coverture, or must come to him by descent, or act of law: neither is there any remitter where the ancient estate is recoverable, neither by action, nor by entry. So that in those cases where the disseisee is beyond the three stages mentioned in the beginning of the note, if he afterwards comes to the estate by a defeasible title, he remains seised as of that estate, and is not remitted to his more ancient title. These are the doctrines of the common law respecting remitter. But they are greatly altered by the statute of the 27 Hen. 8. That statute executes the possession to the party in the same plight, manner, and form, as the use was limited to him. It operates only with respect to the first taker, and therefore the issue is remitted. By the statute of 32 Henry 8, it is enacted, that no fine, feoffment, or other act by the husband, of the wife's lands, shall be any discontinuance; but that the wife and her heirs, and such others to whom the right shall appertain after her decease, shall, notwithstanding such fine, or other act, lawfully enter into her lands, according to their rights and titles therein. This takes from the wife, and those claiming under her, the effect of the statute of the 27 Hen. 8, so that she has her election to take by the 27 Hen. 8, or to enter by the 32 Hen. 8, upon which she shall be remitted. See Duncombe v. Wingfield, Hobart, 254.—Sir W. Blackstone, 3 Com. Cha. 10. observes, that the doctrine of remitter might seem superfluous to an hasty observer; who perhaps would imagine, that since the tenant hath now both the right, and also the possession, it little signifies by what means such possession shall be said to be gained. But the wisdom of our ancient law determined

nothing

most sure and more worthy title; *Quod prius est, verius est, & quod prius est tempore, potius est jure:* [a] therefore many bookes instead of remitter say, that he is *en son primer estate*, or *en son melior droit*, or *en son melior estate*, or the like (1).

[a] 25 Ass. pl. 4. 35 Ass. pl. 11. 26 E. 3. 69. 11 H. 4. 50. a. 41 E. 3. 17. b.

Et tit. Remit. 11. 6 E. 3. 17.

(8 Rep. 153)

"*Where a man hath two titles.*" Here this word (Titles) is taken in the largest sense, including rights: for being properly taken, [b] as in case of a condition, mortmaine, ☞ assent to a ravisher, and the like, there is no remitter wrought unto them, because these are but bare titles of entrie, for the which no action is given: but a remitter must be to a precedent right: and *Littleton* in this Chapter putteth all his cases onely of remitters, to rights remediable.

[348. a.]

[b] Vide Sect. 429 & 659, &c. 34 H. 8. tit. Remitter, Br. 50. 44 E. 3. Attaint. 22. 38 Ass. pl. 7. (Plo. 484. Ant. 345.)

(2 Roll. Abr. 421.)

19 H. 6. 59. 78. 45. tit. Entre Cong. 3. Pl. Com. 246. a. (3 Rep. 1.)

"*And another a more latter title, &c.*" Here is to be observed, that an estate must worke a remitter to an ancient right; for albeit two rights doe descend, there can be no remitter, because one right cannot worke a remitter to another: for regularly to every remitter there be two incidents, viz. an ancient right and a defeasible estate of freehold comming together.

"*The elder title is the more sure and more worthie title.*" So as the eldest title is worthily (as hath beene said) preferred, because it is the more sure and more worthy.

19 H. 6. 61, 62.

"*As if tenant in taile discontinue the taile, &c.*" Here our author, according to his accustomed manner, to illustrate his description putteth an example of a remitter, where the law preferreth the ancient estate by right, before a new estate defeasible. And this remitter is wrought by an estate cast upon the issue in taile by discent, which is an act in law, and the discent of the land in possession, and the right of estate taile descend together.

(Post. 390. a. Ant. 246. a. Post. 357. a.)

"*Is quite taken away and defeated, &c.*" Here be two things implied and to be understood: First, that this remitter is wrought in this case by operation of law upon the freehold in law descended without any entrie. Secondly, that the law so favoureth a remitter (being a restoring to right), that if the discontinuee be

nothing in vain. As the tenant's possession was gained by a defective title, it was liable to be overturned, by showing that defect in a writ of entry; and then he must have been driven to his writ of right, to recover his just inheritance; which would have been doubly hard, because during the time he was himself tenant, he could not establish his prior title by any possessory action: the law, therefore, remits him to his prior title, and puts him in the same condition as if he had recovered the land by writ of entry. Without the remitter, he would have had *jus, et seisinam*, separate, a good right, but a bad possession; now, by the remitter, he hath the most perfect of all titles, *juris et seisinæ conjunctionem*.—[Note 299.]

(1) I. Here the ancient right and the defeasible estate *come together*. It is immaterial whether they come by descent or by other act of law. See the instances brought by Littleton afterwards, Sect. 665, 666, and 678.—[Note 300.]

be an infant or a feme covert, and tenant in taile after a discontinuance disseise them and die seised, the issue shall be remitted without any respect of the privilege of infancie or coverture; and therefore our author said, *the title and interest of the discontinuee is quite taken away and defeated.* 11 E. 4. 1.

" *Then the discontinuee, &c.* Here is a reason added in this particular case, that fitteth not other cases of remitter; for in this case and many other, the law that abhorreth suits of vexation doth avoid circuitie of action; for the rule is, *Circuitus est evitandus.* 11 E. 3. 3. tit. Ass. 85. 4 E. 4. 35. 11 R. 2. Bar. 242. 30 E. 3. 8. 6 E. 3. 7.

19 H. 6. 63. 24 E. 3. 70. 14 H. 4. 27. 10 H. 7. 11. F. N. B. Mesne & Wast.

Sect. 660.

*ALSO, if tenant in tayle infeoffe his sonne in fee, or his cosine inheritable by force of the taile, which sonne or cosine at the time of the feoffment is within age, and after the tenant in taile dieth, and hee to whom the feoffment was made is his heire by force of the taile; this is a remitter to the heire in taile to whom the feoffement was made. For albeit that during the life of the tenant in tayle who made the feoffement, such heire shall bee adjudged in by force of the feoffement, yet after the death of tenant in taile, the heire shall be adjudged in by force of the taile, and not by force of the feoffment. * For (A) altho' such heire were of full age at the time of the death of the tenant in taile who made the feoffment, this makes no matter, if the heire were within age at the time of the feoffement made unto him. And if such heire beeing within age at the time of such feoffment, commeth to full age, living the tenant in tayle that made the feoffement, and so being of full age he charges by his deed the same land with a common of pasture, or with a rent charge, and after the tenant in tayle dyeth; now it seemeth that the land is discharged of the common, and of the rent, for that the heire is in of another estate in the land than he was at the time of the charge made, in as much as hee is in his remitter by force of the tayle, and so the estate which hee had at the time of the charge, is utterly defeated, † &c.* (1)

OUR author having put one example where both the rights descend together, now puts another example, ☞ where the issue in taile claimeth by purchase in the life of tenant in taile, and the ancient right descendeth after to the same issue. [348. b.] Temps E. 1. Remit. 13. 11 E. 3. Age, 5. 38 E. 3. 24. 40 E. 3. 43. 21 E. 4. 19.

" *For altho' such heire were of full age at the time of the death, &c.*"

* *For* not in L. and M. or Roh. † *&c.* not in L. and M. or Roh.

(A) *Perhaps* " And " *should be inserted here instead of* " For." *See Mr. Ritso's Intr. p.* 113. 114.

(1) II. Here the ancient right *comes after* the defeasible estate.—[Note 301.]

&c." The reason is, because no follie can be adjudged in the infant at the time of the acceptance of the feoffement. Therefore the law respecteth the time of the feoffement, and not the time of the death. And albeit he might have waived the estate which he had by the feoffement at his full age, yet here it appeareth, that the right of the estate taile descending to him either within age, or of full age, shall work a remitter in him; for that the waiver of the state should have beene to his losse and prejudice.

27 H. 8. c. 10. of Uses. 35 H. 8. Dy. 54. b. 6 E. 6. ib. 77. 1 & 2 P. & M. 116. 1 & 2 P. & M. 129. 191. 28 H. 8. 23. b. Pl. Com. Amy Townshend's case, fol. 111. 1 Leo. 91. Hob. 255. 298.)

Since *Littleton* wrote, and after the statute of 27 *H.* 8. *cap.* 10, if tenant in taile make a feoffement in fee to the use of his issue being within age, and his heires, and dieth, and the right of the estate taile descend to the issue being within age; yet he is not remitted, because the statute executeth the possession in such plite, manner and forme, as the use was limited: *Et sic de similibus*, so as there is a great change of remitters since *Littleton* wrote (1).

34 H. 8. tit. Remit. Br. 49. (Dyer, 106. Sid. 63.

Pl. Com. ubi supra.

But if the issue in taile in that case waive the possession, and bring a formedon in the discender, and recover against the feoffees, he shall thereby bee remitted to the estate taile; otherwise the lands may be so incumbred, as the issue in taile should be at a great inconvenience; but if no formedon be brought, if that issue dieth, his issue shall be remitted; because a state in fee simple at the common law descendeth unto him.

(2 Roll. Abr. 419. 421. 1 Roll. Rep. 260.)

(2 Roll. Abr. 419. 421. 3 Rep. 5. b. Hob. 45.)

"*Being of full age he charges by his deed, &c.*" The reason is, because the grantor had not any right of the estate in taile in him at the time of the grant, but only the estate in fee simple gained by the feoffment, which (as *Littleton* here saith) is wholly defeated. And the state of the land out of which the rent issued, being defeated, the rent is defeated also. [349. a.]

11 H. 7. 21. Edriche's case. (Mo. 319. 1 Rep. 148. Ant. 278. a.)

But if tenant in taile make a lease for life whereby he gaineth a new reversion in fee, so long as tenant for life liveth, and he granteth a rent charge out of the reversion, and after tenant for life dieth, whereby the grantor becommeth tenant in taile againe, and the reversion in fee defeated; yet because the grantor had a right of the entaile in him, cloathed with a defeasible fee simple, the rent-charge remaineth good against him, but not against his issue; which diversitie is worthy of observation, for it openeth the reason of many cases.

(2 Roll. Abr. 422.)

If the heire apparent of the disseisee disseise the disseisor, and grant a rent-charge, and then the disseisee dieth, the grantor shall hold it discharged; for there a new right of entrie doth descend unto him, and therefore he is remitted.

So if the father disseise the grandfather, and granteth a rent-charge, and dieth, now is the entry of the grandfather taken away, if after the grandfather dieth the sonne is remitted, and he

(1) The effect of this statute on the doctrine of Remitter is very fully explained in Duncombe *v.* Wingfield, Hob. 254. See 2 Leo. 222. 1 Sid. 63. Dyer, 351.

he shall avoid the charge. So as where our author putteth his example of a fee taile, it holdeth also in case of a fee simple.

"*A common of pasture or a rent charge, &c.*" Here *Littleton* putteth his case of things granted out of the land. But what if the issue at full age by deed indented or deed poll make a lease for yeares of the land, and after by the death of tenant in taile he is remitted, whether shall he avoid the lease or no? And it is holden he shall not, because it is made of the land it selfe, and the land is become by the lease in another plight than it is in the case of a grant of a rent-charge, which I gather out of our author's owne words in another place. 33 H. 8. Dier, 51. b. Vide Sect. 289.

"*The land is discharged of the rent, &c.*" *Littleton* doth adde these words materially, because the whole grant is not thereby avoided, but the land discharged of the rent-charge; for the grantee shall have notwithstanding a writ of annuitie, and charge the person of the grantor. Li. 2. f. 36. b. Ward's case.

Sect. 661.

ALSO, a principall cause why such heire in the cases aforesaid, and other like cases, shall bee said in his remitter, is for that there is not any person against whom he may sue his writ of formedon. *For against himselfe he cannot sue, and hee cannot sue against any other, for none other is tenant of the freehold; and for this cause the law doth adjudge him in his remitter,* scilicet, *in such plite, as if hee had lawfully recovered the same land against another, &c.*

"*A principall cause why, &c.*" And of this opinion is [*d*] *Littleton* in our bookes. [*d*] 12 E. 4. 20 41 E. 3. 18. 11 H. 4. 50.

"*There is not any person against whom, &c. as if hee had lawfully recovered the same land against another, &c.*" Here it is to be understood, that regularly a man shall not be remitted to a ☞ right remedilesse, for the which he can have no action; for *Littleton* here saith, that there is no person against whom the issue when he commeth to the land without folly may bring his action; and saith also, that this is the principall cause of the remitter; for neither an action without a right, nor a right without an action, can make a remitter. As if tenant in taile suffer a common recovery in which there is error, and after tenant in taile disseiseth the recoveror and dieth, here the issue in taile hath an action, viz. a writ of error; but as long as the recoverie remaineth in force, he hath no right, and therefore in that case there is no remitter (1). (6 Rep. 58. b. 1 Sid. 63. 2 Roll. Abr. 419.) Lib. 3. f. 3. the Marquesse of Winchester's case. (3 Rep. 3.)

[349. b.]

If

(1) III. By what sir Edward Coke says here, and in other parts of this Chapter, it appears, that there is *no remitter to a bare title, nor to an irremediable right, nor to a bare right of action, nor in those cases where the freehold does not accrue to the right, nor where there was default in him who takes the defeasible estate, nor if he takes the defeasible estate by st. 27 H. 8. c. 10, which executes*

If *B.* purchase an advowson, and suffereth an usurpation and six moneths to passe, and after the usurper granteth the advowson to *B.* and his heires, *B.* dieth, his heire is not remitted, because his right to the advowson was remedilesse, viz. a right without an action (2).

(Ant. 122. b.) 5 H. 7. 35. Tenant in taile of a mannor whereunto an advowson is appendant maketh a discontinuance, the discontinuee granteth the advowson to tenant in taile and his heires, tenant in taile dieth, the issue is not remitted to the advowson, because the issue had no action to recover the advowson before he recovered the mannor whereunto the advowson was appendant. And so it is of all other inheritances regardant, appendant or appurtenant; a man shall never be remitted to any of them before he recontinueth the mannor, &c. whereunto they are regardant, appendant, or belonging.

Britton, fol. 126. *Car nul ne poet claimer droit en les appurtenances ne en les accessories que nul droit ad en le principall.*

[e] Bract. li. 4. fo. 243. b. [e] *Item, excipi potest, &c. quamvis jus habeat in tenemento et pertinentiis, primo recuperare debet tenementum ad quod pertinet advocatio, et tunc postea præsentet et non ante, et de hâc materiâ in Rotulo de termino Sancti Michaelis, anno regis Henrici tertio in comitatu Norff. de Thomâ Bardolfe.*

8 R. 2. Quare Imp. 199. 2 H. 4. 18. 14 H. 6. 15, 16. 8 H. 6. 17. 33 H. 6. 15. F. N. B. 35. B. & 36. F. 24 E. 3. Discont. 16. 33 H. 8. Dier, 48. b. (Ant. 324. b. 333. b.) (Post. 363. b.) But, on the other side, if a man be remitted to the principall, he shall also be remitted to the appendant or accessory, albeit it were severed by the discontinuee, or other wrong doer. And therefore if tenant in taile be of a mannor whereunto an advowson is appendant, and infeoffeth *A.* of the mannor with the appurtenances, *A.* re-infeoffeth the tenant in taile, saving to himselfe the advowson, tenant in taile dieth; his issue being remitted to the mannor, is consequently remitted to the advowson, although at that time it was severed from the mannor. So it is in the same case if tenant in taile had beene disseised, and the disseisor suffer an usurpation, if the disseisee enter into the mannor, he is also remitted to the advowson.

Sect. 662.

ALSO, if land be entailed to a man and to his wife, and to the heires of their two bodies begotten, who have issue a daughter, and the wife dieth, and the husband taketh another wife, and hath issue another daughter,

executes the possession in the same plight as the use was limited. It is upon the last ground, that where tenant in tail makes a feoffment to the use of his issue within age, and dies, the issue in tail is not remitted. Neither is there a remitter to a term for years. Hence, if lessee for years, to commence at a future day, enters before that day (which is a disseisin), and continues in possession till the term commences, he shall not be remitted, for the disseisor acquires by the disseisin an estate of freehold; which, though it be tortious, the law will not divest from him for a term which is of no account. See 2 Roll. Abr. 420. l. 35. Com. Dig. tit. *Remitter*, C.—[Note 302.]

(2) This seems to be altered by the afore-mentioned statute of 7 Ann. c. 18. *Note to the 11th edition.*

[350. a.] *daughter, and discontinue the taile, and after he disseiseth the discontinuee and* ☞ *so die seised, now the land shal descend to the two daughters.* * *And in this case as to the eldest daughter, who is inheritable by force of the tayle, this is no remitter but of the moitie* (ceo † n'est un remitter forsque de le moity). *And as to the other moitie she is put to sue her action of* formedon *against her sister. For in this case the two sisters are not tenants in parcenarie, but they are tenants in common, for that they are in by divers titles. For the one sister is in her remitter by force of the entaile, as to that which to her belongeth; and the other sister is in as to that to her belongeth in fee simple by the discent of her father,* ‡ *&c.*

"*THIS is no remitter but of the moitie, &c.*" Here *Littleton* putteth a case where the issue in taile shall be remitted to a moitie, because but a moity of the land descended unto her, and there cannot be any remitter, but for so much as commeth to the issue by discent, or by any other meanes without his folly; and in this case by act in law the coparcenary is defeated, for the daughters are in by severall titles, viz. the eldest daughter is tenant in taile *per formam doni,* by the remitter of the one moitie; and the youngest seised in fee simple by discent of the other moitie, against whom the other sister in taile may have her *formedon* (1). 44 E. 3. 26. 19 H. 6. 59. (Plo. 246. a.)

Sect. 663.

IN the same manner it is, if tenant in taile enfeoffe his heire apparent in tayle (the heire being within age), and another jointenant in fee, and the tenant in tayle dieth; now the heire in tayle is in his remitter as to the one moitie, and as to the other moitie hee is put to his writ of formedon, ‖ *&c.*

"*THE heire, &c. is in his remitter as to one moitie, &c.*" Hereby it appeareth that albeit joyntenants be seised *pro indiviso per my et per tout*, yet each of them hath in judgement of law but a right to a moitie; and therefore the issue in taile in this case is remitted but to a moity, and is tenant in common but with the other feoffee. And so it is if the discontinuee, after the death of tenant in tayle, make a charter of feoffment to the issue in tayle, being within age, who hath right, and to a stranger in fee, and make livery to the infant in name of both; the issue is not remitted to the whole, but to the halfe: for first he taketh the fee simple, and after the remitter is wrought by operation of law, and therefore can remit him but to a moitie. But of this sufficient hath beene said in the Chapter of Joyntenants. (2 Roll. Abr. 41.) Vide Sect. 288.

Sect.

* *And* not in L. and M. or Roh.
† n'est—est, *L. and M. and Roh.*
‡ *&c.* not in L. and M. or Roh.
‖ *&c.* not in L. and M. or Roh.

(1) IV. By this and the following section it appears, that if *part of the estate* comes to the right, it is remitted for that part.—[Note 303.]

☞ Sect. 664. [350. b.]

*ALSO, if tenant in taile enfeoffe his heire apparent, the heire being of full age at the time of the feoffment, and after tenant in taile dieth; this is no remitter to the heire, because it was his folly, that being of full age hee would take such feoffment, &c. But such folly cannot be adjudged in the heire being within age * at the time of the feoffment, &c.*

(Ant. 171. b. 187. a. 246. a. 337. b. 308. b.) 40 E. 3. 44. 18 E. 4. 25.

BY this feoffment, albeit the heire apparent hath some benefit in the life of his ancestor, yet is he thereby (besides his owne) subject during his life to all charges and incumbrances made or suffered by his ancestor. And therefore our author saith well, *it was his folly, that being of full age hee would take such feoffment*, but folly shall not be judged in one within age in respect of his tender yeares, and want of experience.

Sect. 665.

ALSO, if tenant in taile enfeoffe a woman in fee, and dyeth, and his issue within age taketh the same woman † to wife; this is a remitter to the infant ‡ within age, and the wife then hath nothing, for that the husband and his wife are but as one person in law. And in this case the husband cannot sue a writ of formedon, *unlesse he will sue against himselfe, which should be inconvenient; and for this cause the law adjudgeth the heire in his remitter, for that no folly can be adjudged in him* (pur ceo que nul folly poit estre || adjudge en luy) *being within age at the time of the espousels, &c. And if the heire bee in his remitter by force of the entaile, it followeth by reason, that the wife hath nothing, &c. For inasmuch as the husband and wife be as one person, the land cannot be parted by moities; and for this cause the husband is in his remitter of the whole. But otherwise it is if such heire were of full age at the time of espousels, for then the heire hath nothing but in right of his wife, § &c.*

(Ant. 202. b.)

HERE *Littleton* putteth a case where the husband within age by the intermarriage may be remitted, albeit he gaineth but a freehold during the coverture *en auter droit*.

Also here is to bee observed, that the estate which doth in this case worke the remitter, could not have continuance after the decease of the wife. And so on the other side, if the husband make a discontinuance, and take backe an estate to him and his wife, during the life of the husband, this is a remitter to the wife presently, albeit the estate is not by the limitation to have continuance after the decease of the husband; which case is proved by the reason of the case which our author here putteth. And here our author observeth the diversity when the husband is

* *&c.* added in L. and M. and Roh.
† *to wife* not in L. and M. or Roh.
‡ *within age* not in L. and M. or Roh.
|| adjudge — avette, *L. and M. and Roh.*
§ *&c.* not in L. and M. or Roh.

is within age, and when hee is of full age; for when he is within age, no folly can be adjudged in him, as in this Chapter hath beene often said.

[351. a.] ☞ Here is also to bee noted, that presently by the marriage within age, the husband is remitted, and the freehold and inheritance of the wife banished cleane away.

"*Taketh the same woman to wife.*" Here it is good to be seene what things are given to the husband by marriage (1). First, it appeareth (4 Rep. 29.)

(1) *On the interest which the husband takes in the chattels real and things in action of his wife.*—Some observations have been offered to the reader in a former part of this work, upon the nature of the estate which the husband takes in his wife's lands of freehold or inheritance. See ante, 325. b. note 2. The following observations are now submitted to his consideration, upon the nature of the interest which the husband takes in his wife's chattels real and things in action. I. *Where the husband survives his wife:*—At the common law no person had a right to administer; it was in the breast of the ordinary to grant administration to whom he pleased till the statute of the 21 Henry VIII. which gave it to the next of kin; and, if there were persons of equal kin, whichever took out administration first, was entitled to the surplus. The statute of distribution was made to prevent this injustice, and to oblige the administrator to distribute. In those cases, where the wife was entitled only to the trust of a chattel real, or to any chose in action, or contingent interest in any kind of personalty, it seems to have been doubted, whether, if the husband survived her, he was entitled to the benefit of it or not. See the commentary on sect. 665. and 4 Inst. 87. 1 Roll. Abr. 346. All. 15. Wytham *v.* Waterhouse, Cro. Eliz. 466. 3 Rep. in Cha. 37. and Gilb. Ca. in Eq. 234. By the 22 and 23 Car. II. c. 10, administrators are liable to make distribution; but as the act makes no express mention of the husband's administering to his wife, and as no person can be in equal degree to the wife with the husband, he was not held to be within the act. To obviate all doubts upon this question, by the 29 Car. II. c. 3, § 25, it is declared that the husband may demand administration of his deceased wife's personal estate, and recover and enjoy the same, as he might have done before the statute of the 22 and 23 of that reign. Upon the construction of these statutes it has been held, that the husband may administer to his deceased wife, and that he is entitled for his own benefit to all her chattels real, things in action, trusts, and every other species of personal property, whether actually vested in her and reduced into possession, or contingent, or recoverable only by action or suit. It was however made a question, after the statute of 29 Car. II. c. 3, § 25, whether, if the husband, having survived his wife, afterwards died during the suspense of the contingency upon which any part of his wife's property depended, or without having reduced into possession such of her property as lay in action or suit, his representative, or his wife's next of kin, were entitled to the benefit of it. But, by a series of cases it is now settled, that the representative of the husband is entitled as much to this species of his wife's property, as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband (see Mr. Hargrave's Law Tracts, 475); and if administration *de bonis non* of the wife is obtained by any third person, he is a trustee for the representative of the husband. See Squib *v.* Wyn, 1 P. W. 378. Cart *v.* Rees, cited ib. 381.

II. With respect *to such part of the wife's personalty as is not in her possession*; as money owing or bequeathed to her, or accrued to her in case of intestacy, or contingent interests, these are a qualified gift by law to the husband, on condition that he reduce them into possession during the coverture; for, if he happen to

appeareth here by *Littleton*, that if a man taketh to wife a woman seised in fee, [*f*] he gaineth by the intermarriage an estate of freehold in her right, which estate is sufficient to worke a remitter, and yet the estate which the husband gaineth dependeth upon

[*f*] 13 H. 4. 6. Staunf. l. 7. b. 18 E. 4. 5. 11 H. 8. 19. 10 H. 6. 11. 7 H. 6. 9. b. Vide Sect. 58.

die in the lifetime of his wife, without reducing such property into possession, she and not his representatives will be entitled to it. Rcll. Abr. 342. 350. Moor, 452. Gold. 160. 2 Vent. 141. His disposing of it to another is the same as reducing it into his own possession. Thus, if a baron be possessed of a term, or the trust of a term in the right of his wife, he may dispose of it, except in the case of a trust term, where the trust is created by herself previously to the marriage: and it should seem that the husband's power of disposition over his wife's contingent personal estate can extend only to such part as he may possibly become possessed of during the marriage, and not to any part of her estate which depends upon a contingency that cannot possibly happen during his life; as if a lease be made to the husband and wife during their lives, with remainder to the survivor, and the husband disposes of the term and dies, the disposition will not bar the wife; for during the coverture she had a mere possibility only. Ant. 46. b. 1 Roll. Abr. 343. pl. 15. Lane, 54, 55. Ch. Ca. 225. Vern. 7. 18. 2 Vern. 270. Eq. Ca. Ab. 58. Pre. Ch. 519. 1 Roll. Ab. 344. 2 Roll. Abr. 48. Poph. 5. 4 Leon. 185. Godb. 139. Cro. Eliz. 841. Hutt. 17.

This interest of the husband in, and his authority over, the personal estate of the wife, is however, considerably modified by equity, in some particular circumstances. A settlement made upon the wife in contemplation of marriage, and in consideration of her fortune, will entitle the representatives of the husband, though he die before the wife, to the whole of her goods and chattels, whether reduced into possession or not during the coverture. Gilb. Eq. Rep. 100: but it seems to be the better opinion, that, in cases where the provision for the wife is not made in consideration of her fortune, or is made in consideration of a particular part only of it, the husband will not, in the first case, be entitled to the wife's choses in action, unless he survive her; and in the second, to no more than is comprised in the contract. Pre. Ch. 63. Amb. 692. 2 Ves. jun. 607. 2 Vez. sen. 676. But it seems doubtful whether a settlement made after marriage will not entitle the representatives of the husband to such an estate in preference to the wife. See Lanoy *v.* duke and dutchess of Athol, 2 Atk. 444; and see 4 Ves. jun. 15.

III. If the husband be obliged to resort to a court of equity, to recover the choses in action of the wife, or any property which he cannot recover without the assistance of the wife, the court will not interfere unless he will submit to dispense equity before it be administered to him: or, in other words, equity will not act on his behalf, unless he submit to make a competent settlement on his wife, when no settlement has been made; but, if the wife consent in court, or being abroad, before proper commissioners there, that the husband shall receive her fortune, he will be ordered payment of it accordingly. 2 P. Will. 641. 3 P. Will. 12. 202. 2 Atk. 67. 2 P. Will. 638. 2 Vez. sen. 60. 2 Bro. C. C. 663. 3 Bro. C. C. 195. But see ex parte Higham, 2 Vez. sen. 579. The equity of the wife to compel the husband to make a settlement is merely personal; so that, if he survive his wife, the children, though unprovided for by settlement, cannot oblige him to make provision for them out of it. Amb. 509; and, except in a strong case of the husband's misbehaviour, as in 3 Atk. 21, and Like *v.* Beresford, 3 Ves. jun. 506. a court of equity will not interfere with the husband's right to receive the income during the coverture, though the wife resist the application, 2 Vez. sen. 562. 4 Ves. jun. 15. 20. 798.

IV. *Whether the wife's equity will prevail against the assignee* of the husband for

upon uncertaintie, and consisteth in privitie [g]; for if the wife be attainted of felony, the lord by escheat shall enter and put out the husband: otherwise it is if the felonie be committed after issue had. Also, if the husband be attainted of felonie, the king gaineth no freehold, but a pernancie of the profits during the coverture, and the freehold remaineth in the wife. [h] Secondly, if she were possessed of a terme for yeares, yet he is possessed in her right; but he hath power to dispose thereof by grant or demise; and if he be outlawed or attainted, they are gifts in law.

[g] 4 Ass. p. 4. 4 E. 3. Ass 166. (1 Rep. 50. a. 1 Roll. Abr. 343, 344. 5 Rep. 17. Hob. 285.)

[h] Pl. Com. fol. 260. b. Dame Hale's case. 50 Ass. 5.

38 H. 6. 23. 21 E. 4. 35. 7 E. 4. 6. 7 H. 7. 2. 10 H. 6. 11.

Upon

for a valuable consideration, has been a subject of frequent discussion; see 1 P. Will. 459. Mr. Cox's note. One of the last cases on this point is Macaulay v. Philips, 4 Ves. jun. 19. in which the Master of the Rolls thus expressed himself: "Many cases upon this point have been before me, which have put "me under the necessity of considering very much the right of the wife; and "I am clearly of opinion, the doubt respecting the assignment of the husband, "for valuable consideration, of the wife's equitable interest, was not well "founded, with the single exception, perhaps, of a trust of a term for years "of land, upon which, perhaps, there may be some doubt; but subject to that, "I am clearly of opinion, an assignment for valuable consideration will not "bar the equity of the wife; and it would be strange if it did, since, in the "courts of law, with regard to an action brought against executors by the "husband for a legacy due to his wife, it is determined, that an action does "not lie, and the reason given is, that it would totally defeat the wife's equity. "It would be whimsical then that the assignment by the husband, for valu-"able consideration, should put that assignee in equity in a better situation "than the husband himself is at law. The guard of this court upon the wife's "interest, would be very singular, if the husband, not being entitled at law, "might assign it for a valuable consideration to another person, who would be "entitled in equity. I am clearly of opinion, it was only a doubt, and it never "was decided that the husband could, by such assignment, or any other means, "deprive her of her equity." See also note 5 Ves. 517. Mr. Roper, to whose useful "*Treatise on the Revocation and Republication of Wills and Testaments*; "*together with Tracts upon the Law concerning Baron and Feme*," the editor is indebted for a considerable part of the present note, observes, that the reason why the trust of a term is probably made an exception to the rule, depends upon the disposition of such a term being good at law, and in order to preserve an unity of decision, in both tribunals; and that for the same reason it seems that an assignment by the husband of his wife's mortgage term will bind her.

Assignees in law are bound by this equity of the wife to have a settlement made for her benefit. The principal cases, in which the doctrine has come into consideration, have arisen in consequence of the husband's bankruptcy, and are systematically arranged and ably discussed by Mr. Montagu in his Digest of the Bankrupt Laws, 1 vol. 199. The result of them, in his words, is, that "the wife's property, which vests in the husband by operation of law, "and of which the assignees under a commission of bankruptcy against the "husband can obtain possession only by the intervention of a court of equity, "or of an ecclesiastical court, is not distributable under the commission, till "there is a sufficient settlement upon the wife out of this or some other fund:— "but whether property which the assignee can recover at law, is subject to a "provision for the wife, seems not to be finally settled. The extent of the "provision is either left to the liberality of the creditors, or determined upon "a reference to the Master, or fixed by the Chancellor."

V. From what has been stated it appears to have been settled, that, *where a settlement of personal estate, except chattels real, is executed before marriage, and contains an express stipulation that the woman, on the event of her surviving her husband,*

[*] Mich. 26 & 27 Eliz. inter Amnor & Lodington, in briefe de error, adjudge in both courts. Lib. 8. fol. 96. Mat. Manning's case.

[*] Upon an execution against the husband for his debt, the sheriffe may sell the terme during her life; but the husband can make no disposition thereof by his last will. Also, if he make no disposition or forfeiture of it in his life, yet it is a gift in law unto him if he doe survive his wife; but if he make no disposition, and die before his wife, she shall have it againe. And the same law is of estates by statute merchant, statute staple, *elegit*, wardships, and other chattels reals in possession.

7 H. 6. fol. 2. (1 Roll. Abr. 346.) Vide Sect. 58.

But if the husband charge the chattell reall of his wife, it shall not binde the wife if shee survive him.

If a feme sole be possessed of a chattell reall, and be thereof dispossessed, and then taketh husband, and the wife dieth, and the husband surviveth, this right is not given to the husband by the intermarriage, but the executors or administrators of the wife shall have it; so it is if the wife hath but a possibilitie.

Pl. Com. fo. 294. Osborne's case, and there fol. 192. b. Wrotesley's case.

In the same manner it is if the wife be possessed of chattels reals *en auter droit*, as executrix or administratrix, or as gardeine in socage, &c. and she intermarrieth, the law maketh no gift of them to the husband, although he surviveth her. In the same manner if a woman grant a terme to her owne use, taketh husband, and dieth, the husband surviving shall not have this trust, but the executors or administrators of the wife [*i*]; for it consisteth in privitie: and so hath it beene resolved by the justices.

[*i*] Pasc. 32 El. in Cancellar. in Witham's case. Hil. 38 Eliz. in Cancell. in Waterhouse's case. Wrotesley's case, ubi sup.

Chattels

husband, shall have the absolute property, or shall have the income of it during her life, no deed executed by the woman, either alone or jointly with her husband, during their joint lives, can transfer, charge, or in any manner affect her contingent right to the property or income, by survivorship.—It then became a question, whether in a suit, to which the husband and wife were parties, a court of equity, with the consent of the wife, upon examination, would direct a transfer, or otherwise sanction any disposition of such her contingent property. In several cases, particularly Fraser *v.* Baillie, 1 Bro. Ch. Ca. 518. Sperling *v.* Rochfort, 8 Ves. 164. Chesslyn *v.* Smith, ib. 183. Richards *v.* Chambers, 10 Ves. 580. and Lee *v.* Muggeridge, 1 Ves. & Beames, 118. it seems now to be settled that the court will not, in such a case, direct such a transfer, or sanction such a disposition. It should, however, be borne in mind, that a wife's vested or contingent interest in a real estate, or chattels real, is, during the joint lives of herself and her husband, always subject to the operation of their fine.

VI. It remains to state some of the general rules of equity respecting *dispositions by a married woman of her separate estate.* Speaking generally, it may be laid down, 1st, That, except in particular cases, a court of equity will decree a conveyance or assignment of a woman's separate estate, either to her husband or a stranger, on a bill filed for such purpose by the husband and wife; Allen *v.* Papworth, 1 Vez. sen. 163; Clarke *v.* Pistor, cited 3 Bro. Ch. Ca. 346; Ellis *v.* Atkinson, 3 Bro. Ch. Ca. 565. 2dly, That a married woman may dispose by anticipation of her separate estate, though it be for her life only, unless the anticipation be prohibited in the deed creating the trust. Grigby *v.* Cox, 1 Vez. sen. 517; Hulme *v.* Tenant, 1 Bro. Ch. Ca. 16; Pybus *v.* Smith, 3 Bro. Ch. Ca. 340; Burnaby *v.* Griffin, 3 Ves. 266; Wagstaff *v.* Smith, 9 Ves. 520: Parkes *v.* White, 11 Ves. 209; and Witts *v.* Dawkins, 12 Ves. 501. And 3dly, That where it appears by the instrument creating the trust to have been the intention of the parties, that the woman should not have the power of disposing of her separate income by anticipation, the court will not allow it. Sockett *v.* Wray, 4 Bro. Ch. Ca. 485; Whistler *v.* Newman, 4 Ves. 129; Mores *v.* Huish, 5 Ves. 692; Hovey *v.* Blakeman, cited in Wagstaff *v.* Smith, 9 Ves. 524.—[Note 304.]

Chattels reals consisting meerely in action the husband shall not have by the intermarriage, unlesse he recovereth them in the life of the wife, albeit he survive the wife; as a writ of right of ward, a *valore maritagii*, a forfeiture of marriage and the like, whereunto the wife was intitled before the marriage.

But chattels reals being of a mixt nature, viz. partly in possession, and partly in action, which happen during the coverture, the husband shall have by the intermarriage, if hee survive his wife, albeit he reduceth them not into possession in her lifetime; but if the wife surviveth him she shall have them. As if the husband be seised of a rent service, charge, or seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arerages; but if the wife survive the husband she shall have them, and not the executors of the husband. So it is of an advowson, if the church become voyd during the coverture [*k*], he may have a *quare impedit* in his owne name, as some hold; but the wife shall have it if she survive him; and the husband if he survive her: *et sic de similibus.*

13 E. 3. Quar. Imp. 57. 14 H. 4. 12. 38 E. 3. 35. b. 50 E. 3. 13. 10 H. 6. 11. F. N. B. 121. 22 H. 6. 25. 29 E. 3. 40. 11 R. 2. Account, 49. 12 R. 2. Briefe, 639. 5 E. 3. Execut. 99.

[*k*] 50 E. 3. 13. 28 H. 6. 9. 7 H. 7. 2.

[351. b.] ☞ But if the arerages had become due, or the church had fallen voyd before the marriage, there they were meerely in action before the marriage; and therefore the husband should not have them by the common law, although he survived her. And so it is of releefes, *mutatis mutandis*. [*l*] But now by the statute of 32 *H.* 8. *cap.* 37, if the husband survive the wife, he shall have the arerages as well incurred before the marriage, as after.

26 E. 3. 64. 10 H. 6. 11. F. N. B. 121. 22 H. 6. 25.

[*l*] Lib. 4. fol. 51, in Ongel's case. Hil. 17 El. Rot. 457. in Com. Banco, Sharp's case.

But the marriage is an absolute gift of all chattels personals in possession in her owne right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unlesse he and his wife recover them. And of personall goods, *en auter droit*, as executrix or administratrix, &c. the marriage is no gift of them to the husband, although he survive his wife (1).

21 E. 4. 4. 21 H. 7. 29. 11 H. 7. 4. 26 H. 8. 7. 43 E. 3. 10. 3 H. 6. 23. 37. 4 H. 6. 5.

14 E. 2. Det. 73. 5 E. 2. ibid. 169. 30 E. 3. 48 E. 3. 12. 12 R. 2. Bre. 638, 639. 16 E. 4. 8. 16 H. 6. Bre. 939.

[*m*] If an estray happen within the mannor of the wife, if the husband die before seisure, the wife shall have it, for that the propertie was not in the wife before seisure.

[*m*] 43 E. 3. 8. V. 10 H. 6. 11. 39 E. 3. 17.

But as to personall goods, there is a diversitie worthy of observation betweene a propertie in personall goods (as is aforesaid) and a bare possession; for if personall goods be bailed to a feme, or if she finde goods, or if goods come to her hands as executrix to a bailiffe, and taketh a husband, this bare possession is not given to the husband, but the action of detinue must be brought against the husband and wife.

But now let us heare *Littleton*.

"*Which should be inconvenient.*" This argument *ab inconvenienti*, our author hath used in many places (A).

Vide Sect. 87, &c.

Sect.

(A) *As to the limited force of the argument, see ante, note* 1 *to* 66. *a.*

(1) But they shall go to the administrator *de bonis non*; for should they go to the husband, the creditors, legatees, &c. of the deceased would be thereby wronged. *Note to* 11*th edition.*—[Note 305.]

(Ant. 350. b.)

Sect. 666.

ALSO, if a woman seised of certaine land in fee taketh husband, who alieneth the same land to another in fee, * *the alienee letteth the same land to the husband and wife for terme of their two lives, saving the reversion to the lessor and to his heires; in this case the wife is in her remitter, and she is seised in deed in her demesne as of fee, as shee was before, because the taking backe of the estate shall be adjudged in law the fact of the husband, and not the fact of the wife; so no folly can be adjudged in the wife, which is covert in such case. And in this case the lessor hath nothing in the reversion* (Et en cest case le lessor n'ad † rien en le reversion), *for that the wife is seised in fee,* ‡ *&c.*

21 E. 3. 26.
29 E. 3. 43.
41 E. 3. Remit. 11.
19 E. 3. Remit. 14.
35 Ass. 12.
38 E. 3. 24.
39 E. 3. 29, 30.
41 E. 3. 17.
46 E. 3. 20. b.
26 E. 3. 69.
Vide Sect. 676.
11 R. 2. Remit. 12. 44 E. 3. 17.

"*THE wife is in her remitter.*" By this it appeareth, that albeit there be no moities betweene husband and wife, yet this is a remitter presently, and standeth not upon the survivor of the wife, as some have thought: for if the estate gained by intermarriage be a sufficient estate to worke a remitter; *à fortiori*, an estate made to the husband and wife shall worke a remitter in the wife. And so it is if tenant in taile infeoffe his issue being within age, and his wife in fee, and dieth; this is a remitter to the issue presently, by the death of tenant in taile; though some have thought the contrarie.

The Marques of Winch. case, ubi sup. (Hob. 71.)

☞ Here also it appeareth, that no follie in this case can be adjudged in a feme covert, for the taking backe of the estate shall be adjudged in law the act of the husband. [352. a.]

Note in the case of the feme covert, she may be remitted in the life of the discontinuor, because she hath a present right: but in the case of tenant in taile, the issue cannot be remitted in the life of the discontinuor, because the issue hath no right untill his decease.

Sect. 667.

BUT in this case if the lessor will sue an action of wast against the husband and his wife, for that the husband hath committed wast, the husband cannot barre the lessor by shewing this, that the taking backe of the estate to him and to his wife was a remitter to his wife, because the husband is stopped to say that which is against his owne feoffement (pur ceo que le baron est estoppe a dire ceo § que est encounter son feoffment), *and taking backe of the estate for terme of life to him and to his wife. And yet the lessor hath no reversion* (Et uncore le lessor n'ad † un reversion),

* *and* added in L. and M. and Roh.
† ascun *added in L. and M. and Roh.*
‡ *&c.* not in L. and M. or Roh.
§ que est *not in L. and M. or Roh.*
† un—null, *L. and M. and Roh.*

reversion), *for that the fee simple is in the wife. And so a man may see one thing in this case, that a man shall bee stopped by matter in fact, though there bee no writing by deed indented, or otherwise.*

"*BECAUSE the husband is stopped to say* (pur ceo que le baron est estoppe a dire), &c."

"*Estoppe*," commeth of the French word *estoupe*, from whence the English word stopped: and it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth: and *Littleton*'s case here proveth this description. Li. 2. f. 4. b. Goddard's case. V. Sect. 41 & 693. 695. 679. (Post. 363. b.)

Touching estoppels, which is an excellent and curious kinde of learning, it is to be observed, that there be three kinde of estoppels. viz. by matter of record, by matter in writing, and by matter *in paiis*. (Cro. Car. 388. 1 Roll. Abr. 865.)

[*a*] By matter of record, viz. by letters patents, fine, recoverie, pleading, taking of continuance, confession, imparlance, warrant of atturney, admittance. [*a*] 43 Ass. 29. 8 E. 4. 7, 8. 22 Ass. 54. 15 E. 3. Estop. 239. 4 E. 3. ib. 133. (1 Roll. Abr. 862.)

[*b*] By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll, [*c*] by defeasance by deed indented or deed poll. [*b*] 4 H. 4. 1. 8 H. 7. 6. 13 H. 7. 24. 15 E. 4. 28. 41 E. 3. Estop. 12. 12 R. 2. ib. 212. [*c*] 8 R. 2. Estop. 283. 35 H. 6. 18. 3 H. 6. 16. 16 H. 7. 5. 34 H. 6. 19. 14 H. 4. 29.

By matter *in paiis*, as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate, as here in the case that *Littleton* putteth; whereof *Littleton* maketh a speciall observation, that a man shall be estopped by matter in the countrey, without any writing (1). (1 Leo. 82. 158. 4 Rep. 53. 8 Rep. 53, 54.)

To make the reader more capable of the learning of estoppels these few rules, amongst others, are to be knowne.

[*d*] First, that every estoppel ought to be reciprocall, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppell: [*e*] privies in bloud, as the heire; privies in estate, as the feoffee, lessee, &c.; privies in law, as the lords by escheat; tenant by the curtesie, tenant in dower, the ☞ incumbent of a benefice, and others that come under by act in law, or in the *post*, shall be bound and take advantage of estoppels; and that a rebutter is a kinde of estoppell. [*d*] 33 H. 6. 19. 50. 30 H. 6. 2. 31 E. 3. Estop. 240. 33 Ass. 18. 30 Ass. 51. 14 Ass. 9. 18 E. 4. 1. (3 Mod. 141.) [*e*] 8 Ass. 53. Br. Fines, 73. 8 H. 6. 17. 21 E. 3. 35. 38 E. 3. 31. 20 E. 3. Estop. 187.

[352. b.]

Secondly,

(1) The reasons why estoppels are allowed, seem to be these: No man ought to allege any thing but the truth for his defence, and what he has alleged once, is to be presumed true, and therefore he ought not to contradict it; for as it is said in the 4 Inst. 272. *allegans contraria non est audiendus*. Secondly, as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out but by evidence; and therefore it is reasonable that some evidence should be allowed to be of so high and conclusive a nature, as to admit of no contradictory proof. *Note to the 11th edition.*—[Note 306.]

[f] 21 E. 4. 4. 23 Ass. 14. 17 H. 6. Estop. 273. 18 E. 3. 30. 7 H. 7. 6 & 16.

[f] Secondly, that every estoppell, because it concludeth a man to alleadge the truth, must be certaine to every intent, and not to be taken by argument or inference (B).

[g] 46 E. 3. 33. 29 Ass. 38. Pl. Com. 398.

[g] Thirdly, every estoppell ought to be a precise affirmation of that which maketh the estoppell, and not be spoken impersonally; as if it be said, *Ut dicitur, quia impersonalitas non concludit, nec ligat: impersonalis dicitur, quia sine personâ.*

[h] 35 H. 6. 33. 46 E. 3. 12. 49 E. 3. 14. 8 Ass. 3. 45 Ass. 5. 3 El. Dy. 196. 11 El. ib. 280. 9 H. 6. 60.

[h] Neither doth a recitall conclude, because it is no direct affirmation.

[i] 5 E. 4. 7. 8 E. 4. 19. 10 E. 4. 12. 22 E. 4. 38. 32 Ass. 9. 35 H. 6. 20.

[i] Fourthly, a matter alleaged that is neither traversable nor materiall, shall not estoppe.

[k] 33 H. 6. 16. 4 E. 3. 22. 6 H. 4. 7. 31 E. 1, Gard. 155. F. N. B. 142. E.

[k] Fifthly, regularly a man shall not be concluded by acceptance or the like, before the title accrued.

[l] 12 H. 7. 4. 20 H. 6. 29. 3 H. 4. 9. 41 E. 3. 4. 11 H. 4. 30.

[l] Sixthly, estoppell against estoppell doth put the matter at large.

[m] 2 R. 3. 14. 2 R. 2. Estoppell, 20. 40 E. 3. 21. 12 E. 4. 13. 18 E. 3. 31. 35. 44 E. 3. 45. 17 Ass. 27. 45 E. 3. 2. 21 H. 7. 24. 5 E. 4. 7. 7 E. 4. 19. 3 E. 4. 11. 4 E. 3. 54. 7 E. 6. Br. Estop. 162. 11 H. 4. 30. 30 E. 3. 21. 31 Ass. 14.

[m] Seventhly, matters alleaged by way of supposall in counts shall not conclude after non-suit: otherwise it is after judgement given; and after non-suit, albeit the supposall in the count shall not conclude, yet the barre, title, replication or other pleading of either partie, which is precisely alleaged, shall conclude after non-suit; and hereby are the bookes reconciled.

[n] 37 Ass. 17. 38 H. 6. 12. 5 El. Dy. 222.

Eighthly, where the veritie is apparent in the same record, there the adverse party shall not be estopped to take advantage of the truth; for he cannot be estopped to alleage the truth, when the truth appeareth of record. [n] If a fine be levied without any originall, it is voydable, but not void; but if an originall be brought, and a *retraxit* entred, and after that a concord is made, or a fine levied, this is void, in respect the veritie appeareth of record.

[o] 7 El. Dy. 244.

[o] An impropriation is made after the death of an incumbent, to a bishop and his successors; the bishop by indenture demiseth the parsonage for fortie yeares, to begin after the death of the incumbent; the deane and chapiter confirmeth it, the incumbent dieth; this demise shall not conclude, for that it appeareth that he had nothing in the impropriation till after the death of the incumbent.

[p] Bract. f. 420. 26 Ass. 64. 39 Ass. 10. 11 H. 4. 84. 7 H. 6. 7. 33 Ass. 5. 11 E. 3. Estop. 229. 21 E. 3. 39. 19 R. 2. Estop. 282. 3 E. 3. ib. 23. 33 E. 3. Estop. Stath. Le stat. de 9 H. 6. ca. 11. 30 H. 6. 2. Doct. & Stud. 69. 34 H. 6. 39. 18 E. 4. 1. b. 10 E. 4. 16.

[p] Ninthly, where the record of the estoppell doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record; as outlawrie, excommengement, profession, attainder of *præmunire*, of felonie, &c. bastardie, muliertie, and shall conclude the partie, though they be strangers to the record. *Vide in Littleton, cap. Villenage, Sect.* 196, 197, &c. But of a record concerning the name of the person, qualitie,

(B) *Vid. ante* 303. *a. and the note under* (A) *there.*

litie, or addition, no estranger shall take advantage, because he shall not be bound by it. But *nota*, reader, that in case of the muliertie *primâ facie*, an estranger shall take benefit of it, &c. But yet because he may be a *mulier* by the ecclesiastical law, and a bastard by the common law, therefore against such a certificate pleaded, the adverse partie may alleage the speciall matter, and confesse the certificate of the bishop according to the ecclesiasticall law, and alleage further the speciall matter according to the common law, whereunto the adverse partie must answer; and so are the books that treat of this matter to be reconciled (1). But now let us returne to *Littleton*.

Sect. 668.

BUT if in the action of wast the husband make default to the grand distresse, and the wife pray to be received, and is received, shee may well shew the whole matter, and how shee is in her remitter, and shee shall barre the lessor of his action, &c.*

"*THE wife pray to be received, and is received.*" Receipt, *receptio*, commeth of the Latine verbe *recipere*, so called because the wife, upon the default of her husband, is received as a feme sole alone, without her husband, to defend her right; and it is also called *defensio juris*; and in this case the wife may bee received by the [*a*] statute: and yet [*b*] ancient authors who wrote before the statute, doe speake of a kind of receit at the common law. The civilians call resceit, *admissionem tertii pro suo interesse*, which more properly is resembled to the receipt of him in the reversion or remainder, that is no party to the writ. (Ant. 192. b.)

20 E. 1. Defensio juris.

[*a*] W. 2. ca. 3.

[*b*] Bract. f. 393. Mir. lib. 3. cap. Exceptions.

[353. a.]

☞ Sect. 669.

FOR in every case where the wife is received for default of her husband, she shall plead and have the same advantage in pleading, as shee were a woman sole, § &c. And albeit that the alienee made the lease to the husband and wife by deed indented, yet this is a remitter to the wife. And also, albeit the alienee rendereth the same land to the husband and his wife by fine for terme of their lives, yet this is a remitter to the wife, because a feme covert which takes an estate by fine, shall not be examined by the justices, † &c.

"*AS shee were a woman sole, &c.*" In this Section foure things are to be understood.

First, when a feme covert is received, that she shall plead as if she

* *&c.* not in L. and M. or Roh.

§ *&c.* not in L. and M. or Roh.

† *&c.* not in L. and M. or Roh.

(1) See note 1 to page 245. a.

she were sole. And this is regularly true, yet holdeth not in all cases: [c] for if a feme covert be received in an assise, and plead a record and faile, therefore she shall not be adjudged a disseisor, as shee should be if shee were sole, &c. So if a feme covert onely levie a fine executorie, and a *scire facias* is brought against her and her husband, if shee be received upon the default of her husband, shee shall barre the conusee, which if she had been sole, shee could not doe, and in some other cases.

[c] 37 Ass. 1.

17 Ass. 17. 29 E. 3. 43. 5 E. 3. Voucher, 178.

Secondly, that though the estate taken backe be by deed indented, yet that shall not hinder the remitter in case of a feme covert, or an infant.

Thirdly, that though it be by fine *sur render*, yet that shall not hinder the remitter; because a feme covert is not to be examined upon any fine, but when shee and her husband passe some estate or interest, or release her right by a fine of the lands or tenements.

(10 Rep. 43.)

Fourthly, if the husband levie a fine of his wife's lands, and the conusee grant and render the land to the husband and wife, although the wife be not partie to the originall, nor to the conusans, and therefore she ought not by the law to take any present estate but by way of remainder only; yet here it is proved by *Littleton* that the grant and render *de facto* to the wife *in præsenti* is not void; for then it could not worke a remitter, but voidable by writ of error; and that avoidable estate doth worke a remitter (1).

Trin. 27 Eliz. inter Owen & Morgan. Rot. 276. in banco communi, Li. 3. fol. 5. the marquesse of Winchester's case. 7 E. 3. 64. 13 E. 1. Voucher, 119.

(3 Rep. 5. a.)

"*Shall not be examined by the justices, &c.*" The examination of a feme covert ought to be secret; and the effect is to examine her, whether shee be content to levie a fine of such lands (naming them particularly and distinctly, and the state that passeth by the fine) of her owne voluntary free will, and not by threats, menaces, or any other compulsorie meanes.

Sect. 670.

AND here note, that when any thing shall passe from the wife which is covert of a husband by ☞ force of a fine: as if the husband and wife make conusance of right to another, &c. or make a grant and render to another, or release by fine unto another, et sic de similibus, *where the right of the wife shall passe from the wife by force of the same fine; in all such cases the wife shall be examined before that the fine be taken, because that such fines shall conclude such femes coverts for ever,* * *&c. But where nothing is moved in the fine but onely that the husband and wife doe take an estate by force of the said fine, this shall not conclude the wife; for that in such case she shall not be at all examined,* † *&c.* [353. b.]

"*WHEN*

* *&c.* not in L. and M. or Roh. † *&c.* not in L. and M. or Roh.

(1) V. From this passage, and others mentioned both by Littleton and Coke, it appears to be a general rule, that *the remitter shall take effect, though the estate which made the remitter is voidable*; as if it be taken from an infant, a feme covert, or upon condition. See Com. Dig. tit. *Remitter*, B. 1.—[Note 307.]

"*WHEN any thing shall passe from the wife covert, &c. by force of a fine, &c.*" And of this opinion is [*d*] *Littleton* in our bookes.

[*] Therefore if the husband and wife be tenants in speciall tayle, and they levie a fine at the common law, and after the husband and wife take backe an estate to them and their heires; in this case the estate tayle is not barred; and yet against a fine levied by her selfe she cannot be remitted, because thereupon she was examined: but in that case if the land descend to her issue, he shall be remitted (1).

[*d*] 15 E. 4. 28. 24 E. 3. 31. 42 E. 3. 6. 3 H. 6. 42. 20 E. 3. tit. Cui in vita, 10. [*] 29 E. 3. 43. 46 E. 3. 5.

Sect. 671.

ALSO if tenant in taile discontinue the taile, and hath ‡ *issue a daughter, and dieth, and the daughter being of full age taketh husband, and the discontinuee make a release of this to the husband and wife for terme of their lives, this is a remitter to the wife, and the wife is in by force of the taile,* causâ quâ suprà, *&c.*

"*AND the daughter being of full age taketh husband, &c.*" Here it appeareth, that her full age when she tooke baron is not materiall, but her coverture at the taking backe of the estate. And so note a diversitie betweene a remitter and a discent: for if a woman be disseised, and being of ful age taketh husband, and then the disseisor dieth seised, this discent shall binde the wife, albeit she was covert when the discent was cast, because she was of full age when she tooke husband, as appeareth before in the Chapter of Discents. But albeit the wife that hath an ancient right, and being of full age, taketh a husband, and the discontinuee letteth the land to the husband and wife for their lives, this is a remitter to the wife, for remitters to ancient rights are favoured in law.

(Ant. 246.)

[354. a.]

☞ Sect. 672.

(Hob. 260.)

ALSO if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the husband alien the land in fee, and take backe an estate to him and to his wife

‡ *issue* not in L. and M. or Roh.

(1) Since Littleton wrote, several statutes have been passed, which have given rise to a great extension of the doctrine respecting alienations by husbands of their wives estates. These are chiefly the statutes of the 4 H. 7, respecting the force and effect of fines, the 27 H. 8, for transferring uses into possession, and the 32 H. 8, for preserving the estates of wives against the alienations of their husbands. The reader will find the effect of these statutes upon the doctrine of remitter, investigated in a very copious and masterly manner in lord chief justice Hobart's account of his argument on giving judgment in the case of Duncombe *v.* Wingfield. See his Rep. page 254.—[Note 308.]

wife for terme of their two lives; in this case this is a remitter in deed to the husband and to his wife, mauger the husband. For it cannot be a remitter in this case to the wife, unlesse it be a remitter to the husband, because the husband and wife are all one same person in law, though the husband be stopped to claime it. * *And therefore this is a remitter against his owne alienation and reprisel, as is said before* †.

HERE it appeareth, that the husband against his owne alienation, if he had taken the estate to him alone, could not have beene remitted. But when the estate is made to the husband and wife, albeit they be but one person in law, and no moities betweene them; yet for that the wife cannot be remitted in this case, unlesse the husband be remitted also, and for that remitters, as hath beene often said, are favoured in law, because thereby the more antient and better rights are restored againe; therefore in this case, in judgement of law, both husband and wife are remitted; which is worthy of great observation.

(Hob. 255.)

Sect. 673.

ALSO, if land be given to a woman in taile, the remainder to another in taile, the remainder to the third in taile, the remainder to the fourth in fee, and the woman taketh husband, and the husband discontinue the land in fee; by this discontinuance all the remainders are discontinued. For if the wife die without issue, they in the remainder shall not have any remedie but to sue their writs of formedon *in the remainder, when* ☞ *it comes to their times* ¶. *But if after such discontinuance, an estate be made to the husband and wife for terme of their two lives, or for terme of another man's life, or other estate, &c. for that this is a remitter to the wife, this is* ⸸ *also a remitter to all them in the remainder. For after that the wife which is in her remitter be dead without issue, they in the remainder may enter, &c. without any action suing, &c. In the same manner is it of those which have the reversion after such entailes* ‡.

[354. b.]

41 E. 3. 17.
41 Ass. 1.
36 Ass. p. 4.

LITTLETON having spoken of remitters to the issue in taile, who is privie in bloud, and to the wife, who is privie in person, now he speaketh of remitters to them in reversion or remainder expectant, upon an estate taile, who are privie in estate. And this case proveth that the wife is remitted presently; for the equitie of the law requireth, that as the discontinuance of the estate in taile is a discontinuance of the reversion or remainder; so, that the remitter to the estate in taile should be a remitter to them in the reversion or remainder.

44 Ass. p. 15.
44 E. 3. 30.
(2 Roll. Abr. 421. 3 Cro. 145. W. Jones, 199.)
20 E. 3. Aid. 29.

Tenant for life the remainder to *A.* in taile, the remainder to *B.* in fee, tenant for life is disseised, a collaterall ancestor of *A.* releaseth with warrantie and dieth, whereby the estate taile is barred; the tenant for life re-entreth, the disseisor hath an estate

* *And therefore* not in L. and M. or Roh.

† *&c.* added in L. and M. and Roh.

¶ *&c.* added in L. and M. and Roh.

⸸ *also* not in L. and M. or Roh.

‡ *&c.* added in L. and M. and Roh.

estate in fee simple determinable upon the estate taile, and the remainder of *B.* is revested in him; and so note in this case the estate for life and the remainder in fee are revested and remitted, and an estate of inheritance left in the disseisor. If a fine be levied *sur grant et render* to one for life or in taile, the remainder in fee, if tenant for life, or in taile, execute the estate for life or in taile, this is an execution of the remainder.

A gift in taile is made to *B.* the remainder to *C.* in fee, *B.* discontinueth and taketh backe an estate in taile, the remainder in fee to the king by deed inrolled; tenant in taile dieth, his issue is remitted, and consequently the remainder, as *Littleton* here saith; and the diversity is [*a*] betweene an act in law, for that may devest an estate out of the king, and a tortious act, or entry, or a false and a feined recovery against tenant for life or in taile, which shall never devest any estate, remainder, or reversion out of the king. [*b*] But a recovery by good title against tenant for life, or in taile, where the remainder is to the king by defeasible title, shall devest the remainder out of the king, and restore and remit the right owners (1).

Vid. Pl. Com. 489. Nichol's case, & fol. 553. in Walsingham's case. 17 Eliz. Dier, 344. 25 E. 3. 48. tit. Resceit, 28. 49 E. 3. 16. [*a*] Seignior Stafford's case, lib. 8. fol. 76. b. [*b*] Cholmley's case, lib. 2. 53. 7 R. 2. Aide le Roy, 61. 22 E. 3. 7.

Sect. 674, 675.

ALSO, if a man let a house to a woman for terme of her life, saving the reversion to the lessor, and after one sue a feyned and false action against the woman, and recovereth the house against her by default, so as the woman may have against him a quod ei deforceat, *according to the statute of Westm. 2. now the reversion of the lessor is discontinued, so that he cannot have any action of waste. But in this case if the woman take husband, and he which recovereth let the house to the husband and his wife for terme of their two lives, the wife is in her remitter by force of the first lease.*

Sect. 675.

AND if the husband and wife make waste, the first lessor shall have a writ of wast against them, for that inasmuch as the wife is in her remitter, he is remitted to his reversion. But it seemeth in this case, if hee that recovereth by the false action, will bring another writ of waste against the husband and his wife, the husband hath no other remedie against him, but to make default to the grand distresse, &c. and cause the wife to be received, and to plead this matter against the second lessor, and shew how the action wherby hee recovered was false and fained in law, &c. so the wife may bar him (issint le feme poit * luy barrer, &c.)

" *A FEYNED*

* luy *not in L. and M. or Roh.*

(1) VI. Thus it may be laid down as another general rule, that a remitter *to the particular estate is a remitter to him in the reversion or remainder.* See Com. Dig. tit. Remitter, B. 5.—[Note 309.]

(5 Rep. 85. 2 Inst. 350. 11 Rep. 62.)

"A FEYNED *and false action.*" 1. *Actio ficta et falsa*, but hereof *Littleton* speaketh himselfe in this Chapter.

[c] W. 2. cap. 4. (Ant. 331. b.)

"*Quod ei deforceat,*" is a writ that is given by [c] statute to any tenant for life or in tayle upon a recovery by default against them in a *præcipe*, and lyeth against the ☞ recoveror and his heires, in which case the particular tenant was without remedie at the common law, because hee could not have a writ of right. And it is called a *quod ei deforceat*, for that they are part of the words of that writ, viz. *Præcipe A. quod, &c. reddat B. unum mesuagium, &c. quod clamat esse jus et maritagium suum, et quod idem A. ei injustè deforceat.*

[355. a.]

Bracton, lib. 4, 367. Flet. lib. 5, cap. 22, & ii. 6. cap. 14. 7 E. 3. 62. F. N. B. 155. (6 Rep. 8. b.) (Cro. Jac. 292. Cro. Car. 178. 444.)

(F. N. B. 155. b.)

"*Recovereth, &c. by default.*" There hath beene a question in our bookes upon these words (by default): as for example, whether a recoverie had by default in an action of waste against tenant in dower, or by the courtesie, a *quod ei deforceat* lyeth by the said statute. And divers hold opinion, that in that case no *quod ei deforceat* lieth, for that judgement is not given by default; for notwithstanding the default, there goeth out a writ to enquire *de vasto facto, et quod vastum prædictum* A. *(the defendant) fecit*; so as the defendant may give evidence, and the jurors may finde for the defendant, that no waste was done: as in the assise albeit it bee awarded by default, yet may the tenant give evidence, and the recognitors of the assise may finde for the tenant; and therefore in those cases, the defendant or tenant *non amittit per defaltam*, as the statute and *Littleton* speaketh, and they cite *F. N. B.* in the point (1).

W. 2. cap. 4.

F. N. B. fol. 155. E.

Secondly,

(1) *Co. MSS.* 215, p. 33 *Eliz. Elmer* v. *Thackers. The case was this. Elmer and his wife, tenant in dower, brought* quod ei deforceat versus *W. Thacker, who pleaded, that* 30 *Elix. he brought waste against the demandants who appeared, and upon* nihil dicit *W. Thacker recovered damages and had judgment. The demandants replied,* nul wast fait. *The tenant demurred in law; and these points were moved,* 1*st, Whether* quod ei deforceat *lies upon recovery by default against tenant in dower in waste.* 2*d, Admitting that it does, whether* quod ei deforceat *lies upon the recovery by* nihil dicit, *as this case is. As to the second point, the whole court resolved clearly, that* quod ei deforceat *does not lie; for in as much as the judgment upon* nihil dicit *is after appearance, there the default is not the cause of the judgment; and the statute says,* per defaltam: *and for this reason judgment was given against the demandant, as appears afterwards in page* 356. *But as to the* 1*st point it was objected, that* quod ei deforceat *does not lie upon default of tenant in dower in waste, as is the case here; for if it should lie in this case, he shall avoid the verdict of twelve men, which was not the intention of the statute, but only to relieve the tenant where he makes default; therefore, in as much as the tenant, notwithstanding the default, might give evidence to the jury, then every person in policy might make default, if afterwards he might prevail upon evidence to have* quod ei deforceat: *and the reason of F. N. B. is, that the verdict has found waste.* 2 *Hen.* 2. *If in waste the jury find falsely, attaint lies, and* 21 *Hen.* 6. 56. 34 *Hen.* 6. 12.; *so where the assise is awarded for default, yet the tenant may have attaint, if it be found against him by false oath.* 17 *Ed.* 2. *Attaint,* 89. 34 *Hen.* 6. 7. *Prior recovers in waste, and has a writ of inquiry in waste, and the sheriff returns the waste* 20 *marks, and awards that he shall recover the place wasted, and treble damages,*

Secondly, they hold that a *quod ei deforceat* lieth where the tenant can have no remedie by attaint; but in this case (say they) an attaint doth lie. 2 H. 4. 2. 21 H. 6. 56. 41 E. 3. 8. 3 H. 6. 29. 22 E. 3. 19.

Thirdly, they hold, that in an action of waste although it be brought against a tenant in dower, or tenant by the courtesie that have a freehold, yet the dammages are the principall; for they were recoverable against tenant in dower and by the courtesie by the common law; and the statute of *Glocester* gave ☞ the place wasted but for a penaltie, so as the nature of the action (say they) remaineth still to bee personall, for that the dammages are the principall: [d] and in proofe hereof they cite divers authorities in law. And if two bring an action of waste, the release of one of them is a good barre against the other, [e] and so resolved by the whole court; which proveth (say they) that the dammages are the principall: for if the land were the principall, the release of one of them should not barre the other, no more than in an assise, a writ of ward, an *ejectione firmæ*, &c. (8 Rep. 85.) [355. b.] (7 Rep. 68. b.) [d] 34 H. 6. 7. 40 E. 3. 37 & 38 E. 3. [e] 9 H. 5. 15. 30 H. 6. tit. Bar. 59.

Lastly, they say, that in actions where dammages are to be recovered, and the land is the principall, the demandant never counteth to dammages, and yet shall recover them: but in an action of waste the plaintiffe counteth to his dammage; and if the dammages be the principall, then cleerely no *quod ei deforceat* lieth.

Others doe hold the contrarie: and as to the first they say, that albeit that in the writ of waste, judgement is not only given upon the default, yet the default is the principall, and the cause of awarding of the writ to enquire of the waste as an incident thereunto: and the law alwayes hath respect to the first and principall cause; and therefore upon such a recoverie [*] a writ of deceit lieth; and that writ lieth not but where the recoverie is by default. So in an action of waste against the husband and wife, upon the default of the husband, the wife shal be received; and yet the statute there speaketh also, *per defaltam*. So upon such a recoverie in waste against the baron and feme by default, the wife shall have a *cui in vitâ* by the statute; and it speaketh where the recoverie is *per defaltam*. And albeit the defendant may give in evidence, if he knoweth it; yet when he makes default, the law presumeth he knoweth not of it, and it may be that he in truth knew not of it; and therefore it is reason, that seeing the statute, that is a beneficiall statute, hath given it him, that he be admitted to his *quod ei deforceat*, in which writ the [*] 17 E. 3. 58 29 E. 3. 42. F. N. B. 98. B. 12 H. 4. 4. 19 E. 2. Disceit, 56. W. 2. cap. 3. 3 H. 4. fol. 1. W. 2. ca. 3. 9 E. 4. 16.

damages, and that he shall have execution for the damages immediately, licet cesset *execution for the thing wasted till the collusion should be inquired into, therefore the damages are the principal; for it is no where found that execution should be awarded of the accessory before the principal: and for this reason,* 12 *Rich.* 2. *Estrepement* 6. *judgment shall not be given in the estrepement, because it is only the accessory, until judgment shall be given in the principal plea. And in Elmer's case, ante* 355. *it was resolved, that this writ lies upon recovery by default in waste against tenant in dower, or any other tenant for life.*—Lord Not. MSS.—[Note 310.]

41 E. 3. 8. b. 2 H. 4. 2. 21 H. 6. 56. 44 E. 3. 42. Br. tit. Quod ei deforc. 4 Pasch. 33 El. Rot. 1125. inter Ed. Elmer & El. sa feme, ten. en dower demandants, & Wil. Thacker ten. in quod ei deforceat. (Cro. Eliz. 263.)

the truth and right shall be tried. And so it is of a recoverie by default in an assise; albeit the recognitors of the assise give a verdict, a *quod ei deforceat* lieth. And all this as to this point was resolved by the whole court of common pleas; and so the doubt in 41 *E.* 3. 8. well resolved. *Nota*, if tenant for life make default after default, and he in the reversion is received and plead to issue, and it is found by verdict for the demandant, the default and the verdict are causes of the judgement; and yet the tenant shall have a *quod ei deforceat.*

[*f*] 33 E. 3. Quod ei deforc. Pl. ult. F. N. B. 156. V. Flet. l. 5. c. 21. 48 E. 3. 19. 40 Ass. 23. 33 H. 6. 25. 39 H. 6. 1. F. N. B. 107. [*g*] 17 E. 2. Attaint. 69. 21 H. 6. 56. 34 H. 6. 12. (1 Cro. 414. Mo. 184. F. N. B. 107. C. 6 Rep. 8. b. 11 Rep. 5.)

As to the second objection, that the defendant may have an attaint. First it was utterly denied, of the other part, [*f*] that an attaint did lie in this case; for though it be taken by the oath of twelve men, yet it is but an enquest of office, whereupon no attaint did lye on either partie, as upon an enquirie of collusion, although it be by one jurie, nor upon a verdict of *quale jus.* Secondly, admitting that an attaint did lie in that case, yet it followeth not *ex consequenti*, that a *quod ei deforceat* did not lie; [*g*] for if an assise bee taken by default, a *quod ei deforceat* doth lie; and yet the partie may have an attaint; for this is no enquest of office, but a recognition by the recognitors of an assise, who were returned the first day, and not returned upon the awarding of the assise by default. And as to the second objection, of this opinion was the whole court in *Edward Elmer*'s case above mentioned. As to the third objection, that the dammages should bee the principall, because they were at the common law; that is an argument (say the other side) that they are more antient, but not that they are more principall; and treble dammages were not at the common law (for the common law never giveth more dammage than the losse amounteth unto), but are given by the statute of *Glocester*; but the place wasted is worthier being in the realtie, than dammages that be in the personaltie: *Et omne majus dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius et à digniori debet fieri denominatio.* And it is confessed, that in an action of waste against tenant for life, or for yeares, the place wasted is the principall, because the statute of *Glocester* doth give the place wasted and treble dammages at one time; for no prohibition or action of waste lay against them at the common law; and in an action of waste, if the defendant confesse the action, the plaintife may have judgement for the place wasted, and release the dammages; which proveth (and so *Fitzherbert* collecteth) that the dammages are not the principall: for a man shall never release the principall and have judgement of the accessorie: and an action of waste against tenant for life is as reall as an action against tenant in dower. And as to the case of 9 *H. 5.* cited on the other side, it was answered, that it was an action in the *tenuit*, which is only in the personaltie, and then the release of the one doth bar both; neither could summons and severance lie in that case; [*h*] but in an action of waste (in the *tenet*), either against tenant for life or for yeares, the release of the one doth not barre the other; and in both those cases summons and severance doth lie: and this point was also resolved accordingly in *Edward Elmer*'s case. But when these three points were resolved by the court for the demandant, then the councell of the tenant moved in arrest of judgement another point, viz. that the judgement was given upon a *nihil dicit*, which

34 H. 6. 7. Wast. 50.

(10 Rep. 115. 1 Leo. 297. 6 Rep. 44.)

[*h*] 6 E. 3. 47. 48 E. 3. 19.

(2 Rep. 68. b. Ant. 139. a. 285. a.)

is

is alwayes after appearance, and not *per defaltam*; and thereupon judgement was stayed (1).

[356. a.] ☞ But to returne to *Littleton*. Here he openeth a secret of law; for the cause of this remitter is, for that the tenant for life in this case might have a *quod ei deforceat*, for so *Littleton* saith: *so as she may have a quod ei deforceat*: Now it appeareth by our bookes, that the tenant for life at the common law was remedilesse, because he could not have (as hath beene sayd) a writ of right; and consequently the feme covert in this case could not bee remitted by the taking of an estate to her husband and her, because her right was remedilesse, and could have no action. But when an act of parliament or a custome doth alter the reason and cause thereof, thereby the common law it selfe is altered, if the act of parliament and custome be pursued; for *Alteratâ causâ et ratione legis, alteratur et lex*,

(8 Rep. 62. 356. F. N. B. 155. B. 2 Inst. 350.)

Vide for the cases upon this ground, 14 H. 7. 11. per Fineux. 27 H. 8. 4. b. [1] Lib. 3. fol. 86.

Aid. 35 H. 6. Gard. 72. 29 E. 3. 5. per Wilbie Custome. Justice Windham's case, a. & b.

(1) Sir Edward Coke, in his commentary on the statute of Gloucester, 2 Inst. 286. observes, that regularly in personal and mixed actions damages were to be recovered at the common law; but that in real actions no damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not; and the demandant in real actions demanded no damages either by writ or count. The assise was a mixed action; and therefore if upon the trial the demandant made out his title, his seisin, and his disseisin by the tenant, he had judgment to recover his seisin and his damages for the injury sustained. But the damages in these cases were awarded against the disseisors only, and not against their alienees or tenants. The statute of Marleberge, 52 Hen. 3. c. 16. gave damages in a writ of mortauncestor against the chief lord. The statute of Gloucester, 6 Ed. 1. c. 1. was a considerable extension of the law of damages. It ordained, that if the disseisor should alien the lands, and should not have whereof damages might be levied, the person into whose hands the tenements came should be charged with the damages, so that each should answer for the time he held them; that the disseisee should recover damages on a writ of entry *sur disseisin* against him who was found tenant against the disseisor; that damages should for the future be recovered in a writ of mortauncestor, as in one of novel disseisin; and also in writs of cosinage, aiel, and besaiel; and generally, that damages should in all cases be rendered where the land was recovered against a man upon his own intrusion, or his own act. The statute then mentions, that till that time damages had been taxed only to the value of the issues of the land: it was therefore provided, that a demandant in future should recover the costs of the writ purchased, together with the damages, not only in the above instances, but generally in cases where he was entitled to recover damages. Though this statute only mentions the costs of the writ, the construction of it has been extended to the whole expense of carrying on the suit. Before this statute the justices in eyre used, where the plaintiff obtained a verdict, to compute the expenses of the suit, and in assessing damages, assessed a sum sufficient to satisfy that expense as well as the damages. The statute of Marlbridge gave costs in particular cases to the defendant; so that it is a mistake to say, that the statute of Gloucester was the first statute by which costs were given. See Sayer's Law of Costs, p. 3. The general law of costs still rests on the statute of Gloucester; so that where costs were not recoverable before that statute, they are not recoverable now, unless in those cases where they have been given either by the statute of Gloucester or by some subsequent statute.—[Note 311.]

lex, et cessante causâ seu ratione legis cessat et lex: as in this case the statute of *W.* 2. giving remedie to this feme tenant for life, in this it giveth her abilitie to bee remitted, because her right is not now remedilesse, but shee hath an action to recover it.

And *Littleton* warily putteth his case, that the recoverie was had against the feme while she was sole; for there was a time when it was a question, whether a recoverie being had by default against the husband and wife, (the wife being tenant for life) the said statute gave a *quod ei deforceat* to the husband and wife, for that the statute gave it against tenant in dower and tenant for life, &c. and here the husband is not tenant for life, but seised in the right of his wife, and therefore out of the statute: and of this opinion is one [g] booke; but (*Apices juris non sunt jura, et parùm differunt quæ re concordant*) the contrarie hath beene adjudged, and so that point is now in peace: and the like in case of receit for him in reversion. But if the husband and wife lose by default, and the husband die, the wife shall not have a *quod ei deforceat*; for a *cui in vitâ* is given to her in that case by a former statute, viz. *W.* 2. *cap.* 3. These things are worthy of due observation, and points of excellent learning; and *Littleton* in our bookes speakes of another kinde of *quod ei deforceat* at the common law, upon a disseisin, which you may read. But now let us heare him in his booke.

[g] 4 E. 3. 38. 33 E. 3. Avowrie, 255. 5 E. 3. 4. F. N. B. 156. A. 5 E. 3. 5. 2 E. 4. 13. F. N. B. 156. C. 33 H. 6. 46. 2 E. 4. 11. 19 E. 4. 2.

"*The reversion is discontinued, so that he cannot have any action of waste.*" Here it appeareth, that when the reversion is devested, the lessor cannot have an action of waste, because the writ is, that the lessee did waste *ad exhæredationem* of the lessor, and that inheritance must continue at the time of the action brought. And it is to bee observed, that in an action of waste brought by the lessor against the lessee, the lessee in respect of the privitie cannot plead generally, *riens en le reversion*, viz. [h] that the lessor hath nothing in the reversion, but he must shew how and by what meanes the reversion is devested out of him; and this holdeth (as hath been said) betweene the lessor and the lessee; but if the grantee of a reversion bringeth an action of waste, the lessee may plead generally, that he hath nothing in the reversion. And yet in some speciall cases an action of waste shall lie, albeit the lessor had nothing in the reversion at the time of the waste done. As if tenant for life make a feoffment in fee upon condition, and waste is done, and after the lessee re-enter for the condition broken; in this case the lessor shall have an action of waste. And so if a bishop make a lease for life or yeares, and the bishop die, the lessee, the fee being void, doth waste, the successor shall have an action of waste. So if lessee for life be disseised, and waste is done, the lessee re-enter, an action of waste shall be maintained against the lessee; and so in like cases: and yet in none of these cases the plaintiffe in the action of waste had any thing in the reversion at the time of the waste made; but these especiall cases have their severall and especiall reasons, as the learned reader will easily finde out.

45 E. 3. 21. 44 E. 3. 34, 35. F. N. B. 60. 23 H. 8. tit. Wast. Br. 138. (Cro. Car. 405. Ant. 327. a. 334. b.)

[h] 46 E. 3. 20. 8 H. 6. 17. 30 H. 6. 7.

(Ant. 54. a. Mo. 52.)

(F.N.B. 112. b.)

(Post. 362. a.)

Here note, that albeit the action be false and feigned, yet is the recoverie so much respected in law, as it worketh a discontinuance. [i] But if tenant for life suffer a common recoverie, or any other recoverie by covine and consent betweene the

[i] 5 Ass. pl. 3. 5 E. 3. Ent. Cong. 42.

15 E. 3. Age, 95. 21 E. 3. 18. per Finchden. 22 E. 3. 2. b. Lib. 1. fol. 15. Sir Will. Pelham's case. 14 El. cap. 8.

tenant

tenant for life and the recoveror, this is a forfeiture of his estate, and he in the reversion may presently enter for the forfeiture. Since our author wrote, the statute of 14 *El. cap.* 6, hath beene made concerning this matter, which is to be considered, [*k*] and hath beene well construed and expounded, and needs not here to be repeated.

[*k*] Lib. 3. fol. 60. Lib. 1. fol. 15.

And it is to be observed, that although the discontinuance groweth by matter of record, yet the remitter may be wrought by matter *in paiis:* and of the residue of these two Sections sufficient hath beene said before.

[356. b.] ☞ Sect. 676. (2 Inst. 343. F. N. B. 193. a.)

ALSO, if the husband discontinue the land of his wife, and after taketh backe an estate to him and to his wife, and to a third person for terme of their lives, or in fee, this is no remitter to the wife, but as to the moitie (ceo * n'est un remitter a la feme, forsque quant a la moity); *and for the other moitie shee must after the death of her husband sue a writ of* cui in vitâ †.

"*THIS is no remitter but as to the moitie, &c.*" Albeit there is authoritie in our bookes to the contrarie, yet the law is taken as *Littleton* here holdeth it, and as before it appeareth in the like case in this Chapter, and for the reason therein expressed.

44 E. 3. 17. 44 Ass. 2. 43 Ass. 3. Vid. Sect. 666.

Sect. 677.

ALSO, if the husband discontinue the land of his wife, and goeth beyond sea, and the discontinuee let the same land to the wife for terme of her life, and deliver to her seisin; and after the husband commeth backe, and agreeth to this liverie of seisin, this is a remitter to the wife: and yet if the wife had beene sole at the time of the lease made to her, this should not be to her a remitter. But inasmuch as she was covert baron at the time of the lease, and liverie of seisin made unto her, albeit shee taketh only the liverie of seisin, this was a remitter to her because a feme covert shall be adjudged as an infant within age in such a case, &c. Quære *in this case if the husband when hee comes backe, will disagree to the lease and livery of seisin made to his wife in his absence, if this shall ouste his wife of her remitter, or not, &c.* (si ‡ ceo oustera son feme de son remitter, ‖ ou nemy, &c.)

"*AND after the husband commeth backe, and agreeth, &c.*" In this case the estate is in the feme covert presently by the liverie before any agreement by the husband; and of this opinion is *Littleton* in our bookes.

15 E. 4. 1. b. 7 H. 4. 17. 1 H. 7. 16. b. 39 E. 3. 30. 27 H. 8. 24.

" *Goeth*

* n'est—est, *L. and M. and Roh.*
† *&c.* added in L. and M. and Roh.
‡ ceo—jeo, *L. and M. and Roh.*
‖ ou nemy, &c. *not in L. and M. or Roh.*

(4 Inst. 146.) "*Goeth beyond sea.*" If hee had beene within the realme, it doth not alter the case.

"*Quære in this case if the husband, &c.*" Here is a question moved by *Littleton*, whether the disagreement of the husband shall ouste the wife of her remitter. And it seemeth that the disagreement shall not devest the remitter.

First, because the state made to the wife which wrought the remitter is banished and wholly defeated, and therefore no disagreement of the husband can devest the state gained by the lease, which by the remitter was devested before.

Secondly, for that the law having once restored her antient and better right, will not suffer the disagreement of the husband to devest it out of her, and to revive the ☞ discontinuance, and revest the wrongfull estate in the discontinuee. [357. a.]

Thirdly, for that remitters tending to the advancement of ancient rights are favoured in law.

41 E. 3. 18. (Plo. 114. b.) And so it is for the same causes, if the wife survive her husband, she cannot claime in by the purchase made during the coverture; but the law adjudgeth her in her better right. But

18 Eliz. Dier, 351. if both estates be waiveable, there albeit the wife *primâ facie* is remitted; yet after the decease of her husband she may elect which of the estates she will. As if lands be given to the husband and wife, and their heires, the husband make a feoffment in fee, the feoffee giveth the land to the husband and wife and the heires of their two bodies, the husband dieth; in this case the wife may elect which of the estates shee will; for both estates are waiveable, and her time of election and power of wayver accrewed to her first after the decease of her husband. If lands be given to a man and the heires females of his body, and he maketh a feoffment in fee, and take backe an estate to him and his heires, and dieth, having issue a daughter, leaving his wife *grossement enseint* with a sonne (A) and dieth, the daughter is remitted; and albeit the sonne be afterward borne, he shall not devest the remitter (1).

(2 Rep. 37. 3 Rep. 26. b. 32. a. 2 Roll. Abr. 421, 422, 423. 9 Rep. 140. b. 2 Cro. 489. Ante, 246. a. 348 3 Leon. 2.)

Sect. 678.

ALSO, if the husband discontinue the lands of his wife, and the discontinuee is disseised, and after the disseisor letteth the same lands to the husband and wife for terme of life, this is a remitter to the wife. But if

(A) *Here the words* " and dieth," *are repeated, and appear to be printed by mistake.*

(1) VII. *The remitter defeats the wrongful estate immediately without entry*; yet where both estates are waveable by a wife, without prejudice to a third person, she may wave which she pleases. But if a third person is interested, she must take her ancient estate. Thus, if there be a feoffment to the husband and wife in tail, remainder to *A.* the husband discontinues, and takes back an estate to him and his wife in tail, remainder to *B.* though the wife in respect to herself may take either the original estate tail, or the estate tail created by the feoffment, both the estates being after marriage; yet she ought to take the first, being for the benefit of *A.* the rightful remainder-man. Hob. 17. 255. —[Note 312.]

if the husband and his wife were of covine‡ and consent that the disseisin should be made, then it is no remitter to his wife, because she is a disseiseresse. But if the husband were of covin and consent to the disseisin, and not the wife, then such lease made to the wife is a remitter, for that no default was in the wife.

"*AND after the disseisor letteth the same lands, &c.*" Note, so much are remitters favoured in law, that the state made by the disseisor (which commeth to the land by wrong, and upon whom the entry of the discontinuee is lawfull) doth remit the wife, and devesteth all out of the discontinuee, albeit he hath a warrantie of the land. 18 E. 4. 2. b. (F. N. B. 98. C.)

"*But if the husband and wife were of covine and consent, &c.*" Here it appeareth that covin and consent of the husband and wife doth hinder the remitter of the wife; for covine and consent in many cases to do a wrong, doth choak a meere right, and the ill manner doth make a good matter unlawfull. 18 E. 4. ubi supra. (3 Rep. 71.)

[357. b.] "*Covine.*" *Covina*, commeth of the French word *Convine*, and is a secret assent ☞ determined in the hearts of two or more to the defrauding and prejudice of another. Pl. Com. 546. in Wimbishe's case. (Ant. 35. a. 4 Rep. 82. b. F. N. B. 98. D.)

A woman is lawfully intitled to have dower, and she is of covine and consent, that one shall disseise the tenant of the land, against whom she may recover her lawfull dower, all which is done accordingly; the tenant may lawfully enter upon her, and avoid the recovery in respect of the covine. But if a disseisor, intruder, or abator, doe endow a woman that hath a lawfull title of dower, this is good, and shall binde him that right hath, if there were no such covine or consent before the disseisin, abatement, or intrusion. 44 E. 3. 46. 11 H. 4. 60. 44 Ass. 29. 19 H. 8. 12. 18 H. 8. 5. 11 E. 4. 2. 7 H. 7. 11. (3 Rep. 78. Plo. 51. a. 54. Ant. 35. a.)

And so it is in all cases where a man hath a rightfull and just cause of action; yet if he of covine and consent doe raise up a tenant by wrong against whom he may recover, the covine doth suffocate the right, so as the recovery, though it be upon a good title, shall not binde or restore the demandant to his right. 41 Ass. p. 28. 25 Ass. p. 1. 27 Ass. 74. 15 E. 4. 4. a. 12 Ass. p. 10.

If tenant in taile and his issue disseise the discontinuee to the use of the father, and the father dieth, and the land descendeth to the issue, he is not remitted against the discontinuee in respect he was privie and partie to the wrong: but in respect of all others he is remitted, and shall deraigne the first warrantie. And so note a man may be remitted against one, and not against another. 11 E. 4. 2. 15 E. 4. 23. 14 H. 8. 13. 33 H. 6. 5. 12 H. 4. 21. b.

A. and *B.* joyntenants be intitled to a reall action against the heire of the disseisor, *A.* cause the heire to be disseised, against whom *A.* and *B.* recover and sue execution. *B.* is remitted, for that he was not partie to the covine, and shall hold in common with *A.*; but *A.* is not remitted, for the reason that *Littleton* here sheweth.

"*Because she is a disseisoresse.*" *Nota*, it is regularly true, that a feme covert cannot be a disseisoresse by her commande- F. N. B. 179. G. 12 E. 4. 9. 35 Ass. 5.

44 E. 3. 9. 23. 13 Ass. 1. Temps E. 1. Waste, 128. 18 Ass. p. 7. 21 E. 4. 53. 21 H. 7. 35. 3 H. 4. 17. (1 Roll. Abr. 278. 666. F. N. B. 117. G.)

ment

‡ *and*—*or*, L. and M. and Roh.

ment or procurement precedent, nor by her assent or agreement subsequent; but by her actuall entry, or proper act, she may be a disseisoresse. And therefore some doe hold that *Littleton* must be intended, that the husband and wife were present when the disseisin was done; and others doe hold that *Littleton* is good law, albeit she were absent; for that if her procurement or agreement be to doe a wrong, to cause a remitter unto her in this speciall case, she shall faile of her end, and remitted she shall not be: but in this speciall case she shall be holden as a disseisoresse by her covine and consent *quatenus* to hinder the remitter. And here it appeareth, that albeit the husband be of covine and consent, &c.; yet if the wife were not of covine and consent also, she shall be remitted, because, as *Littleton* saith, there was no default in the wife.

(4 Rep. 52.)

Sect. 679.

ALSO, if such discontinuee make an estate of freehold to the husband and wife by deed indented upon condition, scilicet, *reserving to the discontinuee a certaine rent, and for default of payment a re-entrie, and for that the rent is behind the discontinuee enter; then for this entrie the wife shall have an assise of* novel disseisin, *after the death of her husband against the discontinuee, because the condition was altogether taken away, inasmuch as the wife was in her remitter; yet the husband with his wife* ☞ *cannot have an assise, because the husband is estopped, &c.* [358. a.]

Pl. Com. in Amy Townshend's case. 12 R. 2. tit. Remitter, 12.

IT is hereby to be observed, that the wife is presently remitted, and that the conditions, and rents, and all other things annexed to, or reserved upon the state (that is vanished and defeated by the remitter) are defeated also (1).

(Sid. 69.) (Hob. 260.)

Sect. 680, 681.

ALSO, if the husband discontinue the tenements of his wife, and take backe an estate to him for life, the remainder after his decease to his wife for terme of her life; in this case this is no remitter to the wife during the life of the husband, for that during the life of the husband the wife hath nothing in the freehold. But if in this case the wife surviveth the husband, this is a remitter to the wife, because a freehold in law is cast upon her against her will (maugre le soen*). *And inasmuch as she cannot*

* soen—feme, *Paper MS.*

(1) VIII. *The remitter defeats entirely the wrongful estate, and consequently every thing annexed to or issuing out of it.* See ant. Sect. 659. 665, 666. and post. Sect. 686, 687. But an estate made of the land itself by him who is remitted, as a lease for years, is not defeated by the remitter.—See Com. Dig. tit. Remitter, B. 2.—[Note 313.]

cannot have an action against any other person, and against her selfe shee cannot have any action, therefore she is in her remitter. For in this case, although the wife doth not enter into the tenements, yet a stranger which hath cause to have an action, may sue his action against the wife for the same tenements, because shee is tenant in law, albeit that she be not tenant in deed.

Sect. 681.

(4 Rep. 8.)
(Plo. 416. b.)

FOR tenant of freehold in deed is he, who, if hee be disseised of the freehold (s'il soit disseisee de † franktenement), *may have an assise: but tenant of freehold in law before his entrie ‡ in deed, shall not have an assise. And if a man ‡ bee seised ‖ of a certaine land, § and hath issue a sonne who taketh wife, and ☞ the father dieth seised, and after the sonne dies before any entrie made by him into the land, the wife of the sonne shall be endowed in the land, and yet he had no freehold in deed, but hee had a fee and freehold in law. And so note, that a* præcipe quòd reddat *may as well be maintained against him that hath the freehold in law, as against him that hath the freehold in deed.*

[358. b.]

HERE five things are to be observed. First, that a remainder expectant upon an estate for life worketh no remitter, but when it falls in possession; for before his time he can have no action, and no freehold is in him. Secondly, though the woman might waive the remainder, yet because she is presently by the death of the husband tenant to the *præcipe*, it is within the rule of remitter, and her power of waiver is not materiall. Thirdly, that a freehold in law being cast upon the woman by act of law, without any thing done or assented to by her, doth remit her, albeit she be then sole and of full age. Fourthly, that a *præcipe* lyeth against one that hath but a freehold in law. Fifthly, that a woman shall be endowed where the husband hath the inheritance, and but a freehold in law, as hath beene said in the Chapter of Dower.

18 H. 8. 3. (3 Rep. 26. a.)

Vide Sect. 447. Bracton, lib. 4. fol. 206. 237. Britton, 83. b. Fleta, lib. 3. cap. 15. (Plo. 229. b. 230. a. Cro. Car. 338. Hob. 256.)

Sect. 682.

ALSO, if tenant in taile hath issue two sons of full age, and he letteth the land tailed to the eldest son for terme of his life, the remainder to the younger son for terme of his life, and after the tenant in taile dieth; in this case the eldest sonne is not in his remitter, because hee tooke an estate of his father. But if the eldest die without issue of his bodie, then this is a remitter to the younger brother, because he is heire in taile, and a freehold

† son *added in L. and M. and Roh.*
‡ *indeed*, not in L. and M. or Roh.
‡ *bee* not in L. and M. or Roh.
‖ *in fee* added in L. and M. and Roh.
§ *and* not in L. and M. or Roh.

freehold in law is escheated (A), *and cast upon him by force of the remainder* (et un franktenement en le ley est escheate, et jecte sur luy per force de le remainder) *and there is none against whom he may sue his action*.*

[a] 12 E. 4. 20. OF this opinion is [a] *Littleton* in our bookes; and of this sufficient hath beene said in the next Section before. See [b] hereafter [b] some explanation hereof.

[b] Sect. 684, 685.

(2 Roll. Abr. 420.)

☞ Sect. 683.

[359. a.]

IN the same manner it is where a man is disseised, and the disseisor dieth seised, and the tenements descend to his heire, and the heire of the disseisor make a lease to a man of the same tenements for terme of † life, the remainder to the disseisee for terme of life, or in taile, or in fee, ‡ the tenant for life dieth, now this is a remitter to the disseisee, &c. causâ quâ suprà, ↓ *&c.*

AND this standeth upon the same reason that the cases in the two Sections precedent doe. See the next Section following.

Sect. 684.

§ *NOTE, if tenant in taile infeoffe his sonne and another by his deed of the land intailed, in fee, and livery of seisin is made to the other according to the deed,* ‖ *and the son not knowing of this agreeth not to the feoffement* (et le fits rien conusant de ceo ¶ agreea a le feoffment), *and after hee which tooke the livery of seisin dieth, and the son doth not occupie the land, nor taketh any profit of the land during the life of the father, and after the father dieth, now this is a remitter to the sonne, because the freehold is cast upon him by the survivor; and no default was in him, because he did never agree, &c. in the life of his father, and hee hath none against whom hee may sue a writ of* formedon, *&c.*

* IT should seeme by this marke, that this was an addition to *Littleton*; but it is of *Littleton's* owne worke, and agreeth with the originall, saving the originall begun this Section thus: *Also if tenant in taile, &c.*

" *By*

* *&c.* added in L. and M. and Roh.
† *his* added in L. and M. and Roh.
‡ *and* added in L. and M. and Roh.
↓ *&c.* not in L. and M. or Roh.
§ *Note—Also*, L. and M. and Roh.
‖ *and* not in L. and M. or Roh.
¶ ne *added in L. and M. and Roh.*

(A) *Here the word* " escheated" *is used in a general sense, and signifies* " fallen to;" *though not by way of escheat in the strict legal meaning of the term. Mr. Ritso thinks the translation should have been,* " a freehold in law is eschewed (fallen to) and cast upon him." *See his Intr. p.* 114.

"*By his deed, &c.*" Here *Littleton* materially addeth by his deed; for if a man intendeth to [*b*] make a feoffement by *parol* to *A.* and *B.* and he and *B.* come upon the land, *A.* being absent, and make livery to *B.* in the name both of *B.* and *A.* and to their heires, this shall enure onely to *B.*; for neither can a man absent take livery, nor make livery, without deed.

(Ant. 49. b. 52. a. 297. b. [*b*] Temps H. 8. Feoffements. Br. 72. 40 E. 3. 41. 10 E. 4. 1. a. 15 E. 4. 18. 18 E. 4. 12. 22 H. 6. 12.

"*And livery of seisin is made to the other according to the deed, &c.*" Note, livery being made to one according to the deede, enureth to both, because the deede whereunto the livery referreth is made to both; for the rule is, that *Verba relata hoc maximè operantur per referentiam ut in eis in esse videntur.*

(9 Rep. 136.) (Ant. 49. b. 52. a.)

[359. b.] ☞ "*And the son not knowing of this agreeth not to the feoffement.*" Here it appeareth, that if the sonne be conusant, and agreeth to the feoffment, &c. this is no remitter to him. And therefore if the feoffement were made by deed indented, and the sonne with the other sealeth the counterpart, and then the feoffor maketh livery to the other according to the deed, and the other dieth, the son is not remitted, because he was conusant of the feoffement, and agreed to the same; and *Littleton* saith in the case that he putteth, that there was no default in the son, because he agreed not to the feoffement in the life of the father: and so it seemeth, that if *A.* be seised in taile, and have issue two sons, and by deed indented betweene him of the one part, and the sons of the other part, maketh a lease to the eldest for life, the remainder to the second in fee, and dieth, and the eldest son dieth without issue, the second son is not remitted, because he agreed to the remainder in the life of the father, or if the like estate had been made by parol, if in the life of the father the tenant for life had beene impleaded, and made default, and he in the remainder had beene received, and thereby agreed to the remainder, after the death of the father and the eldest son without issue, the second son should not be remitted, because he agreed to the remainder in the life of the father; all which is well warranted by the reason yeelded by our author in this Section.

Vide Sect. 682.

Sect. 685.

FOR if a man be disseised of certaine land, and the disseisour make a deed of feoffement whereby he infeoffeth B. C. *and* D. *and liverie of seisin is made to* B. *and* C. *but* D. *was not at the liverie of seisin, nor ever agreed to the feoffment, nor ever would take the profits, &c. and after* B. *and* C. *die, and* D. *survive them, and the disseisee bringeth his writ upon disseisin in the* per *against* D. *hee shall shew all the matter* (* il monstra tout le matter), † *how he never agreed to the feoffement, and hee shall discharge himself of dammages, so as the demaundant shall recover no dammages*

* il—mesme celuy *D. L. and M. and Roh.*

† *and* added in L. and M. and Roh.

dammages against him, although he be tenant of the freehold of the land. And yet the statute of Gloucester, ‡ cap. 1. *will, that the disseisee shall recover dammages in a writ of entrie founded upon a disseisin* (en briefe de *entre,* foundue sur § disseisin) *against him which is found tenant. And this is a proofe in the other case* ☞ *that forasmuch as the issue in taile came to the freehold, and not by his act* (et ‖ nemy per son fait), *nor by his agreement, but after the death of his father* († mes apres la mort son pier), *therefore this is a remitter to him, inasmuch as he cannot sue an action of* formedon *against any other person, &c.* [360. a.]

(8 Rep. 1. Post. 365. b. 366.a. 369. 381. Ant. 11. b. 115.a. Plo. 365.)

THIS case standeth upon the same reason that the next precedent case doth.

"*Against him which is found tenant, &c.*" Here it appeareth, that acts of parliament are to be so construed, as no man that is innocent or free from injurie or wrong, be by a literall construction punished or endamaged: and therefore in this case, albeit the letter of the statute is generally to give dammages against him that is found tenant, and the case that *Littleton* here putteth *D.* being survivor, is consequently found tenant of the land; yet because he waived the estate, and never agreed to the feoffment, nor tooke any profits, he shall not be charged with the dammages.

(2 Roll. Abr. 522.)

Sect. 686, 687.

ALSO, if an abbot alien the land of his house to another in fee, and the alienee by his deed charge the land with a rent-charge in fee, and after the alienee infeoffe the abbot with licence, to have and to hold to the abbot and to his successors for ever, and after the abbot die, and another is chosen, and made abbot; in this case the abbot that is the successor, and his covent, are in their remitter, and shall hold the land discharged, because the same abbot cannot have an action, nor a writ of entre sine assensu capituli, *of the same land against any other person* (pur ceo que mesme l'abbe ne poit aver ascun action, ¶ ne briefe *d'entre sine assensu capituli,* de mesme la terre envers nul auter person). (1)

Sect. 687.

IN the same manner it is, where a bishop or a deane, or other such persons alien, &c. without assent, &c. and the alienee charge the land, &c.

‡ cap. 1. *not in L. and M. or Roh.*
§ le novel *added in L. and M. and Roh.*
‖ ceo *added in L. and M. and Roh.*
† mes—que, *L. and M. and Roh.*
¶ ne—de, *L. and M. and Roh.*

(1) Here *Littleton* begins to treat of *remitter to bodies politic.*—[Note 314.]

[360. b.] *&c. and after the bishop takes backe an estate of the same land by licence, to him and his ☞ successours, and after the bishop dieth; his successor is in his remitter, as in right of his church, and shall defeat the charge, &c.* causâ quâ suprà.

OUR author having spoken of remitters to singular or naturall persons, as issues in taile, and to feme coverts, and to their heires, and to them in reversion or remainder, and their heires; now he speaketh of remitters to bodies politike and incorporate, as to abbots, bishops, deanes, &c. And as discents doe remit the heire which comes in the *per*, so succession doth remit the successor, albeit he cometh in the *post*. And so in other cases where the issue in taile of full age shall be remitted, there in the like case shall the successor be remitted also, and defeat all meane charges and incumbrances.

"*With licence*," *&c.* That is, of the king and the lords immediate and mediate, to dispense with the statutes of mortmaine; whereof see more before, *Sect.* 140.

Sect. 688.

ALSO, if a man sue a false action against tenant in taile, as if one will sue against him a writ of entrie in the post, *supposing by his writ that the tenant in taile had not his entrie but by* A. *of* B. *who disseised the grandfather of the demandant, and this is false, and he recovereth against the tenant in taile by default, and sueth execution, and after the tenant in taile dieth, his issue may have a writ of* formedon *against him which recovereth; and if hee will plead the recoverie against the tenant in taile, the issue may say, that the said* A. *of* B. *did not disseise the grandfather of him which recovered, in manner as his writ suppose, and so he shall falsifie his recovery* (et issint il fauxera * le recoverie). *And admit this were true, that the said* A. *of* B. *did disseise the grandfather of the demandant which recovered, and that after the disseisin, the demandant, or his father, or his grandfather by a deed had released to the tenant*

[361. a.] *in taile all the right which hee had in the ☞ land, &c. and notwithstanding this hee sueth a writ of entrie in the* post *against the tenant in taile, in manner as is aforesaid, and the tenant in taile plead to him that the said* A. *of* B. *did not disseise his grandfather, in such manner as his writ suppose; and upon this they are at issue, and the issue is found for the demandant, wherby he hath judgment to recover, and sueth execution; and after the tenant in taile dieth, his issue may have a writ of* formedon *against him that recovered; and if he will plead the recovery by the action tried against his father § who was tenant in taile, then he may shew and plead the release made to his father, and so the action which was sued, feint in law †.*

"*HE*

* le—son, *L. and M. and Roh.*
§ *who was*, not in L. and M. or Roh.
† *&c.* added in L. and M. and Roh.

"HE *recovereth against the tenant in taile by default.*" *Littleton* addeth (by default) because if the [c] recovery passed upon an issue tried by verdict, he shall never falsifie in the point tried, because an attaint might have beene had against the jurors; and albeit all the jurors be dead, so as the attaint doe faile, yet the issue in taile shall not falsifie in the point tried, which, untill it be lawfully avoided, *pro veritate accipitur.* As if the tenant in taile be impleaded in a *formedon*, and he traverseth the gist, and it is tried against him, and thereupon the demandant recover; in this case the issue in taile shall not falsifie in the point tried; but he may falsifie the recovery by any other matter; as that the tenant in taile might have pleaded a collaterall warrantie, or a release, as *Littleton* here putteth the case, or to confesse and avoid the point tried. And *Littleton*'s case holdeth not only in a recovery by default, whereof he speaketh, but also upon a *nihil dicit*, or confession or demurrer.

[c] 12 E. 4. 19. 13 E. 4. 3. 11 H. 4. 89. 7 H. 4. 17. 14 H. 7. 10, 11. 28 Ass. 32. 52. 34 Ass. 7. 10 H. 6. 5. 19 H. 6. 39. Brooke, tit. Fauxifier de Recoverie, 55. 22 H. 6. 28. 34 H. 6. 2. 26 H. 6. 32. 36 H. 6. Fauxef. de Recoverie, 27. (6 Rep. 7. 1 Roll. Rep. 443.)

Sect. 689.

AND it seemeth, that a faint action is as much to say in English a fained action, *that is to say, such an action as albeit the words of the writ be true, yet for certaine causes hee hath no cause nor title by the law to recover by the same action. And a false action is, where the words of the writ bee false. And in these two cases aforesaid, if the case were such, that after such recovery, and execution* ☞ *thereupon done, the tenant in tayle had disseised him that recovered, and thereof died seised, whereby the land descended to his issue, this is a remitter to the issue, and the issue is in by force of the taile; and for this cause I have put these two cases precedent, to enforme thee (my sonne) that the issue in taile by force of a discent made unto him after a recovery and execution made against his ancestour* (apres un recovery et execution * fait envers son auncester), *may be as well in his remitter, as he should be by the discent made to him after a discontinuance made by his ancestour of the entayled lands by feoffement in the countrie, or otherwise, &c.*

[361. b.]

HERE *Littleton* explaineth what a faint action is, and what a false action is, which is plaine and perspicuous. And here it is to be observed, that a remitter may be had after a recovery upon a faint action by a disseisin and a discent, aswell as by a discent after a discontinuance by a feoffement, &c.

Sect. 690.

ALSO, in the cases aforesaid, if the case were such, that after that the demandant have judgement to recover against the tenant in tayle, and the same tenant in tayle dieth before any execution had against him, whereby the tenements descend to his issue, and he who recovereth sueth a scire

* ent *added in L. and M. and Roh.*

scire facias *out of the judgement to have execution of the judgement against the issue in taile, the issue shal plead the matter as aforesaid; and so prove that the* †*said recovery was false or faint in law, and so shall barre him to have execution of the judgement* ‡.

HERE it appeareth, that if a judgement be given against a tenant in taile upon a faint or false action, and tenant in taile die before execution, no execution can be sued against the issue in tayle. But if in a common recoverie judgement bee had against tenant in tayle where he voucheth, and hath judgement to recover over in value, albeit the tenant in tayle dieth before execution, yet the recoveror shall execute the judgement against the issue in tayle in respect of the intended recompence; and for that it is the common assurance of the realme, and is well warranted [*d*] by our bookes, and was not invented by justice *Choke*, who was a grave and learned judge in the time of *E.* 4. (as some hold by tradition); but it may bee ☞ that it was upon former authorities and opinions of judges discovered by him, assented unto by the rest of the judges.

[362. a.]

28 Ass. 32. 34 Ass. pl. 7. 15 E. 3. Age, 95. 11 H. 4. 89. 7 H. 4. 17. 33 E. 3. Entrie Cong. 31. 21 H. 6. 13. 10 H. 6. 6. 12 E. 4. 20. 14 H. 7. 11. 23 Eliz. Dier, 376. Lib. fol. 106. Shelley's case. Pl. Com. 55. (Cro. Car. 388. Plo. 14.)

See hereafter Sect. 709. 15 E. 3. Briefe, 324. 42 E. 3. 53. 44 E. 3. 21. 48 E. 3. 11. 1 E. 4. 6. 5 E. 4 2. [*d*] 12 E. 4. 20. Dier, 23 Eliz. 376. Lib. 10. fol. 37, 38. in Mary Portington's case.

If a recoverie bee had against tenant for life without consent or covine, though it be without title, and execution be had, and tenant for life dieth, the reversion or remainder is discontinued, so as he in the reversion or remainder cannot enter; but if such a recoverie be had by agreement and covine betweene the demandant and the tenant for life, then, as hath beene said, it is a forfeiture of the estate for life, and he in the reversion or remainder may enter for the forfeiture. So it is if the tenant for life suffer a common recovery at this day, it is a forfeiture of his estate; for a common recovery is a common conveyance or assurance, whereof the law taketh knowledge. Since *Littleton* wrote, there were two statutes [*e*] made for preservation of remainders and reversions expectant upon any manner of estate for life; the one in 32 *H.* 8. the other in 14 *Eliz.*: but 32 *H.* 8. extended not to recoveries, when tenant for life came in as vouchee, &c. and therefore that act is repealed by 14 *Eliz.* and full remedie provided for preservation of the entrie of them in reversion or remainder. But the statute of 14 *Eliz.* extendeth not to any recovery, unlesse it be by agreement or covine. Secondly, [*f*] if there be tenant for life, remainder in taile, the reversion or remainder in fee, if tenant for life be impleaded by agreement, and he vouche tenant in taile, and he vouch over the common vouchee, this shall barre the reversion or remainder in fee, although he in the reversion or remainder did never assent to the recovery; because it was not the intent of the act to extend to such a recovery, in which a tenant in taile was vouched; for he hath power by common recovery, if he were in possession, to cut off all reversions and remainders. And so if tenant for life had surrendered to him in remainder in taile, he might have barred the remainders and reversions expectant upon his estate. Thirdly, where the proviso of that act speaketh of an assent of record

5 Ass. 3. 5 E. 3. Entre Cong. 42. Li. 1. fol. 15, 16. Sir William Pelham's case. (6 Rep. 8. b. Ant. 356. a.)

[*e*] 32 H. 8. cap. 31. 14 Eliz. cap. 8. (Sect. 675. 10 Rep. 49.)

[*f*] Lib. 3. fol. 60, 61. Lincolne College case.

† *said* not in L. and M. or Roh. ‡ &c. added in L. and M. and Roh.

record by him in reversion or remainder, it is to be understood, that such assent must appeare upon the same record, either upon a voucher, *aid prier*, receit, or the like; for it cannot appeare of record, unlesse it be done in course of law, and not by any extrajudiciall entrie, or by *memorandum*.

(2 Roll. Abr. 23. 146.)

Sect. 691.

ALSO, if tenant in taile discontinue the taile, and dieth, and his issue bringeth his writ of formedon *against the discontinuee (being tenant of the freehold of the land) and the discontinuee plead that he is not tenant, but utterly disclaymeth from the tenancy in the land; in this case the judgement shall be, that the tenant goeth without day, and after such judgement the issue in the taile that is demandant may enter into the land, notwithstanding the discontinuance, and by such entrie hee shall be adjudged in his remitter. And the reason is, for that if any man sue a* præcipe quòd reddat *against any tenant of the freehold, in which action the demandant shall not recover damages, and the tenant pleads nontenure * or otherwise disclaime in the tenancie, the demandant cannot averre* (ne poit averrer) *his writ, † and say that hee is tenant, as the writ supposeth. And for this cause the demandant after that judgement is given that the tenant shall goe without day, may enter into the tenements demanded, the which shall bee as great an advantage to him in law, as if he had judgement to recover against the tenant, and by such entrie hee is in his remitter by force of the entaile. But where the demandant shall recover damages against the tenant, there the demandant may averre, that he is tenant, as the writ supposeth, and that for the advantage of the demandant to recover his dammages, or otherwise hee shall not recover his dammages, which are ‡ or were given to him by the law.*

(Doct.Pla. 133.) 5 E. 4. 1. 36 H. 6. 29. 6 E. 3. 8. 4 E. 4. 38. (3 Rep. 26.) Non-tenure. Vide Bracton, lib. 5. fol. 431, 432. & 414. Britton, cap. 84.

HERE it appeareth, that upon the plea of nontenure, or of disclaimer of the tenant in a *formedon* in the discender, albeit the expresse judgement be that the tenant shall goe without day, yet in judgement of law the demandant may enter according to the title of his writ, and bee seised in tayle, notwithstanding the discontinuance. And here, *Littleton* saith, the demandant shall be adjudged in his remitter; where he taketh remitter in a large sense: for in this case the demandant hath not two rights, but hath onely one antient right, and restored to the same by course of law; and so remitter here is taken for a recontinuance of the right.

☞ "*In which action the demandant shall not recover damages.*" Here is to bee observed, that in such a *præcipe* where the demandant is to recover dammages, if the tenant pleade non-tenure or disclaime, [*f*] there the demandant may averre him to be tenant of the land, as his writ suppose for the benefit of his damages, which otherwise he should lose,

[362. b.]

[*f*] 13 H. 7. 28. 36 H. 6. 29. 22 H. 6. 44. 4 E. 4. 38. 5 E. 4. 1. 6 E. 3. 8. (7 Rep. 40.)

* *or*—*but*, L. and M. and Roh.
† *and say*, not in L. and M. or Roh.
‡ *or were* not in L. and M. or Roh.

lose, or pray judgement and enter. [g] But where no damages are to bee recovered, as in a *formedon* in the discender, and the like, there hee cannot averre him tenant, but pray his judgement and enter, for thereby hee hath the effect of his suite: *Et frustrà fit per plura, quod fieri potest per pauciora.*

[g] 8 E. 3. 431. 24 E. 3. 9. 11 H. 4. 16. & 7 H. 6. 17. 5 E. 4. 1. (5 Rep. 68. Doct. Pla. 49.)

"*Averrer.*" To averre or avouch, or verifie, *verificare*, whereof commeth *verificatio*, an averment; and is so said as well in English as in French; and is two-fold, viz. generall and particular. A generall averment, which is the conclusion of every plea to the writ, or in barre of replications and other pleadings (for counts or avowries in nature of counts need not be averred) containing matter affirmative, ought to bee averred, *et hoc paratus est verificare*, &c. Particular averments are, as when the life of tenant for life, or tenant in taile, are averred; and there, tho' this word *(verificare)* be not used, but the matter avouched and affirmed, it is upon the matter an averment. And an averment containeth as well the matter as the forme thereof.

(Ant. 303. a.)

"*That the tenant shall goe without day.*" *Quòd tenens eat sine die.* This is the entrie of the judgement in that case, that the tenant shall goe without day, that is, to be discharged of further attendance; and this is ☞ sometime finall for that action, whereof *Littleton* here putteth an example; and sometime temporarie, whereof *Littleton* also hath put an example: as when excommengement is pleaded in disabilitie of the plaintiffe or demandant, there the award is, that the tenant or defendant shall goe without day; and yet when the demandant or plaintiffe have purchased his letters of absolution, upon shewing them to the court, he may have a resommons or reattachment to recontinue the cause againe. But it is to be knowne, that when judgement is given for the tenant or defendant upon a plea in barre, or to the writ, &c. the judgement is all one, viz. *quod tenens*, or *defendens eat inde sine die*, and shall have reference to the nature and matter of the plea, and so be taken either to goe in barre, or to the writ. So when judgement is given against the plaintiffe, either in barre of his action, or in abatement of his writ, &c. the judgement is all one, viz. *nihil capiat per breve*; and it appeareth by the record whether the plea did goe in barre, or to the writ. And the cause of the judgement is never entred in the record in any case; for that upon consideration had of the record it appeareth therein.

[363. a.]

(9 Rep. 7. Sid. 265. 310.)

Vid. Sect. 201. (8 Rep. 68.)

3 H. 4. 2. 11.

(Ant. 135. b.)

Sect. 692.

(F. N. B. 192. b, 1 Roll. Abr. 631. Doct. Pla. 133.) (3 Lev. 330.)

ALSO, if a man be disseised, and the dissesor die, his heire being in by discent, now the entrie of the dissesee is taken away; and if the dissesee bring his writ of entrie sur disseisin *in the* per, *against the heire, and the heire disclaime in the tenancie, &c. the demandant may averre his writ that hee is tenant as the writ suppose, if he will, to recover his dammages: but yet if hee will relinquish the averment, &c. he may lawfully enter into the land because of the disclaimer, notwithstanding that his*

entrie before was taken away. And this was adjudged before my master sir R. Danby, *late chiefe justice of the common place, &c. and his companions, &c.*

"*ALSO if a man be disseised, &c.*" Albeit in this case, and in the case before, the entrie of the demandant in his owne act, and the demandant hath no expresse judgement to recover, yet shall he be remitted; because he in judgement of the law shall be in according to the title of his writ, and by his entrie defeat the discontinuance, and consequently is remitted to his antient estate.

36 H. 6. f. 29.

"*Sir Robert Danby,*" knight, was a gentleman of an ancient and faire descended family, and chiefe-justice of the court of common-pleas; a grave, reverend, and learned judge, ☞ of whom our author speaketh here with very great reverence, as you may perceive. And here is to be noted how necessarie it is, after the example of our author, to observe the judgements and resolutions of the sages of the law.

5 E. 4. 41.
4 E. 4. 38.

[363 b.]

Sect. 693.

ALSO, where the entrie of a man is congeable, although that he takes an estate to him when hee is of full age for terme of life, or in taile, or in fee, this is a remitter to him, if such taking of the estate be not by deed indented, or by matter of record, which shall conclude or estop him (que * concludera ou estoppera). *For if a man be disseised, and takes backe an estate from the disseisor without deed, or by deed poll, this is a remitter to the disseisee* (Car si home soit disseisie, et † reprent estate de le disseisor sans fait, on per fait polle, ceo est ‡ un remitter al disseisee), ‖ *&c.*

29 Ass. p. 2 6.
43 Ass. p. 3.
11 H. 7. 20.
3 H. 6. 19.
40 E. 3. 43.
(Sect. 683.)
(Hob. 256.)
(Ant. 49. b. 350. a.)

HERE appeareth a diversitie betweene a right of entrie and a right of action; for if a man of full age having but a right of action taketh an estate to him, hee is not remitted: but where hee hath a right of entrie, and taketh an estate, he by his entrie is remitted, because his entrie is lawfull. And if the disseisor infeoffe the disseisee and others, the disseisee is remitted to the whole, for his entrie is lawfull: otherwise it is if his entrie were taken away.

8 R. 2. Quar. imp. 199.
19 H. 6. 30.
8 H. 6. 17.
21 H. 6. 2.
3 H. 4. 8.
14 H. 6. 15, 16.
37 H. 6. 18.
26 H. 8. 4.

"*Where the entrie is congeable.*" *A.* is disseised of a mannor, whereunto an advowson is appendant, an estranger usurpes to the advowson, if the disseisee enter into the mannor, the advowson is recontinued againe, which was severed by the usurpation. And so it is if tenant in tayle be of a mannor whereunto an advowson is appendant, the tenant in taile discontinueth in fee, the

F. N. B. 36. f. & 35. b. (3 Rep. 3. b. Sect. 661.)

discontinuee

* luy *added in L. and M. and Roh.*
† reprent—ent prent, *L. and M. and Roh.*
‡ un—bon, *L. and M. and Roh.*
‖ *&c.* not in L. and M. or Roh.

discontinuee granteth away the advowson in fee, and dieth, the issue in tayle recontinueth the mannor by recoverie, he is thereby remitted to the advowson; and in both cases hee that right hath shall present when the church becommeth voyd.

The patron of a benefice is outlawed, and the church becommeth voyd, an estranger usurpeth, and six moneths passe, the king doth recover in a *quare impedit*, and remove the incumbent, &c. the advowson is recontinued to the rightfull patron. And so note a diversitie betweene a recontinuance and a remitter; for a remitter cannot be properly, unlesse there be two titles; but a recontinuance may be where there is but one.

22 Ass. p. 33. en le case de Theobald Grinvile. (3 Rep. 3.)

"*By deed indented, &c.*" Here it appeareth that if the disseisor by deed indented make a lease for life, or a gift in taile, or a feoffment in fee, whereunto liverie of seisin is requisite; yet the deed indented shall not suffer the liverie made according to the forme and effect of the indenture, to work any remitter to the disseisee, but shall estop the disseisee to claime his former estate; and if the disseisor upon the feoffment doth reserve any rent or condition, &c. the rent or condition is good: and the reason wherefore a deed indented shall conclude the taker more than a deed poll, is, for that the deed poll is only the deed of the feoffor, donor, and lessor; but the deed indented is the deed of both parties, and therefore aswell the taker as the giver is concluded.

13 H. 4, 5. 3 H. 4. 17. 8 H. 4. 8. 12 H. 4. 19. 35 Ass. 8. 17 Ass. 3. 29 Ass. 53. 43 E. 3. 17. Parker's case. 44 E. 3. Estop. 10. 21 H. 6. 2. per Paston. 8 H. 6. 17. per Cotismere. (1 Roll. Abr. 863. 878.

"*Or by matter of record.*" As by fine, deed indented and inrolled (A), and the like. 4 Rep. 52.)

[364. a.] ☞ Sect. 694.

ALSO, if a man let land for terme of life to another, who alieneth to another in fee, and the alienee make an estate to the lessor, this is a remitter to the lessor, because his entrie was congeable, &c.*

This is evident enough upon that which hath beene said.

Sect. 695. (Hob. 256.)

ALSO, if a man be disseised, and the disseisor let the land to the disseisee by deed pol, or without deed, for terme of yeares, by which the disseisee entreth, this entrie is a remitter to the disseisee. For in such case where the entrie of a man is congeable, and a lease is made to him, albeit that he claimeth by words in paiis, *that he hath estate by force of such lease, or saith openly, that he claimeth nothing in the land but by force of such*

* *&c.* not in L. and M. or Roh.

(A) *Vid. ante* 251. *b. where lord Coke makes a distinction between a matter of record, as a fine, and a deed recorded, as a deed inrolled. See also ante* 362. *a.*

such lease, yet this is a remitter to him, for that such disclaimer in paiis (tiel † disclaimer en le paiis) *is nothing to the purpose. But if hee disclaime in court of record, that he hath no estate but by force of such lease, and not otherwise, then is he concluded* (Mes s'il ‡ disclaimer en court de record, que il ‖ n'ad estate forsque per force de tiel lease, et nemy auterment, donque il est conclude), *&c.*

(3 Rep. 25.) HERE appeareth a diversitie betweene a claim *in paiis* of an estate, and a claime of record, for a claim *in paiis* shall not hinder a remitter. Otherwise it is of a claime of record, because that doth worke a conclusion.

Sect. 696.

ALSO, if two joyntenants seised of certaine tenements in fee, the one being of full age, the other within age, bee disseised, * *&c.* *and the disseisor die seised, and his issue enter, the one of the joyntenants being then within age, and after that he commeth to full age, the heire of the disseisor letteth the tenements to the same joyntenants for terme of their* † *two lives, this is a remitter (as to the moitie) to him that was within age, because hee is seised of the moitie which belongeth to him in fee, for that his entrie was congeable. But the other joyntenant hath in the other moity but an estate for terme of his life by force of the lease, because his entry was taken away, &c.*

(2 Inst. 308.) HERE note a diversitie worthy the observation, that where joyntenants or coparceners have one and the same remedie, if the one enter, the other shall enter also: but ☞ where remedies bee severall, there it is otherwise. [364. b.]

10 H. 6. 10. 19 H. 6. 45. 31 H. 6. tit. Ent. Cong. 54. As if two joyntenants or coparceners joyne in a reall action, where their entrie is not lawfull, and the one is summoned and severed, and the other pursueth and recovereth the moitie, the other joyntenant or coparcener shall enter and take the profits with her, because their remedie was one and the same. But where two coparceners be, and they are disseised, and a discent is cast, and they have issue and die, if the issue of the one recover her moitie, the other shall not enter with her, because their remedies were severall (A): and yet when both have recovered, they are coparceners againe. So here in this case that *Littleton* putteth, the two joyntenants have not equall remedie; for the infant hath a right of entrie, and the other a right of action; and therefore the infant being remitted to a moitie, the other shall not enter and take the profits with her.

If

† disclaimer—clayme, *L. and M. and Roh.*

‡ disclaimer—clayme, *L. and M. and Roh.*

‖ n'ad—ad, *L. and M. and Roh.*

* *&c.* not in L. and M. or Roh.

† *two* not in L. and M. or Roh.

(A) *The reason for which their remedies were several is explained ante* 164. *a. In commenting upon the statute of Gloucester, cap. 6. lord Coke observes, that if two coparceners be disseised, the one hath issue and die, the aunt and the niece shall not join, for they have not one right, but several, and therefore they must have several actions, but when they have recovered they shall hold in coparcenary.* 2 *Inst.* 308.

If *A.* and *B.* joyntenants in fee, be disseised by the father of *A.* who dieth seised, his sonne and heire entreth, he is remitted to the whole, and his companion shall take advantage thereof. Otherwise here in the case of *Littleton*, for that the advantage is given to the infant, more in respect of his person than of his right; whereof his companion shall take no advantage. But if the grandfather had disseised the joyntenants, and the land had descended to the father, and from him to *A.* and then *A.* had died, the entrie of the other should be taken away by the first discent; and therefore he should not enter with the heire of *A.*

But here in the case of *Littleton*, if after the discent the other joyntenant had died, and the infant survived, some say that he should have entred into the whole, because hee is now, in judgement of law, solely in by the first feoffment, and he claimeth not under the discent. Vide 35 Ass. pl. ultim.

Chap. 13. Of Warrantie. Sect. 697.

IT is commonly said, that there bee three warranties, scilicet, *warrantie lineall, warrantie collaterall, and warrantie that commence by disseisin. And it is to be understood, that before the statute of* Gloucester *all warranties which descended to* (B) *them which are heires to those who made the warranties, were barres to the same heires to demand any lands or tenements against the warranties, except the warranties which commence by disseisin; for such warrantie was no barre to the heire, for that the warrantie commenced by wrong, viz. by disseisin.*

"*IT is commonly said.*" Here by the opinion of *Littleton*, *communis opinio* is of authoritie, and stands with the rule of law, *A communi observantia non est ☞ recedendum:* and againe, *Minimè mutanda sunt quæ certam habuerunt interpretationem.* Vide Sect. 288. 331. (Vaughan, 375.) (1 Rep. 1.)

[365. a.]

Here our author beginneth this Chapter with an exact division of warranties. A warrantie is a covenant reall annexed to lands or tenements, whereby a man and his heires are bound to warrant the same; and either upon voucher, or by judgement in a writ of *warrantiæ cartæ* to yeeld other lands and tenements (which in old bookes is called *in excambio*) to the value of those that shall bee evicted by a former title, or else may bee used by way of *rebutter* (1). "*Rebouter,*" Bract. lib. 2. fol. 37. Lib. 5. fol. 380, 381. &c. Glanvill. lib. 3. cap. 1, 2, 3. Lib. 7. ca. 2, 3. Lib. 9. ca. 4.

Britton, ca. 105. fol. 249, 250, &c. & fol. 88. 106. b. 196, 197. Fleta, lib. 5. cap. 15. Lib. 6. cap. 23. Mirr. cap. 2. § 17. 38 E. 3. 21. 45 E. 3. 18.

(B) *Vid. ante* Sect. 601, *and the note under* (A) *there.*

(1) The doctrine of *warranty* was formerly one of the most interesting and useful articles of legal learning; but the effect and operation of warranties having, by repeated acts of the legislature, been reduced to a very narrow compass, it is become in most respects a matter of speculation rather than of use.

(Ant. 303. b. 2 Roll. Abr. 775, 776. Cro. Jac. 4.)

" *Rebouter*," is a French word, and is in Latine *repellere*, to repell or barre; that is, in the understanding of the common law, the action of the heire by the warrantie of his ancestor; and this is

use. In some instances, however, warranties have still a powerful influence on our landed property; and there is no part of our jurisprudence to which the ancient writers have more frequently recourse to explain and illustrate their legal doctrines. Hence abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our laws, which are more immediately connected with the doctrines that respect the alienation of landed property.

In the civil law warranty is defined, the obligation of the seller to put a stop to the eviction, and other troubles which the buyer suffers, in the property purchased. Eviction is defined to be the loss which the buyer suffers, either of the whole thing that is sold, or of a part of it, by reason of the right which a third person has to it. The other troubles are those which, without touching the property of the thing sold, diminish the right of the purchaser; as if any one pretends a right to the usufruct of the lands sold, to a rent issuing out of them, to a service, or any other thing of the like nature. The buyer being thus evicted or troubled in his possession, has his recourse to the seller to warrant him. This warranty is either *in law*, being that security which every seller is bound to give for maintaining the buyer in the free possession and enjoyment of the thing sold, although the sale makes no mention of it; or *in deed*, being that kind of particular or conventionary warranty, which the seller and buyer regulate among themselves. See *Domat.* l. i. tit. 2. § 10. By the practice of *the Roman law*, the buyer might, immediately after the eviction or trouble, give notice of it to the seller, who then, if he thought proper, might make himself a party to the action, and defend it; but till the sentence was pronounced, the buyer could not bring his action of warranty against the seller; and the action was brought before the judge of the place in which the seller was domiciliated. But the practice is different in the courts of law *in France*. There the buyer, when he gives notice of the action to the seller, may bring his action of warranty against him before the judge, before whom the original action is brought; and if he cannot defend the action, the judge condemns him to indemnify the seller, by the same sentence by which he pronounces in favour of the plaintiff in the original cause. See *Pothier Traité des Contracts de Vente*, partie 2. c. 1. sect. 2. art. 5. § 2. The first warrantor may call upon another to warranty; he in the same manner may call upon a third. But to prevent the delays which must unavoidably ensue from multiplying warranties, a fourth warrantor is not permitted to intervene, except in particular circumstances. The degrees also must be observed. Each person must vouch his own immediate warrantor, as it is not lawful for him to vouch any of the ulterior warrantors. After the warrantor has entered into the warranty, the person warranted may either proceed in his defence jointly with the warrantor, or leave the cause to him solely. The sentence binds them both equally. If the person against whom the action is brought be evicted or troubled in his possession by the sentence of the judge, he has a claim upon the warrantor for a complete indemnification. Sometimes the precise sum to be paid by way of indemnity is fixed and agreed to by the parties upon the making of the contract; but penal obligations of this nature are greatly discountenanced by the laws of France. It is always in the breast of the judge to moderate or increase them; but they cannot be increased either by the express contract of the parties, or the equity of the judge, to more than double of the property evicted. See *Traité des Evictions et de la Garantie Formelle, par Mons. Berthelot*, 2 vol. oct. Paris, 1781.

The

is called to rebut or repell. [c] *Britton* saith, *Garrantor en un sence signifie a defender son tenant en sa seisin, et en auter sence signifie que si il ne le defende, que le garrant luy soit tenue a eschanges,*

[c] Britton, fol. 197. b.

The warranty treated of by Littleton in this Chapter is evidently of *feudal extraction*, being derived from the obligation which the lord was under, by that system of polity, to defend his tenant's title to the land against all claimants. If the tenant was evicted, the lord was bound to make him a recompense, by giving him lands of equal value to those evicted from him. The doctrine and practice of warranty, in the early ages of the feudal law, is thus set forth in the book of the Fiefs, tit. 25. It is there stated that a vassal held a fief from the lord, and being disturbed in his possession of it, called upon the lord to defend him. The lord refused to appear before the judge, by which the vassal lost his cause. The vassal thereupon demanded a recompense from the lord. The lord said in answer that the vassal never held the fief, nor received the investiture of it from him. The vassal replied, that he held the fief from the lord, and had been invested with it by him; that he had called upon the lord to defend the possession on the trial, and that the lord did not then deny the lands being held of him. All this the vassal proved by proper witnesses. Upon this case it was held, that when a vassal is disturbed in the possession of his fief, if he calls on the lord to defend him, and it appears on the trial that the lord invested him with a fief that did not belong to him, the lord is bound either to give him another fief of equal value, or the price of it in money; and that he is bound to do this as soon as it clearly appears that the vassal will be evicted of the fief: but that if the lord denies that the fief is held of him, and that the vassal, or any of his ancestors, were invested with it by him, and the vassal proves those facts, either by an instrument properly authenticated, or by the peers of the court, the lord must give him another fief; or may be put to his oath, that neither the vassal nor any of his ancestors held the fief from, or were invested with it by him, or any of his ancestors. If the lord does this, he is to be acquitted.—Sir Martin Wright seems to question whether the lord's obligation to protect or defend the feudatory, made him anciently liable upon eviction (without any fraud or defect in him) to compensate the loss of the fief. He observes, that it can hardly be imagined that while feuds were precarious, and held at the will of the lord, or indeed, that while they were generously given, without price or stipulated render, the lord should be subject to such a loss; especially since it is likely that the lord's obligation upon eviction rather prevailed upon the reason of contracted and improper feuds, than from the nature of a pure original feud. He observes, that none of the ancient feudists make any such distinction, but that all of them suppose the lord's obligation upon eviction to have been general; yet he asserts they must be understood to speak of the times in which they wrote, when improper feuds chiefly prevailed. See Introduc. to the Law of Tenures, pp. 38, 39, 40.—Upon a principle similar to that upon which this distinction is grounded, it seems to have been formerly made a question by the writers on the feudal laws of the German and Italian states, whether investiture alone, without any express promise or undertaking on the part of the lord, entitled the tenant to claim an equivalent from the lord, in case of eviction. Rosentall, a German feudist of great authority, has stated this question, and the authorities upon which the two opposite opinions respecting it are founded. He mentions it to be his own opinion, that investiture alone, without any promise, entitled the tenant to an equivalent; and he says, that the greatest part of those who maintain the opposite opinion, admit that the lord, though he has made no promise, is bound to give an equivalent, if the fief were originally granted for services done; or otherwise, in the way of remuneration. See *Rosentall Tractatus et Synopsis totius Juris feudalis*, Coll. Allob.

[d] Bract. lib 5. fol. 380.
[e] Fleta, lib. 5. cap. 15 (A).

eschanges, et de faire son gree a la vaillaunce. [d] *Bracton* saith, *Warrantizare nihil aliud est, quàm defendere et acquietare tenentem qui warrantum vocavit in seisinâ suâ.* [e] *Fleta* saith, *Warrantizare nihil aliud est quàm possidentem vocantem defendere et acquietare in suâ seisinâ vel possessione erga petentem, &c. et tenens de re warranti excambium habebit ad valentiam.*

Lib. 4. fol. 81. Noke's case. (F. N. B. 134. H.)

It is to be observed, that there be two kinde of warranties, that is to say, *warrantia expressa et tacita*, vulgarly said warrantie in deed, because they be expressed; and warranties in law, because the law doth tacitely imply them. And this division of warranties that *Littleton* here speaketh of, he intendeth of warranties

(A) *This reference to Fleta is very incorrect. See Fleta, lib. 6. cap. 23. § 2.*

Allob. 1610. vol. 1. 469, 470.—In a more recent publication, expressly on the subject of gratuitous fiefs, it is held, that the lord is bound to defend the fief, and to give the tenant an equivalent, if it is evicted from him. The author states the objection made by sir Martin Wright; and in answer to it observes, that the feudal contract and connection between the lord and tenant is such, as distinguishes it from a voluntary donation, and necessarily includes this obligation upon the lord. See *Petri Schultzii Dissertatio de Feudo Gratiæ in Jenichen Thesaurus Juris feudalis*, Francofurti ad Mænum, tom. 2. 556. 567, 568. It should seem that with us anciently, every kind of homage, when received, but not before, bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation, for services due to the lords paramount, and to defend his title to the lands against all others; but that in subsequent times, the implied acquittal and warranty were peculiar to that species of homage which is known by the appellation of homage ancestrel. See ant. 67. b. note 1. 105. a. note 1. In another material quality, the warranty annexed to homage ancestrel differed from express warranty. In the case of express warranty the heir was chargeable only for those lands which he had by descent from the ancestor who created the warranty. But in the case of homage ancestrel the tenant was not driven to recover in value only those lands which the lord had from that ancestor who created the warranty; that would be impossible, as it was essential to homage ancestrel, that the seigniory should have been created before time of memory. It being therefore impossible to ascertain which lands descended from the ancestor who made the grant, the law charged all the lands. See ant. 102. b. But defence and recompense were not the only benefits which the tenant derived from the lord's warranty; it rebutted or repelled the lord from claiming the land itself, or any profit or right from it, but those which under the feudal contract were due to him as lord, according to the fundamental maxim of the doctrine of fiefs, *Homagium repellit perquisitum.* Such appear to be the outlines of the system of warranty in the early ages of the feudal law. The practice of subinfeudation necessarily occasioned a considerable extension of it. It was totally inhibited by the statute made in the 18th year of Edward I. commonly called the statute *quia emptores terrarum.* That statute had a particular influence both on the practice and the doctrine of warranty. The free alienation of property which it authorized necessarily put an end to the homage ancestrel, and consequently to the implied warranty annexed to it. To remedy this, if the *lord* aliened, the tenants, before they attorned to the new lord, required a new warranty from him; if the *tenant* aliened, it was with an express clause of warranty. This gave the new tenant the benefit of the lord's obligation to warrant the old tenant: as the new tenant might vouch the old tenant, and he in his turn might deraign the lord. This subject will be pursued, and an attempt will be made to investigate and explain the grounds of the distinction between lineal and collateral warranty, in note 2. 373. b.--[Note 315.]

ranties in deed. And of warranties in law, more shall be said hereafter in this Chapter. As for promises or contracts annexed to chattells reall or personall, they are not intended by our author in his said division, but only warranties concerning freeholds and inheritances.

Vid. Sect. 733. (2 Roll. Abr. 738. Sid. 178. Cro. Ja. 4. Ant. 101. b. Post. 384. a. 1 Roll. Rep. 316. Cro. Jac. 386. 3 Bulst 95. Poph. 143. Bridg. 128. Owen, 60. 3 Mod. 261. S.C.Shower,68.)

"*Before the statute of Gloucester.*" This statute was made at a parliament holden at *Glocester* in the sixth yeare of the reigne of king *E.* 1, and therefore it is called the statute of *Glocester*.

"*Were barres to the same heires to demand any lands, &c.*" For the statute, as hath beene said, being made in 6 *E.* 1, was before the statute of *donis conditionalibus*, which was enacted 13 *Edward* 1, when all states of inheritance were fee simple. But after the statute of 13 *Edward* 1, the heire in tayle is not barred by the warrantie of his ancestour, unlesse there be assets, as shall be said hereafter more largely in this Chapter.

Gloc. cap. 3. Vid. Sect. 724, 725 & 727, &c. (2 Inst. 293.) Bracton, lib. 4, fol. 321. b. Fleta, lib. 5. cap. 34. 7 E. 3. Garr. 47.

By the statute of *Glocester* foure things are enacted. (8 Rep. 52, 53.)

First, that if a tenant by the courtesie alien with warrantie and dieth, that this shall bee no barre to the heire in a writ of *mordancester*, without assets in fee simple; and if lands or tenements descend to the heire from the father, he shall be barred, having regard to the value thereof.

[365. b.] ☞ Secondly, that if the heire, for want of assets at that time descended, doth recover the lands of his mother by force of this act, and afterwards assets descend to the heire from the father, then the tenant shall recover against the heire the inheritance of the mother by a writ of false judgement, which shall issue out of the record, to resummon him that ought to warrant, as it hath beene done in other cases, where the heire being vouched commeth into the court, and pleadeth that he hath nothing by discent.

Thirdly, that the issue of the sonne shall recover by a writ of *cosinage*, *aiel*, and *besaiel*.

And lastly, that the heire of the wife, after the death of the father and mother, shall not bee barred of his action to demand the heritage of the mother by writ of entrie, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Concerning the first, there be two points in law to be observed. (Ant. 54. b.)

First, albeit the statute in this article name a writ of *mordancester*, and after writs of *cosinage*, *aiel*, and *besaiel* [e]; yet a writ of right, a *formedon*, a writ of entry *ad communem legem*, and all other like actions, are within the purview of this statute; for those actions are put but for examples.

[e] 11 E. 2. tit. Garr. 83. 4 E. 3. Garr. 63. 18 E. 3. 51. Pl. Com. 110. 7 E. 3. 53. Temps E. 1. Garr. 87.

Secondly, where it is said in the said act (if the tenant by the courtesie alien, yet his release with warrantie to a disseisor, &c. is within the purview of the statute, for that it is in equall mischiefe; and if that evasion might take place, the statute should have beene made in vaine.

27 E. 3. 8, 9. 14 E. 4. Gar. 5. Dier, Quarto Mar. 148. a.

If tenant by the courtesie be of a seigniorie, and the tenancie escheate unto him, and after he alieneth with warrantie, this shall not binde the issue, unlesse assets descend; for it is in equall mischiefe. But notwithstanding this statute, if feme tenant in dower had

22 Ass. 9 & 37. Temps E. 1. Gar. 86.

had aliened in fee with warranty and died, the warranty had bound the heire untill the statute [o] of 11 *H.* 7, since our author wrote: by which statute the heire may enter, notwithstanding such warrantie.

[o] 11 H. 7. cap. 20. (Post. 380. a. 381. a.)

But note, there is a diversitie betweene a warranty on the part of the mother, and an estoppell; for an estoppell of the part of the mother shall not binde the heire, when hee claimeth from the father: as if lands bee given to the husband and wife, and to the heires of the husband, the husband make a gift in taile, and dieth, the wife recovereth in a *cui in vitâ* against the donee, supposing that she had fee simple, and make a feoffement and dyeth, the donee dyeth without issue, the issue of the husband and wife bring a *formedon* in the reverter against the feoffee; and notwithstanding that he was heire to the estoppell, and the mother was estopped, yet for that he claimed the land as heire to his father, hee was not estopped. Note, that warranties are favoured in law, being part of a man's assurance; but estoppels are odious.

18 E. 3. 9.

(Hob. 31. 8 Rep. 54. a.)

If a feme heire of a disseisor infeoffeth me with warrantie, and marrieth with the disseisee, if after the disseisee bring a *præcipe* against me, I shall rebut him, in respect of the warrantie of his wife, and yet he demandeth the land in another right. And so if the husband and wife demand the right of the wife, a warrantie of the collaterall ancestor of the husband shall barre.

21 R. 2. Judgement, 263. (2 Roll. Abr. 776. 8 Rep. 53. b. Ant. 326. a. Doct. & Stud. 44. b. 1 Leo. 261.)

If a woman had beene tenant for life, the remainder or reversion to her next heire, and the woman had aliened in fee and died, this warrantie had barred her heire in remainder or reversion; but this is partly holpen by the said act of 11 *H.* 7, viz. where the woman hath any estate for life of the inheritance or purchase of her husband, or given to her by any of the ancestors of the husband, or by any other person seised to the use of her husband, or of any of his ancestors, there her alienation, release, or confirmation with warrantie, shall not binde the heire.

11 H. 7. cap. 20. Vid. Sect. 595. See this statute of 11 H. 7. c. 20. well expounded, Lib. 1. fol. 176. in sir Anthony Mildmaye's case. 3 & 4 Ph. & Mar. Dier, 146. Lib. 3. fol. 59, 60, 61, 62. Lincolne Coll. case. Pl. Com. fol. 56. 20 Eliz. Dier, 362. Doct. & Student, 55. 8 Eliz. Dier, 248. 19 Eliz. Dier, 354. 21 Eliz. ibid. 362. Lib. 3. fol. 50, 51, sir George Browne's case. Lib. 5. fol. 79. Fitzh. case. 27 H. 8. 23.

To the authorities quoted in the margent, which may serve as commentaries upon the said statute, I will only adde two cases. The one was [f] A man seised of lands in fee levied a fine to the use of himselfe for life, and after to the use of his wife, and of the heires males of her body by him begotten for her jointure, and had issue male, and after he and his wife levied a fine, and suffered a common recovery, the husband and wife died, and the issue male entred by force of the said statute of 11 *H.* 7. And it was holden by the justices of assise (the case comming downe to be tried by *nisi prius*), that the entry of the issue male was lawfull (A): and yet this case is out of the letter of the statute; for she neither levied the fine, &c. being sole, or with any other after-taken husband, but is by herselfe with her husband that made the joynture. *Sed qui hæret in literâ hæret in cortice*; and this case being in the same mischiefe, is therefore within the remedy of the statute, by the intendment of the makers of the same, to avoid the disherison of heires who were provided

[f] Mich. 13 Jac. inter Harley & West in ejectione firmæ in Communi Banco. Lincoln.

(A) *This determination was over-ruled by the case of Kirkham* v. *Thompson, Cro. Jac.* 474. *See also Whately* v. *Kemp, cited* 2 *Vez. sen.* 358.

provided for by the said joynture, and especially by the husband himselfe that made the joynture, which (as it was said) is a stronger case than the example set downe in the statute.

[366. a.] The other was, [g] A man is seised of ☞ lands in the right of his wife, and they two levie a fine, and the conusee grant and rendereth the land to the husband and wife in speciall tayle, the remainder to the right heires of the wife, they have issue, the husband dyeth, the wife taketh another husband, and they two levie a fine in fee, and the issue entereth, this is directly within the letter of the statute, and yet it is out of the meaning; because the state of the land moved from the wife, so as it was the purchase of the husband in letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warrantie shall binde the heire at this day. So if a man bee tenant for life (otherwise than as tenant by the courtesie) and alien in fee with warrantie, and dieth, this shall at this day binde the heire that hath the reversion or remainder by the common law not holpen by any statute. But all this is to be understood, unlesse the heire that hath the reversion or remainder doth avoid the estate so aliened in the life of the ancestour; for then the estate being avoided, the warrantie being annexed unto the estate, is avoided also; whereof more shall be said in this Chapter in his proper place. And therefore it is necessary for the heire in such cases to make an entry as soone as he hath notice or probable suspicion of such an alienation.

[g] Pasch. 17 Eliz. (4 Rep. 10.) Ant. 360. a. 115. a. Post. 369. a. 381. a. Sid. 24. Plo. 105. a. Dyer, 64. b. Jo. 31. Hob. 332. Cro. Eliz. 2. 2 Cro. 475. Ben. 40. 2 Inst. 681. W. Jones. 13. & 254. Palm. 21. 32. 216. Cro. Car. 244. pl. 464. Com. Banco, Latton's case, which I myselfe heard and observed. (2 Roll. Abr. 141. Moor. 93.) Sect. 725. (1 Rep. 66. Post. 367. b. 388. b. 10 Rep. 95.)

As to the second clause of the statute of *Gloucester*, there are two points of law to be observed.

First, that by the expresse purview of the statute, if assets doe after discend from the father, then the tenant shall have recovery or restitution of the lands of the mother. But in a *formedon*, if at the time of the warrantie pleaded no assets be discended, whereby the demandant recovereth, if after assets discend, there the tenant shall have a *scire facias* for the assets, and not for the land intailed. And the reason hereof is, that if in this case the tenant should be restored to the land intailed, then if the issue in taile aliened the assets, his issue should recover in a *formedon*; and therefore the sages of the law, to prevent future occasions of suits, resolved the said diversitie in the cases abovesaid, upon consideration and construction of the statute of *Gloucester*, and of the statute *de donis conditionalibus*.

Pl. Com. Fulmerstone's case, 110. a. Lib. 8. fol. 53. Sym's case.

Secondly, it is to bee observed, that after assets discended, the recoverie shall bee by writ of judgement, which shall issue out of the rolle of the justices, &c. And here two things are to be declared and explained. First, by what writ, &c. and that is cleere, viz. by *scire facias*. But the second is more difficult; and that is, upon what manner of judgement the *scire facias* is to be grounded: for explanation whereof it is to be understood, that if the tenant will have benefit of the statute he must plead the warrantie, and acknowledge the title of the demandant, and pray that the advantage of the statute may bee saved unto him, and then if after assets discend, the tenant upon this record shall have a *scire facias*: and if assets discend but for part, he shall have a *scire facias* for so much. But if the tenant plead the warrantie, and plead further that assets discended, &c. and the demandant

Lib. 8. fol. 53. 54. Sym's case. Ibid. 134. Mary Shipley's case. (Doct. Pla. 180.) (2 Cro. 15. Ant. 33. a. 326. a.)

demandant taketh issue that assets discended not, &c. which issue is found for the demandant, whereupon he recovereth, the tenant, albeit assets doe after discend, shall never have a *scire facias* upon the said judgement; for that by his false plea he hath lost the benefit of the said statute.

Touching the third, sufficient hath beene spoken before. For the last, it is to be observed, that if the husband be seised of lands in the right of his wife, and maketh a feoffement in fee with warrantie, the wife dieth, and the husband dieth, this warrantie shall not binde the heire of the wife without assets, albeit the husband be not tenant by the curtesie. But of this you shall reade more hereafter.

8 E. 2. tit. Gar. 81. 18 E. 3. 51.

Vide Sect. 725.

In the meane time know this, that the learning of warranties is one of the most curious and cunning learnings of the law, and of great use and consequence (1).

(2 Roll. Abr. 774. Hob. 14. 28. 2 Saund. 183.)

"*To demand any lands or tenements.*" A warrantie may not only be annexed to freeholds, or inheritances corporeall, which passe by livery, as houses and lands, but also to freeholds or inheritances incorporeall, which lye in grant, as advowsons; and to rents, commons, estovers, and the like, which issue out of lands or tenements. And not onely to inheritance *in esse*, but also to rents, commons, estovers, &c. newly created. As a man (some say) may grant a rent, &c. out of land for life, in tayle, or in fee with warrantie; for although there can be no title precedent to the rent, yet there may be a title precedent to the land, out of which it issueth before the grant of the rent, which rent may bee avoided by the recovery of the land; in which case the grantee may helpe himselfe by a *warrantia cartæ*, upon the especiall matter. And so a warrantie in law may extend to a rent, &c. newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implyeth a warrantie in law. And so a rent newly created may be granted for oweltie of partition.

2 H. 4. 13. 30 H. 8. Di. 41. Temps, E. 1. Admesurement, 16. 32 E. 1. Voucher, 294. 30 E. 1. Exchange, 16. 9 E. 4. 15 E. 4. 9. 29 Ass. 13. (F. N. B. 134. Ante 50. b. 101. b. 308. nota. Post. 389. a.)

Vide Sect. 741. 45 E. 3. Voucher, 72. 9 E. 3. 78. 18 E. 3. 55. 30 E. 3. 30. 21 H. 7. 9. 3 H. 7. 4. 7 H. 4. 17. 10 E. 4. 9. b. 21 E. 4. 26. 14 H. 8. 30 H. 8.

☞ A man seised of a rent secke issuing out of the mannor of *Dale*, taketh a wife, the husband releaseth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, the wife bringeth a writ of dower of the rent, the terre-tenant shall vouche, for that albeit the release enured by way of extinguishment, yet the warrantie extended to it; and by warranting of the land, all rents, &c. issuing out of the land, that are suspended or discharged at the time of the warrantie created, are warranted also.

[366. b.]

Dier, 42. (2 Roll. Abr. 744.)

Sect.

(1) Upon the alterations, made by the statute law in the doctrine of warranty, see notes 1 and 2. 373. b.

Sect. 698.

WARRANTIE that commences by disseisin is in this manner: as where there is father and son, and the sonne purchaseth land, &c. and letteth the same land to his father for terme of yeares, and the father by his deed thereof infeoffeth another in fee, and bindes him and his heires to warrantie, and the father dies, whereby the warrantie descendeth to the son, this warrantie shall not barre the sonne; for notwithstanding this warrantie the sonne may well enter into the land, or have an assise against the alienee if he will, because the warrantie commenced by disseisin: for when the father which had but an estate for terme of yeares, made a feoffement in fee, this was a disseisin to the sonne of the freehold which then was in the sonne. In the same manner it is, if the sonne letteth to the father the land to hold at will, and after the father make a feoffement with warrantie, &c. And as it is said of the father, so it may be said of every other ancester, &c. In the same manner is it, if tenant by elegit, *tenant by statute merchant, or tenant by statute staple, make a feoffment in fee with warranty, † this shal not bar the heire which ought to have the land, because such warranties commence by disseisin.*

WARRANTIE, that commences by disseisin, &c." (1) It is called a warranty that commenceth by disseisin, because regularly the conveyance whereunto the warranty is annexed doth worke a disseisin. (Doct. & Stud. 155. a. b.)

In this Section *Littleton* putteth five examples of a warrantie commencing by disseisin, viz. of a feoffement made with warranty by tenant for yeares, by tenant at will, by tenant by *elegit*, by tenant by statute merchant, and by tenant by statute staple: all these and the other examples that *Littleton* putteth of this kinde of warranties in the succeeding Sections, have foure qualities. 7 E. 3. 41. 43 E. 3. 17. 50 E. 3. 12. Vide Sect. 611. (2 Inst. 154. 1 Roll. Abr. 663. 3 Rep. 37.)

First, that the disseisin is done immediately to the heire that is to be bound; and yet if the father bee tenant for life, the remainder Lib. 5. fol. 79. b. Fitzherbert's case. (Cro. Car. 483. 2 Roll. Abr. 741.)

† *&c.* added in L. and M. and Roh.

(1) As to *warranties commencing by disseisin*:—Lord chief baron Gilbert divides warranties into two sorts; first, those commencing by disseisin or wrong; and secondly, binding warranties. The first are where the ancestor that makes the warranty is partner to the wrong; and such warranties are not obliging, because it cannot be presumed that one who is so unjust as to do wrong, will be so just as to leave a recompense to his heir; wherefore such contracts are wholly rejected as collusive, and founded on no consideration. In the *Ancien Coutumier de Normandie*, ch. 96. it is said, that in a writ of *nouvelle disseisine* there is no vouching to warranty; because it is not to be suffered that any one should retain the possession of another, either by himself, or by the means of another, or that he should disturb it by his foolish hardihood; and whoever does so ought to restore it.—[Note 316.]

remainder to the sonne in fee, the father by covine and consent maketh a lease for yeares, to the end that the lessee shall make a feoffement in fee, to whom the father shal release with warrantie, and all is executed accordingly, the father dyeth, this warrantie shall not binde, albeit the disseisin was not done immediately to the sonne; for the feoffement of the lessee is a disseisin to the father, who is *particeps criminis*. So it is if one brother make a gift in tayle to another, and the uncle disseise the donee, and infeoffeth another with warrantie, the uncle dieth, and the warrantie descendeth upon the donor, and then the donee dyeth without ☞ issue, albeit the disseisin was done to the donee and not to the donor, yet the warrantie shall not binde him. The father, the sonne, and a third person are joyntenants in fee, the father maketh a feoffment in fee of the whole with warrantie, and dieth, the sonne dieth, the third person shall not only avoyd the feoffement for his owne part, but also for the part of the sonne; and he shall take advantage that the warrantie commenced by disseisin, though the disseisin was done to another.

[367. a.]

31 E. 3. tit. Garrantie, 28. (5 Rep. 50. a.)

(2 Roll. Abr. 772, 773.) Ant. 32. a. 56. a. 171. a. 179. a. F. N. B. 149. c.

(Cro. Car. 483.)

The second qualitie appearing in *Littleton*'s examples is, that the warrantie and disseisin are *simul et semel*, both at one and the same time. [*y*] And yet if a man commit a disseisin of intent to make a leoffment in fee with warrantie, albeit he make the feoffment many yeares after the disseisin, notwithstanding because the warrantie was done to that intent and purpose, the law shall adjudge upon the whole matter, and by the intent couple the disseisin and the warrantie together.

[*y*] 19 H. 8. 12. Lib. 5. fol. 79. b. Fitzh. case. (Plowd. 51. a. 3 Rep. 78. Post. 369. a. 371. a. 9 Rep. 81. a. Ant. 314. b. 5 Rep. 78.)

The third qualitie is, that the warrantie that commenceth by disseisin by all these examples (if it should binde) should binde as a collaterall warrantie, and therefore commencing by disseisin shall not binde at all.

(1 Leon. 304, 305. Cro. Car. 388.) Vide Sect. 611. 699. Bract. fol. 216. 223, 224. Fleta, lib. 4. cap. 17. 1, 2. Britton, cap. Disseisin. 50 E. 3. 12. b. 8 H. 7. 5. 7 E. 3. 11. 14 E. 3. Feoffments et faits, 67. 18 E. 3. Issue, 36. 4 E. 2. Briefe 790. 19 E. 2. Ass. 400. 43 E. 3. 7. 17 E. 3. 41. 43 E. 3. Diss. 5. 3 E. 4. 17. 12 E. 4. 12. 10 E. 4. 18. F. N. B. 201.

"*Shall not bar the heire, &c.*" For by the authoritie of our author himselfe, a lessee for yeares may make a feoffment, and by his feoffment a fee simple shall passe; so as albeit as to the lessor it worketh by disseisin, yet betweene the parties the warrantie annexed to such estate standeth good; upon which the feoffee may vouch the feoffor or his heires, as by force of a lineall warrantie. And therefore if a lessee for yeares, or tenant by *elegit*, *&c.* or a disseisor incontinent make a feoffment in fee with warrantie, if the feoffee be impleaded, hee shall vouch the feoffor, and after him his heire also; because this is a covenant reall, which binde him and his heires to recompence in value, if they have assets by discent to recompence; for there is a feoffment *de facto*, and a feoffment *de jure*: [*] and a feoffment *de facto* made by them that have such interest or possession as is aforesaid, is good betweene the parties, and against all men but only against him that hath right. And therefore if the lord be gardeine of the land, or if the tenant maketh a lease to the lord for yeares, or if the lord be tenant by statute merchant, or staple, or by *elegit* of the tenancie, and make a feoffment in fee, hee hereby doth extinguish his seigniorie, although having regard to the lessor it is a disseisin.

Lib. 3. fol. 78. in Fermor's case. [*] Temps E. 1. Counterplea de Voucher, 126. 50 E. 3. ibidem, 124. Vide W. 1. cap. 48. in the second part of the Institutes. (10 Rep. 95. 2 Roll. Abr. 740.)

The

The fourth qualitie is a disseisin; but that is put for an example; and the rather, for that it is most usuall and frequent: but a warrantie that commenceth by abatement or intrusion (that is, when the abatement or intrusion is made of intent to make a feoffment in fee with warrantie), shall not binde the right heire, no more than a warranty that commenceth by disseisin, because all doe commence by wrong. And so it is if the tenant dieth without heire, and an ancestor of the lord enter before the entrie of the lord, and make a feoffment in fee with warrantie, and dieth, this warrantie shall not binde the lord, because it commenceth by wrong, being in nature of an abatement. *Et sic de similibus* (1).

Sect. 699.

[367. b.] *ALSO, if a gardeine in chivalrie, or gardeine in socage, make ☞ a feoffment in fee, or in fee taile, or for life, with warrantie, &c. such warranties are not barres to the heyres to whom the lands shall bee discended, because they commence by disseisin.*

HERE *Littleton* addeth the case of gardeine in chivalrie, and gardeine in socage, and gardeine because nurture is also in the same case. 16 E. 3. Gar. 20. 8 Ass. 2. 43 E. 3. 7. and the books abovesaid. Vide Sect. 698. (3 Rep. 37.)

Sect. 700.

ALSO, if father and sonne purchase certaine lands or tenements, to have and to hold to them joyntly, &c. and after the father alien the whole to another (et puis le pier alien * l'entier a un auter), *and binde him and his heires to warrantie, &c. and after the father dieth, this warrantie shall not barre the sonne of the moitie that belongs to him of the said lands or tenements, because as to that moitie which belongs to the sonne, the warrantie commences by disseisin, &c.*

"TO

* l'entier—l'entierte, *L. and M. and Roh.*

(1) The editor, in note 1, to page 330. b. has (he fears too prolixly) attempted to explain the difference between actual disseisin and disseisin by election, and to prove that the disseisin produced by a feoffment, however slender or tortious the estate of the feoffor may be, is an actual disseisin. It is submitted to the reader, that what he has said on that subject is confirmed by what Littleton says in this Section, and lord Coke's commentary upon it. The discussion, in the note above referred to, of the operation of a feoffment, and the discussion in note 1, p. 271. b. of the operation of conveyances deriving their effect from the statute of uses, will, perhaps, assist the reader in forming accurate notions of the difference in the operations and effect of feoffments, fines, common recoveries, bargains and sales, releases and wills.—[Note 317.]

13 Ass. 8.
13 E. 3.
Gar. 24, 25. 37.
22 H. 6. 51.
8 H. 7. 6.
(5 Rep. 79)

"*TO have and to hold to them joyntly, &c.*" This is to bee intended of a joynt purchase in fee; for if the purchase were to the father and the sonne, and the heires of the sonne, and the father maketh a feoffment in fee with warrantie, if the sonne entreth in the life of the father, and the feoffee re-enter, the father dieth, the sonne shall have an assise of the whole; and so is the booke of 22 *H.* 6. to be understood. But if the sonne had not entred in the life of the father, then for the father's moitie it had beene a barre to the sonne, for that therein he had an estate for life; and therefore the warrantie as to that moitie had beene collaterall to the sonne, and by disseisin for the sonne's moitie; and so a warrantie defeated in part, and stand good in part. And this appeareth by the example that *Littleton* hath put. But if the purchase had beene to the father and sonne, and to the heires of the father, then the entrie of the sonne in the life of the father, as to the avoydance of the warrantie, had not availed him, because his father lawfully conveyed away his moitie (1).

(Post. 393. a.)
(1 Rep. 66.)
(F. N. B. 192. a.)

Temps E. 1.
Vouch. 207.
39 E. 3. 26.
John London's case, 14 H. 6.
(8 Rep. 42.
Plowd. 66. b.
5 Rep. 119.)

If a man of full age and an infant make a feoffment in fee with warrantie, this warrantie is not void in part, and good in part; but it is good for the whole against the man of full age, and voyd against the infant: for albeit the feoffment of an infant passing by liverie of seisin be voydable, yet his warrantie, which taketh effect only by deed, is meerely voyd.

☞ Sect. 701. [368. a.]

ALSO, if A. *of* B. *bee seised of a mese, and* F. *of* G. *that no right hath to enter into the same mese, claiming the said mese, to hold to him and to his heires, entreth into the sayd mese, but the same* A. *of* B. *is then continually abiding in the same mease: in this case the possession of the freehold shall bee alwayes adjudged in* A. *of* B. *and not in* F. *of* G. *because in such case where two bee in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shal adjudge him in possession that hath right to have the possession of the same tenements. But if in the case aforesayd, the sayd* F. *of* G. *make a feoffment to certaine barrettors and extortioners in the countrie, to have maintenance*

(1) It is greatly to be regretted, that sir Edward Coke has not expressed himself more fully on the subject hinted at by him in this note, the defeating of the warranty by the heir's entry or claim in the ancestor's life-time. It is thus mentioned by lord chief-baron Gilbert, Ten. 135. The heir was presumed to receive a recompense, and therefore was barred if he did not claim during the life of his ancestor; and this was the more reasonable, because such recompenses were anciently in lands, which did of right descend to the heir; and if the ancestor did alien them, the heir must claim his own during the life of his ancestor, otherwise he could never claim it, inasmuch as this was the whole time of limitation for the heir to challenge his own in this case; and if he slipped that time, he was barred for ever, inasmuch as there might be secret conveyances to alien the recompense for the benefit of the heir, which might turn to the prejudice of the purchaser.—[Note 318.]

tenance from them of the sayd house, by a deed of feoffment with warrantie, by force whereof the said A. of B. dare not abide in the house, but goeth out of the same (per force de quel le dit *A.* de *B.* ne osast pas demurrer en le mease, mes * alast hors de le mease), *this warrantie commenceth by disseisin, because such feoffment was the cause that the sayd A. of B. relinquished the possession of the same house* †.

"*WHERE two bee in one house, &c. and the one claimeth by one title, and the other by another title, &c.*" For the rule is, *Duo non possunt in solido unam rem possidere.* (Ant. 194. a. 244. a. 1 Roll. Abr. 661, 662. Plowd. 233. b.)

19 H. 6. fol. 28. b. per Newton. (Siderf. 385. a. Ant. 180. b. 181. a.)

These words of our author be significant and materiall: [*h*] for if a man hath issue two daughters, bastard eigne and mulier puisne, and die seised, and they both enter generally, the sole possession shall not be adjudged only in the mulier, because they both claime by one and the same title; and not one by one title, and the other by another title, as our author here saith. [*h*] 17 E. 3. 59. 11 Ass. p. 23. (Perk. 84. 8 Rep. 101. b. Hob. 120. Ant. 189. 244. 10 Rep. Lampet's case.)

[*i*] If the tenaunt in an assise of an house desire the plaintiffe to dine with him in the house, which the plaintiffe doth accordingly, and so they bee both in the house; and in truth one pretendeth one title, and the other another title; yet the law in this case shall not adjudge the possession in him that right hath; because our author here saith, hee claimed not his right, and it should be to his prejudice if the law should adjudge him possession; and a trespasser hee cannot bee, because hee was invited by the tenant in the assise. [i] Pl. Com. 91. the Parson of Honey Lane's case. (Ant. 245. b. Plowd. 93. a. b.)

"*Barrettors.*" A barrettor is a common moover and exciter, or maintainer of suits, quarrels, or parts, either in courts, or elsewhere in the countrey. In courts, as in courts of record, or not of record; as in the countie, hundred, or other inferior courts. In the countrie in three manners: first, in disturbance of the peace: secondly, in taking or keeping of possessions of lands in controversie, not only by force, but also by ☞ subtiltie and a deceit, and most commonly in suppression of truth and right: thirdly, by false inventions, and sowing of calumniations, rumors, and reports, whereby discord and disquiet may grow betweene neighbours. See the Inditement of a common Barretor. W. 1. cap. 18, & 32. 40 E. 3. 33. Lib. 8. fol. 36. b. Case de Barretrie. (3 Inst. 175. Siderf. 282. 2 Roll. Abr. 355.) (1 Roll. Abr. 353.)

[368. b.]

"*Barretor*" is derived of this word *(barret)* which signifieth not only a wrangling suit, but also such brawles and quarrels in the countrey as are aforesaid. 33 E. 1. Stat. de Conspiracie. Lib. 8. ubi supra. (3 Rep. 36.)

"*Extortioners.*" Extortion in his proper sense, is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it be due; *quod non est debitum, vel quod est ultra debitum, vel ante tempus quod est debitum:* for this is to be knowne, that it is provided by the [*l*] statute of *W.* 1, that no sheriffe, nor any other minister P. Com. fol. 64. Lib. 10. fol. 101, 102. Beaufage's case. (3 Inst. 149.)

42 E. 3. 5. 27 Ass. 14. Pl. Com. 68. [*l*] W. 1. c. 26. &c. W. 1. c. 10. (2 Roll. Abr. 32.)

of

* se en, *added in L. and M. and Roh.* † *&c.* added in L. and M. and Roh.

of the king, shall take any reward for doing of his office, but only that which the king alloweth him, upon paine that hee shall render double to the partie, and be punished at the king's pleasure. And this was the antient common law, and was punishable by fine and imprisonment; but the statute added the aforesaid penaltie. But some latter statutes having permitted them to take in some cases; by colour thereof the king's officers and ministers, as sheriffes, coroners, escheators, feodaries, gaolers, and the like, doe offend in most cases; and seeing this act yet standeth in force, they cannot take any thing but where and so farre as latter statutes have allowed unto them. But yet such reasonable fees as have beene allowed by the courts of justice of antient time to inferiour ministers and attendants of courts for their labour and attendance, if it be asked and taken of the subject, is no extortion.

(Plowd. 465. Noy, 111. 2 Roll. Abr. 32.) 23 H. 6. c. 10. 33 H. 6. 22. 21 H. 7. 17. Staunf. 49. 3 E. 3. Cor. 372.

[n] Hil. 13 Jac. Reg.

And all this was resolved [n] by the whole court of king's bench, betweene *Shurley* plaintiffe, and *Packer* deputie of one of the sheriffes of London, in an action upon the case in the king's bench.

See the statute of 21 *H.* 1. *cap.* 5. setting downe the fees of ordinaries, registers, and other officers, in certaine cases, and many other statutes; as for example, the statute of 19 *H.* 7. *cap.* 8. against taking of shewage (that is, taking of any thing for shewing of wares and merchandises that be truly customed to the king before) and the like.

Pl. Com. in Dine and Manningham's case. Mir. cap. 5. § 1.

Of this crime it is said, that it is no other than robberie; and another saith, that it is more odious than robberie; for robberie is apparent, and hath the face of a crime; but extortion puts on the visure of vertue, for expedition of justice, and the like; and it is ever accompanied with the grievous sinne of perjurie.

7 E. 4. 21.

But largely extortion is taken for any oppression by extort power, or by colour or pretence of right; and so *Littleton* taketh it in this place. *Extortio* is derived from the verbe *extorqueo*; and it is called *crimen expilationis*, or *concussionis:* and here barretors and extortioners are put but for examples; for if the feoffement be made to any other person or persons, the law is all one.

(3 Inst. 175. 2 Inst. 212. Dyer, 555, 556. Sid. 212, 213. Noy, 52.)

"*To have maintenance from them.*" Maintenance, *manutenentia*, is derived of the verbe *manutenere*, and signifieth in law a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right: *Culpa est rei se immiscere ad se non pertinenti*; and it is twofold, one in the countrey and another in the court. For quarrels and sides in the court [k] the statutes have inflicted grievous punishments. But this kinde of maintenance of quarrels and sides in the countrey is punishable only at the suit of the king, [r] as it hath beene resolved. And this maintenance is called *manutenentia*, or *manutentio ruralis*, for example, as to take possessions, or keepe possessions, whereof *Littleton* here speaketh, or the like (1).

[k] 1 E. 3. c. 14. 20 E. 3. cap. 4, 5.

[r] Mich. 7 Jac. in the Starre-Chamber. (Doc. Pla. 240.)

The

(1) Whether an attorney's laying out money for his client be maintenance, see Pierson *v.* Hughes, Freeman, 71. 81.—By the ancient Roman law, there were few cases in which a person was admitted to plead by an attorney, according to the rule, *Nemo alieno nomine lege agere potest.* Recourse was therefore

The other is called *curialis*, because it is done *pendente placito* in the courts of justice; and this was an offence at the common law, and is threefold.

First, to maintaine to have part of the land, or any thing out of the land, or part of the debt, or other thing in plea or suit; and this is called *cambipartia*, champertie. 33 E. 1. Stat. 2. in fine. Regist. 183. 6 E. 3. 33.

22 H. 6. 7. 9 H. 7. 22. (2 Roll. Abr. 114.) 30 Ass. 5. 19 E. 4. 3. 20 H. 6. 12. 34 H. 6. 2. 11 H. 6. 11. 8 H. 5. 8. 10 E. 4. 19. W. 1. cap. 25. 28 W. 2. cap. 49. Artic. super Cart. cap. 11. F. N. B. 171, 172. Mirror, cap. 1. § 5. (Mo. 6. Ant. 157. Hob. 294.)

[369. a.] The second is, when one maintaineth the one side, without having any part of the thing in ☞ plea, or suit; and this maintenance is twofold, general maintenance, and speciall maintenance; whereof you shall reade at large in our bookes, which were too long here to be inserted.

The third is when [*u*] one laboureth the jury, if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lyeth against him; and if he take money, a *decies tantum* may be brought against him. And whether the jury passe for his side or no, or whether the jurie give any verdict at all, yet shall he be punished as a maintainer or embraceor either at the suit of the king or partie.

[*u*] 13 H. 4. 16. b. F. N. B. 171. 11 H. 6. 10. 37 H. 6. 31.

Here in this case that *Littleton* putteth, the feoffment is void by the statute [*a*] of 1 *R.* 2; for thereby it is enacted, that feoffements made for maintenance shall be holden for none, and of no value, so as *Littleton* putteth his case at the common law; for he seemeth to allow the feoffement, where he saith *such feoffment was the cause, &c.*: but some have said that the feoffement is not voide betweene the feoffor and feoffee, but to him that right hath.

[*a*] 1 R. 2. cap. 9. Vid. 27 H. 2. fol. 23.

Now, since *Littleton* wrote, there is a notable statute [*b*] made in suppression of the causes of unlawfull maintenance (which is the most dangerous enemie that justice hath), the effect of which statute is,

[*b*] 32 H. 8 cap. 9. (Plowd. 79. a.)

First, that no person shall bargaine, buy, or sell, or obtaine any pretenced rights or titles. (2 Roll. Abr. 113, 114. Hob. 115.)

Secondly, or take, promise, grant, or covenant to have any right or title of any person in or to any lands, tenements, or hereditaments; but if such person which so shall bargaine, &c. their ancestors, or they by whom he or they claime the same, have beene in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole yeare, &c. upon paine to forfeit the whole value of the lands, &c. and the buyer or taker, &c. knowing the same, to forfeit also the value. (1 Leon. 167. 208.

Thirdly, Plowd. 89. a.)

therefore had to a fiction at law, by which it was supposed that the property of the thing in contest was made over to the attorney. The consequence was, that the proceedings were carried on in the name of the attorney, and even the sentence passed upon him. Hence he was called the *dominus litis*. See *Boehmer de dominio litis, l.* 12. *Pothier Pandecta Justinianeæ*, lib. 3. tit. 3. § 2. —[Note 319.]

Thirdly, provided that it shall be lawfull for any person, being in lawfull possession, by taking of the yearely farme, rents or profits, to obtaine and get the pretenced right or title, &c. of any lands whereof he or they shall be in lawfull possession.

For the better understanding of which statute, you must observe, that title or right may be pretenced two manner of wayes:

(1 Cro. 232, 233.) First, when it is meerely in pretence or supposition, and nothing in verity.

Pl. Com. fol. 86. &c. Partridge's case. Secondly, when it is a good right or title in verity, and made pretenced by the act of the partie; and both these are within the said statute: for example, if *A.* be lawfull owner of land, and is in possession, *B.* that hath no right thereunto granteth to, or contracteth for the land with another, the grantor and the grantee (albeit the grant be meerely void) are within the danger of the statute; for *B.* hath no right at all, but only in pretence. If *A.* be disseised in this case, *A.* hath a good lawfull right; yet if *A.* being out of possession, granteth to, or contracteth for the land with another, he hath now made his good right of entrie pretenced within the statute, and both the grantor and grantee within the danger thereof. *A fortiori* of a right in action. *Quod nota.*

It is further to be knowne, that a right or title may be considered three manner of wayes.

First, as it is naked and without possession. Secondly, when the absolute right commeth by release or otherwise to a wrongfull possession; and no third person hath either *jus proprietatis*, or *jus possessionis*. The third when he hath a good right, and a wrongfull possession. As to the first, somewhat hath beene said, and more shall be said hereafter. As to the second, taking the former example, if *A.* be disseised, and the disseisee release unto him (N), he may presently sell, grant, or contract for the land, and need not tarrie a yeere; for it is a rule upon this statute, that whosoever hath the absolute ownership of any land, tenements, or hereditaments (as in this case the disseisor hath), there such owner may at his pleasure bargaine, grant, or contract for the land, for no person can thereby be prejudiced or grieved. And so if a man mortgage his land, and after redeeme the same; or if a man recover land upon a former title, or be remitted to an ancient right, he may at any time bargaine, grant, or contract for the land, for the reason aforesaid. As to the third, if in the case aforesaid the disseisor dieth seised, and *A.* the disseisee entreth, and disseise the heire of the disseisor, albeit he hath an antient right, yet seeing the possession is unlawfull, if he bargaine or contract for the land before hee hath beene in possession by the space of a yeare, he is within the danger of the statute, because the heire of the disseisor hath right to the possession, and he is thereby grieved, *et sic de similibus:* and albeit he that hath a pretenced right (and none in verity) getteth the possession wrongfully, yet the statute extendeth unto him as well as where he is out of possession.

Pl. Com. Partridge's case, ubi sup. 6 E. 6. Brooke, tit. Maintenance, 38. (Cro. Car. 388. Plowd. 89. a.)

23 Eliz. Dier, 374. Pl. Com. Partridge's case, fol. 87. Note, the words of the statute be (any pretenced right), therefore a lease for yeares is within the statute; for the statute saith not (the right), but (any right), and the offendour shall forfeit the whole value of the land. And where the statute speaketh of rights in the plurall number, yet any one right is within the statute. [a] But yet if a man make a lease for yeares to another

[a] Mich. 30 & 31 Eliz. 2811. inter Finch & Cockham in Com. Banc. (Mo. 266.) (2 Roll. Abr. 114.)

(N) *i. e. the disseisor.*

[369. b.] another to the intent to trie the title in an *ejectionæ firmæ*, that is out of the statute, ☞ because it is in a kinde of course of law; but if it be made to a great man, or any other to sway or countenance the cause, that is within this statute.

Also the statute speakes (of any right or title to any land, &c.) [*b*] A customary right, or a pretence thereof to lands holden by copie, is within this statute.

[*b*] Lib. 4. fol. 26. Copihold cases.

The said proviso (which is rather added for explanation, than of any necessitie) extendeth only to a pretenced right or title, and (A) to a good and cleare right; and therefore without question, any that hath a just and lawfull estate may obtaine any pretenced right by release or otherwise; for that cannot be to the prejudice of any: nay, as hath been said, a disseisor that hath a wrongfull estate may obtaine a release of the disseisee, and that is not within the body of the act, and consequently standeth not in need of any proviso to protect him.

6 E. 6. tit. Maintenance. Brooke, 38. (5 Rep. 60.)

And therefore [*c*] if there be tenant for life, the remainder in fee by lawfull and just title, he in the remainder may obtaine and get the pretenced right or title of any stranger, not only for that the particular estate and the remainder are all one, but for that it is a meane to extinguish the seeds of troubles and suits, and cannot be to the prejudice of any, as hath beene said. And where the statute saith, (being in lawfull possession by taking the yearely rent, &c.) those words are but explanatory, and put for example; for howsoever he be lawfully seised in possession, reversion, or remainder, it sufficeth though he never tooke profit. But the matter observable upon this proviso, which is worthy of observation, is, that if a disseisor make a lease for life, lives, or yeares, the remainder for life, in tayle, or in fee, he in remainder cannot take a promise or covenant, that when the disseisee hath entred upon the land, or recovered the same, that then he should convey the land to any of them in remainder, thereby to avoid the particular estate, or the interest or estate of any other; for the words of the proviso be (buy, obtaine, get, or have by any reasonable way or meane) and that is not by promise or covenant to convey the land after entry or recovery; for that is neither lawfull, being against the expresse purview of the body of the act, and not reasonable, because it is to the prejudice of a third person. But the reasonable way or meane intended by the statute, is by release or confirmation, or such conveyances as amount to as much: and this agreeth with the letter of the law, viz. the pretenced right or title of any other person; and rights and titles are by release or confirmation, as by reasonable wayes and meanes lawfully transferred and extinct: and the words of promise or covenant, &c. which are prohibited by the body of the act are omitted in the proviso.

[*c*] 34 H. 8. Dier, 52.

"*Relinquished the possession, &c.*" This must be understood, that before livery of seisin upon the feoffement, *A. of B.* departed out of the house; for otherwise the livery and seisin should be void, because *A. of B.* was in possession. And *Littleton* here saith, *by a deed of feoffment*, so as albeit the deed were made before the departure it is not materiall; but the departure must be before the livery of seisin, for that doth worke the disseisin. And yet that which *Littleton* saith is true, that the feoffement was the cause that he relinquished his possession; for otherwise he would not have done it.

(2 Rep. 31. Ant. 48. b.)

But

(A) *Here the word "not" seems to be omitted by mistake.*

But admit that *A. of B.* had departed for any other cause, yet if *F. of G.* enter and enfeoffe certaine barretors or extortioners, or any other with warrantie, this is a warrantie that commenceth by disseisin, for that the feoffement worketh a disseisin.

Sect. 702.

ALSO, if a man which hath no right to enter into other tenements, enter into the same tenements, and incontinently make a feoffement thereof to others by his deed with warranty, and deliver to them seisin, this warranty commenceth by disseisin, because the disseisin and feoffement were made as it were at one time. And that this is law, you may see in a plee * M. 11 E. 3. *in a writ of* formedon *in the reverter.*

See before in the Chapter of Releases. (5 Rep. 79.) 46 E. 3. 6.

THIS doth explaine that which hath beene said before. And albeit *Littleton* useth the words (and incontinently thereof make a feoffement); and that in this case of *Littleton* the disseisin and feoffement were made *(quasi uno tempore)*, yet if the disseisin were made to the intent to make a feoffment with warrantie, albeit the feoffement be long after this (as hath beene said) is a warrantie ☞ that commenceth by disseisin. [370. a.]

[d] 31 E. 3. tit. Garr. 28.

"*Mich.* 11 *E.* 3." This is mistaken, and should be [*d*] 31 *E.* 3, and so is the originall, which case you shall see in Master *Fitzherbert's* Abridgement, for there is no booke at large of that yeare. Hereby you may perceive that learned men looke not only to the cases reported, but unto records, as you may see *Littleton* did; for *Fitzherbert* put this case in print long after, as elsewhere hath been shewed.

Sect. 703.

WARRANTY lineall is, where a man seised of lands in fee maketh a feoffement by his deed to another, and bindes himselfe and his heires to warrantie, and hath issue and die, and the warranty descend to his issue, that is a lineal warranty (Garranty lineal est, lou home seisie de terres en fee, † fait feoffement per son fait a un auter, et oblige luy et ses heires a garranty, et ad issue et morust, et le garrantie discendist a son issue, ceo est lineal garranty). *And the cause why this is called lineall warrantie, is not because the warrantie descendeth from the father to his heire* (Et la cause pur ceo que ‡ est dit lineal garrantie, n'est pur ceo que le garranty discendist de le pier a son heire); *but the cause is, for that if no such deed with warrantie had been made by the father, then the right of the tenements should descend to the heire, and the heire should convey the discent from his father* (et l'heire conveyeroit le discent de ‖ son pier), *&c.*

"*WARRANTY*

* M. 11.—anno xxxi. *L. and M. and Roh.*

† et *added in L. and M. and Roh.*

‡ ceo *added in L. and M. and Roh.*

‖ son—le, *L. and M. and Roh.*

"*WARRANTY lineall, &c.*" A warrantie lineall is a covenant reall annexed to the land by him which either was owner, or might have inherited the land, and from whom his heire lineall or collaterall might by possibilitie have claimed the land as heire from him that made the warranty; whereof *Littleton* himselfe putteth divers cases, which shall be explained in their proper places. And in this case put in this Section, *Littleton* (once for all) sheweth, that the reason of the example here put, is because if no such alienation with warrantie (for so is *Littleton* to be intended) had beene made, the very lands had descended to the heire, so as the case being put of lands in fee simple, the alienation without the warrantie had barred the heire. And note, that it is called a lineall warrantie (1), not because it must descend upon the lineall heire; for be the heire lineall or collaterall, if by possibilitie he might claime the land from him that made the warrantie, it is lineall; having regard to the warrantie, and title of the land. And also it is called lineall, in respect that the warrantie made by him that had no right or possibility of right to the land, is called collaterall, in regard that it is collaterall to the title of the land. And it is also to be observed, that in all the cases that *Littleton* hath put, or shall put, the lineall or collaterall warranty doth binde the heire; and therefore the successour claiming in another right shall not be bound by the warrantie of any naturall ancestour. For which cause [*c*] in a *juris utrum* brought by a parson of a church, the collaterall warrantie of his ancestour is no barre, for that he demandeth the land in the right of his church in his politike capacitie, and the warrantie descendeth on him in his naturall capacitie. [*d*] But some have holden, that if a parson bring an assise, that a collaterall warranty of his ancestour shall binde him; and their reason is, for ☞ that the assise is brought of his possession and seisin, and he shall recover the meane profits to his owne use; but seeing he is seised of the freehold, whereof the assise is brought *in jure ecclesiæ*, which is in another right than the warrantie, it seemeth that it should not be any barre in the assise. The like law is of a bishop, archdeacon,

(1 Rep. 1.)

(Post. 371. a. 375. a.)

(3 Rep. 59.) 35 E. 3. Garr. 73.

[*c*] 27 H 6. Garr. 48.

[*d*] 34 E. 3. Garr. 71.

[370. b.]

(1) As to the distinction between lineal and collateral warranty:—By the definitions given in this place of lineal warranty, it appears to be distinguished from collateral warranty chiefly by this circumstance, that he on whom it descends might possibly have claimed the land as heir to him that made the warranty, and whether he claims as heir lineal or as heir collateral, the warranty is equally lineal. But he must claim as heir; for if an estate is limited to the sons of any person successively in tail, and the eldest son aliens with warranty, and dies without issue, the second son is heir at law to the eldest son: he does not however claim as heir, but as purchaser, and therefore the warranty is collateral to him. So if an estate is limited to the father for life, and after his decease to his sons successively in tail, and the father aliens with warranty and dies, the warranty descends on his eldest son and heir; but as he claims as purchaser, not as heir, the warranty is collateral to him. But though he must claim as heir, it is not necessary he should make his title *immediately* as heir to him, (see Sect. 706.) neither is it necessary he should derive from him alone. See Sect. 714.—An attempt will be made, note 2, page 373. b, to explain the real distinction between lineal and collateral warranty.—[Note 320.]

deacon, deane, master of an hospitall, and the like, of their sole possessions, and of the prebend, vicar, and the like.

[*] 45 Ass. 6. 6 E. 3. 56. a. b. Pl. Com. 234. & 553, 554. (8 Rep. 1. Ant. 19. b.)

"*And bindes himselfe and his heires.*" [*] King *H.* 3. gave a mannor to *Edmund* earle of Cornewall, and to the heires of his body, saving the possibilitie of reverter, and died: the earle, before the statute of *W.* 2. *cap.* 1. *de donis conditionalibus*, by deed gave the said mannor to another in fee with warrantie in exchange for another mannor, and after the said statute in the 28 yeare of *E.* 1. dieth without issue, leaving assets in fee simple; which warrantie and assets descended upon king *E.* 1. as cosin germaine and heire of the said earle, viz. son and heire of king *Henry* the third, brother of *Richard* earle of Cornwall, father of the said earle *Edmund.* And it was adjudged, that the king, as heire to the said earle *Edmund*, was by the said warrantie and assets barred of the possibilitie of reverter, which he had expectant upon the said gift, albeit the warranty and assets descended upon the naturall body of king *E.* 1. as heire to a subject; and king *E.* 1. claimed the said mannor, as in his reverter *in jure coronæ* in the capacity of his body politike, in which right he was seised before the gift. In this case, how by the death of the said earle *Edmund* without issue, the king's title by reverter, and the warrantie and assets, came together, and that the warrantie was collaterall, yet the king shall not be barred without assets, as a subject shall be; and many other things are to be observed in this case, which the learned reader will observe (1).

Vide 27 H. 6. Garr. 48. 34 E. 3. Garr. 71.

Vide Sect. 711, 712. (Hob. 339.) 9 Rep. 132. b. Vaug. 379.)

(8 Rep. 51.)

Sect. 704.

*FOR if there be father and sonne, and the sonne purchase * lands in fee, and the father of this disseiseth the sonne, and alieneth to another in fee by his deed* (et le pier de ceo disseisist son fits, et † aliena a un auter en fee per son fait,) *and by the same deed binde him and his heires to warrant the same tenements, &c. and the father dieth; now is the son barred to have the said tenements; for he cannot by any suit, nor by other meane of law, have the same lands by cause of the said warrantie. And this is a collaterall warrantie; and yet the warrantie descendeth lineally from the father to the sonne.*

Sect.

* *lands—tenements*, L. and M. and Roh. † ceo *added in L. and M. and Roh.*

(1) The king was in this case barred of the possibility of reverter descending to him *in jure coronæ*, by warranty and assets from a subject descending on his body natural; for in all likelihood those lands will descend to the same person to whom the crown will descend, and consequently will be a good recompense for the loss of the crown lands, but in the case of the parson, his successor can have no benefit of what the predecessor has in his natural capacity. Hawk. Abr. 474.—[Note 321.]

Sect. 705.

BUT because if no such deed with warrantie had beene made, the sonne in no manner could convey the title which hee hath to the tenements from his father unto him, inasmuch as his father had no estate in right in the lands; wherefore such warrantie is called collaterall warrantie, inasmuch as he that maketh the warrantie is collaterall to the title of the tenements: and this is asmuch to say, as hee to whom the warrantie descendeth, could not convey to him the title which hee hath in the tenements by him that made the warrantie, in case that no such warrantie were made.

[371. a.]

HERE *Littleton* putteth an example, proving that it is not called lineall, because it descendeth lineally from the father to the son; for in this case the warrantie descendeth lineally, and yet is a collaterall warrantie. In this example you must intend that the disseisin was not of intent to alien with warrantie to barre the sonne; but here the disseisin being done to the sonne, without any such intent, the alienation afterwards with warrantie doth barre the sonne; because that albeit the warrantie doth lineally descend, yet seeing the title is collaterall, that is, that the sonne claimeth not the land as heire to his father, therefore in respect of the title it is a collaterall warrantie. And thus doth *Littleton* agree [e] with the authoritie of our bookes. So as the diversities do stand thus. First, where the disseisin and feoffment are *uno tempore*, and where at severall times. Secondly, where the disseisin is with intent to alien with warrantie, and where the disseisin is made without such intent, and the alienation with warrantie afterwards made.

5 E. 3. 14. 46 E. 3. 6. 19 H. 8. 12. 8 R. 2. Garr. 100. Vid. Sect. 716.

[e] 46 E. 3. 6. 5 E. 3. 14. 19 H. 8. 12.

Sect. 706.

ALSO, if there bee grandfather, father, and son, and the grandfather is disseised, in whose possession the father releaseth by his deed with warrantie, &c. and dieth, and after the grandfather dieth; now the son is barred to have the tenements by the warranty of the father. And this is called a lineall warrantie, because if no such warrantie were, the son could not convey the right of the tenements to him, nor shew how hee is heire to the grandfather but by means of the father.

HERE *Littleton* putteth an example where the son must claime the land as heire to his grandfather; and yet because hee cannot make himselfe heire to his grandfather but by his father, it is lineall.

1 H. 4. 33. 35 E. 3. Gar. 73.

And it is to bee observed, that the warrantie in this case descended upon the son, before the discent of the right, which happened by the death of the grandfather, in whom the right was. *Vide Littleton Cap. de Releases*, and after in this Chapter, *Sect.* 707. and 741.

"*The*

(3 Rep. 59. Ant. 265. a. Post. 386.)

"*The father releaseth by his deed with warrantie, &c.*" [*f*] It is to be knowne, that upon everie conveyance of lands tenements, or hereditaments, as upon fines, feoffments, gifts, &c. releases and confirmations made to the ☞ tenant of the land, a warrantie may bee made, albeit hee that makes the release or confirmation, hath no right to the land, &c.; but some doe hold, that by release or confirmation, where there is no estate created, or transmutation of possession, a warrantie cannot be made to the assignee. [371. b.]

[*f*] 14 E. 3. Voucher, 108. 16 E. 3. ibid. 87. 18 E. 3. ibid. 6. 10 E. 3. 52. 21 E. 3. 27. 11 H. 4. 22. 44 E. 3. Cont. de Vouch. 22. 12 H. 7. 1. Vide Sect. 733. 738. 745. (Post. 385. a.)

Sect. 707.

ALSO, if a man hath issue two sonnes and is disseised, and the eldest sonne release to the disseisor by his deed with warrantie, &c. and dies without issue, and afterwards the father dieth, this is a lineall warrantie to the younger sonne, because albeit the eldest sonne died in the life of the father, yet by possibilitie it might have beene, that he might convey to him the title of the land by his elder brother, if no such warrantie had beene. For it might bee, that after the death of the father the elder brother entred into the tenements and died without issue, and then the yonger sonne shall convey to him the title by the elder son (et donque le puisne fits conveyera a luy le title per l'eigne * fits). *But in this case if the younger sonne releaseth with warrantie to the disseisor, and dieth without issue, this is a collaterall warrantie to the elder son, because that of such land as was the father's, the elder by no possibilitie can convey to him the title by meanes of the younger son* (Mes en tiel cas, si le puisne fits relesse ove garrantie a le disseisor, et morust sans issue, ceo est un collateral garrantie al eigne † fits, pur ceo que de tiel terre que fuit al pier, l'eigne per nul possibilitie poit conveyer a luy le title per meane de le puisne ‡ fits).

35 E. 3. Gar. 73. 11 H. 4. 33. (1 Rep. 66.)

HERE *Littleton* putteth an example, where the heire that is to be barred by the warrantie, is not to make his discent by him that made the warrantie, as in the case before; and yet because by possibilitie he might have claimed by the eldest sonne, if he had survived the father, and died without issue, and so the younger brother might by possibilitie have beene heire to him, the warrantie is lineall.

And here it is to be noted, that the warrantie of the eldest sonne descended before the right descended; whereof more shall be said hereafter, *Sect.* 741; and the opinion of *Littleton* in this case is holden for law against the opinions in 35 *E.* 3. *Gar.* 73.

9 E. 3. 16. 38 E. 3. 21. 46 E. 3. 26. 8 R. 2. Gar. 101. (2 Roll. Abr. 773.)

"*But in this case if the younger sonne releaseth with warrantie, &c.*" This warrantie in this case is collaterall to the eldest sonne, and to the issues of his bodie; but if the eldest sonne dieth without issue of his bodie, then the warrantie is lineall to the issues of the bodie of the youngest: and so the warrantie that was collaterall to some persons, may become lineall to others.

Sect.

* fits *not in L. and M. or Roh.*
† fits *not in L. and M. or Roh.*
‡ fits *not in L. and M. or Roh.*

[372. a.]

☞ Sect. 708.

ALSO, if tenant in taile hath issue three sonnes, and discontinue the tayle in fee, and the middle son release by his deed to the discontinuee, and binde him and his heires to warrantie, &c. and after the tenant in taile dieth, and the middle son dieth without issue, now the eldest sonne is barred to have any recoverie by writ of formedon, *because the warrantie of the middle brother is collaterall to him, inasmuch as hee can by no meanes convey to him by force of the tayle any discent by the middle, and therefore this is a collateral warrantie. But in this case if the eldest sonne die without issue, now the youngest brother may well have a writ of* formedon *in the discender, and shall recover the same land, because the warrantie of the middle is lineall to the youngest son, for that it might bee that by possibilitie the middle might bee seised by force of the taile after the death of his eldest brother, and then the youngest brother might convey his title of discent by the middle brother.*

HEREBY it also appeareth, that a warrantie that is collaterall in respect of some persons, may afterwards become lineall in respect of others. Whereupon it followeth, [*] that a collateral warrantie doth not give a right, but bindeth only a right so long as the same continueth: but if the collateral warrantie be determined, removed, or defeated, the right is revived. [*f*] And yet in an assise the plaintiffe hath made his title by a collateral warrantie.

(Dr. and Stud. 153. b.) 8 R. 2. Gar. 101. [*] 43 Ass. 44. 24 H. 8. tit. Taile. Br. 7 H. 5, 6. tit. Ass. 359. 34 E. 3. [*f*] 16 Ass. p. 16.

Droit, 29. 19 H. 6. 59. 21 H. 7. 40. 5 H. 7. 29. 3 H. 7. 9. b. 27 Ass. 74. 29 Ass. 50. 43 Ass. 8. 14 H. 4. 13. 19 H. 6. 60.

"*Barred,*" is a word common aswell to the English as to the French, of which commeth the nowne, a bar, *barra*. It signifieth legally a destruction for ever, or taking away for a time of the action of him that right hath. And *barra* is an Italian word, and signifieth barre, as we use it; and it is called a plea in barre, when such a barre is pleaded. Here *Littleton* putteth an example of a barre of an estate taile by a collaterall warranty. It is to be observed, that in some cases an estate taile may be barred by some acts of parliament made since *Littleton* wrote; and in some cases an estate taile cannot be barred, which might when *Littleton* wrote have been barred. For example, if tenant in tayle levie a fine with proclamations according to the statute, this is a barre to the estate taile, but not to him in reversion or remainder, if hee maketh his claime, or pursue his action within five yeares after the state taile spent.

(Doct. Plac. 54.) (Dr. and Stud. 56. a.) 4 H. 7. c. 24. & 32 H. 8. c. 36. (10 Rep. 43.)

[*b*] If a gift be made to the eldest sonne, and to the heires of his bodie, the remainder to the father and to the heires of his bodie, the father dieth, the eldest son levieth a fine with proclamations, and dieth without issue; this shall barre

[372. b.]

☞ the second sonne, for the remainder descended to the eldest.

If tenant in taile be disseised, or have a right of action, and the tenant of the land levie a fine with proclamations, and five yeares passe, the right of the estate taile is barred.

[*b*] Dalison, 2 El. & 7 El. Vide Lib. 3. fol. 84. le case de Fines. (3 Leon. 10.) (Ant. 120. b. 9 Rep. 104. Plowd. 374. a. 375. a. Cro. Eliz. 896.) Noy, 46. (Dyer, 3. b. 133.)

If

[b] 26 H. 8. cap. 13. 33 H. 8. cap. 20. 5 E. 6. c. 11. Staunf. Pl. Coron. 18.

[b] If tenant in taile in possession, or that hath a right of entrie, bee attainted of high-treason, the estate taile is barred, and the land is forfeited to the king; and none of these were barred when *Littleton* wrote. A lineall warrantie and assets was a barre to the estate taile when *Littleton* wrote; whereof more shall be said hereafter.

[c] 12 E. 4. 9. Taltarum's case.

[d] Vide devant Sect. 690. Vid. Lib. 3. fol. 5. Cuppledick's case, & fol. 94. 97. 106. Lib. 1. fol. 62. Capel's case. Lib. 2. fol. 16. 52. 74. 77. Lib. 6. fol. 41, 42. Lib. 10. fol. 37. Marie Portington's case. (Ante 335. a.)

[c] A common recoverie with a voucher over, and a judgement to recover in value, was a barre of the estate taile when *Littleton* wrote. [d] And of common recoveries there bee two sorts, viz. one with a single voucher, and another with a double voucher, and that is more common and more safe: there may be more vouchers over.

[e] 38 H. 8. Taile, Br. 41. Pl. Com fol. 555. 29 H. 8. Dier, 52.

[f] 34 H. 8. cap. 20.

[e] If the king had made a gift in taile, and the donee had suffered a common recoverie, this should have barred the estate taile in *Littleton*'s time, but not the reversion or remainder in the king. And so if such a donee had levied a fine with proclamations after the statute of 4 *H.* 7, this had barred the estate taile, although the reversion was in the king (1). [f] But since *Littleton* wrote, a common recoverie had against tenant in taile of the king's gift, or such a fine levied by him, the reversion continuing in the crowne, is no barre to the estate taile by the statute of 34 *H.* 8. (2). And where the words of the statute be (whereof the reversion or remainder at the time of such recoverie had shall be in the king) these ten things are to be observed upon the construction of that act (3).

First,

(1) 29 *H.* 8. *Dy.* 32. *accord. tail barred, but not discontinued, because the reversion is in the king: so note the issue is barred by* 4 *H.* 7. *Hob.* 382. *for* 32 *H.* 8. *cap.* 36. *was not then made. Note also, that* 32 *H.* 8. *cap.* 36. *excepts tenant in tail by gift of the king.* Lord Nott. MSS.—[Note 322.]

(2) Upon this act see Mr. Cruise's Essay on Recoveries, 2d ed. 255. and 5 Digest. ch. xiii. § 9.

(3) Nota, 34 *H.* 8. *is not of force in Ireland, therefore the knowledge of the common law in these points is necessary there.*—B. *being tenant in tail by gift of king H.* 8. *of the manor of* T. *an.* 14 *Eliz. contracted with* A. *to convey it to him and his heirs in consideration of a sum of money, and the manner of assurance was this: queen Eliz. in May* 14 *Eliz. grants her reversion to* C. *and* D. *and their heirs; June* 14 *Eliz.* B. *suffers a recovery to the use of* C. *and* D. *and their heirs; and in the same term* B. *and* A. *levy a fine of* T. *to* C. *and* D. *which they grant, and render to* A.; *and afterwards, in the same term, reconvey the reversion by fine, &c. to queen Eliz. And now whether this estate to* A. *was a gift in tail* ex provisione *from the queen, within the statute of* 34 *H.* 8. *c.* 20. *was the question between* E. *heir of the body of* A. *and* F. *who claimed by the fine levied by the father of the said* E. *whose daughter he had married; and it was held by Berkeley that it was not,* 1*st, because the grant of the reversion to* C. *expresses no intent of the queen to create an estate tail to* A.: 2*d, when the estate tail of* B. *was docked by the recovery, and upon the fine levied* C. *rendered the tail to* A. *he might have rendered the fee simple if he had willed; and he was the donor of the estate tail, not the queen, except of the reversion afterwards reconveyed:* 3*d, this reversion reconveyed was not in the queen her original reversion, but a new reversion expectant upon the tail of* A. *(for the former tail was docked) wherefore* A. *cannot bar the reversion in the queen, but he may bar his own issue notwithstanding* 34 *H.* 8.: 4*th, because although gift in tail by a subject may be a provision of the king within the statute, nevertheless the intent should appear,*

which

First, that the estate taile must bee created by a king, and not by any subject, albeit the king be his heire to the reversion; for the preamble speakes of gifts made to subjects, and none can have subjects but the king. And also in the preamble it is said (for service done to the kings of the realme), and the body of the act referreth to the preamble. [g] And therefore if the duke of *Lancaster* had made a gift in taile, and the reversion descended to the king, yet was not that estate taile restrained by that statute; and so of the like.

[g] Trin. 23 Eliz. inter Dively & Ashton, resolved in the Court of Wards. Lib. 2. fol. 15 & 16, in Wiseman's case.

Secondly, if the king grant over the reversion, then a recoverie suffered will barre the state taile, because the king had no reversion at the time of the recoverie.

Thirdly, if the king make a gift in taile, the remainder in taile, or grant the reversion in taile, keeping the reversion in the crowne, a recoverie against tenant in taile in possession shall neither

Lib. 8. fol. 77, 78, the Lord Stafford's case. (2 Roll. 394.)

which is not the case here. Hales made two questions. I. *What shall be said a provision by the king within this statute, and this is question of law.* II. *Whether this shall be said to be such a provision, which is matter of fact. To the first it seems, that if the queen be merely instrumental in procuring an estate tail to be settled, but that the estate itself does not proceed either from the charge, or from the bounty of the crown as a reward for service, it is no provision within this statute; and therefore it is to be seen, if in this case the entail was upon contract between subject and subject, and if the queen were merely instrumental to perfect the conveyance and save her own reversion, which is the second question, and a question of fact. To the second, that this is not such a provision, there are these presumptions:* 1*st, Nothing appears of record that such provision was intended, which by Coke is here held to be necessary (but Hales doubted hereof).* 2*d, No land, money, or other consideration, moved the queen to procure* B. *to grant this estate tail to* A. 3*d, It does not appear that the queen took notice of any service done by* A. *or of any favour intended by her to him.* 4*th, If the queen had intended a provision within the statute, she might have caused* C. *to convey the fee simple first to herself, and then have granted to* A. *in tail.* 5*th, If it was intended that* A. *should have an entail, which should not be a provision within the statute, no one can contrive any other way than this to effect it.* 6*th, It appears that* A. *was to purchase, and that the queen should not be prejudiced, nor any other person which is effected.*—Nota, *At the common law, if the king grant lands in fee simple conditional, it was doubted if donee* post prolem suscitatam *might have alieued to bar his issue,* Riley, 438. *supra* 19. *b. but clearly not to bar possibility of reverter in the king; no, not though the alienation were with warranty collateral, unless assets descended to the king. Ante,* 19. *b. and* 370. in margine. Sed unde *alienation without warranty or assets bars subject donor,* 4 *H.* 6. *Rot. Parl. n.* 51. *Commons petition that feoffees who buy lands of the king, tenant in taile may enjoy them against the king.* Resp. le roy s'avisera.—*Note also after Westm.* 2. *and before* 34 *H.* 8. *recovery or fine barred the tail of gift by the king, not the reversion to the king; so that by the wisdom of the common law, where the king raised the family, a kind of perpetuity was intended; for every man was discouraged to purchase from the donee, for no act of his could bar the king's reversion or possibility of reverter, which was a good way to preserve the memory of the king's bounty. When this would not do, upon the dissolution of monasteries, the crown having much land to bestow, began now to provide by* 34 *H.* 8. *that no alienation should bar the entail; for there needed no law for the reversion, and no other way could preserve the memory, &c.: and yet this is often eluded by a temporary grant of the reversion by the king, and a reconveyance, &c.*—Lord Nott. MSS.—[Note 323.]

neither barre the estate taile in possession by the expresse purview of the statute, nor by consequence the state in remainder or reversion; for that the reversion or remainder cannot be barred, but where the estate taile in possession is barred.

Lib. 2. fol. 15, 16. Wiseman's case. Lib. 2. fol. 52. Cholmleye's case.

Fourthly, if a subject make a gift in taile, the remainder to the king in fee, albeit the words of the statute be, (whereof the reversion or remainder of the same, &c.) yet seeing the estate in taile was not created by a king, as hath beene said, the estate taile may bee barred by a common recoverie.

(Mo. 115. 195. 2 Rep. 15. b. 1 Cro. 430.)

Fifthly, if Prince *Henrie*, sonne of *Henrie* the Seventh, had made a gift in taile, the remainder to *Henrie* the Seventh in fee, which remainder by the death of *Henrie* the Seventh had descended to *Henrie* the Eighth, so as he had the remainder by discent; yet might tenant in taile, for the cause aforesaid, barre the estate taile by a common recoverie.

Lib. 2. fol. 16. Wiseman's case.

Sixthly, the word (remainder) in the statute is no vaine word; for the words of the preamble be, the king hath given or granted, or otherwise provided to his servants and subjects. The word (reversion) in the body of the act hath reference to these words (given or granted); and (remainder) hath reference to these words (otherwise provided). As if the king in consideration of money, or of assurance of land, or for other consideration by way of provision, procure a subject by deed indented and inrolled, to make a gift in taile to one of his servants and subjects for recompence of service, or other consideration, the remainder to the king in fee, and all this appeare of record; this is a good provision within the statute, and the tenant in taile cannot by a common recoverie barre the estate taile. So it is, if the remainder bee limited to the king in taile; but if the remainder bee limited to the king for yeares, or for life, that is no such remainder as it is intended by the statute, because it is of no remainder of continuance, as it ought to be, as it appeareth by the preamble; and it ought to have some affinitie with a reversion, wherewith it is joyned.

Seventhly, where a common recoverie cannot barre the state taile by force of the said statute, there a fine levied in fee, in taile, for lives, or yeares, with proclamations according to the statutes, shall not barre the state taile, or the issue in taile, where the reversion or ☞ remainder is in the king, as is aforesaid, by reason of these words in the said act (the said recovery, or any other thing or things hereafter to be had, done, or suffered by or against any such tenant in taile to the contrary notwithstanding), which words include a fine levied by such a donee, and restraineth the same. [373. a.]

So resolved Pasch. 31 Eliz. Rot. 1645, in Notley's case in Communi Banco. (8 Rep. 77.)

Eighthly, but where a common recovery shall barre the estate taile, notwithstanding that statute, there a fine with proclamations shall barre the same also.

(3 Cro. 430. Cro. Eliz. 595. Sid. 166. 4 Leon. 40. Moor, 467.)

Ninthly, where the said latter words of the statute be (had, done, or suffered by or against any such tenant in taile,) the sense and construction is, where tenant in taile is partie or privie to the act, be it by doing or suffering that which should worke the barre, and not by meere permission, he being a stranger to the act (1).

As

(1) 11 *Car. Cro.* obiter *in Wyat's case, tenant in tail, reversion to the king, is disseised, entry of the issue is barred; which perhaps is so here, because in both cases the tail is not barred.*—Lord Nott. MSS.—[Note 324.]

As if tenant in tayle of the gift of the king, the reversion to the king expectant, is disseised, and the disseisor levie a fine, and five yeares passe, this shall barre the estate taile (2); and so if a collaterall ancestour of the donee release with warrantie, and the donee suffer the warrantie to descend without any entry made in the life of the ancestour, this shall binde the tenant in tayle, because he is not party or privie to any act, either done or suffered by or against him.

So holden Trin. 39 Eliz. Rot. 1914, inter Stratford & Dover in Communi Banco. (Hob. 332. 2 Roll. Abr. 773.)

Tenthly, albeit the preamble of the statute extend onely to gifts in taile made by the kings of England before the act (viz. hath given and granted, &c.) and the body of the act referreth to the preamble (viz. that no such feigned recovery hereafter to be had against such tenant in taile), so as this word (such) may seeme to couple the body and the preamble together; yet in this case (such) shall be taken for such in equall mischiefe, or in like case; and by divers parts of the act it appeareth that the makers of the act intended to extend it to future gifts; and so is the law taken at this day without question.

A recovery in a writ of right against tenant in taile without a voucher, is no barre of any gift in taile. 33 E. 3. Judgement, 252.

If tenant in taile the remainder over in fee cesse, and the lord recover in a *cessavit*, this shall not barre the estate taile, for the issue shall recover in a *formedon*; neither were either of these barres when *Littleton* wrote. But let us now heare *Littleton*. 8 H. 6. 55. 10 H. 6. 5. 14 E. 4. 5. b. 15 E. 4. 8. F. N. B. 134. b. Pl. Com. 237. 28 E. 3. 95. F. N. B. 28. l.

Sect. 709.

ALSO, if tenant in taile discontinue the taile, and hath issue and dieth, and the uncle of the issue release to the discontinuee with warrantie, &c. and dieth without issue, this is a collaterall warranty to the issue in tayle, because the warranty descendeth upon the issue, that cannot convey himselfe to the entayle by meanes of his uncle.

THE

(2) Cro. Car. 430. Jones cited the case according to the report in this place; but it seems he was misled by this book. See the note immediately following.—*It seems to some that the case of Stratford and Dover above quoted is not law; for in* 2 *Rep.* 11. *Magd. Coll. case, it is adjudged, that the fine does not bar the college, not being parties, because the* 13 *Eliz. makes void all acts which it suffers, and such sufferance extends to the act in which they are not parties, by sir Orl. B.—And sir F. Moore,* 467. *reports the same case: and there by Walmsley it is said, that this issue is only bound in the time the fine is levied, but no other issue, and this by* 34 *H.* 8.; *hence it seems, that sir F. Moore or lord Coke have misreported the case, for they are contrary to each other. Note,* Mr. Palmer *told* Hen. Finch, *afterwards lord Nottingham and chancellor, that he attended* Walter *chief baron upon a reference, and that Walter denied the above case, and said, that the roll was* contra, *and the judgment there* contra *to this report, and that he and* Palmer *went to the house of lord Coke, then living, and shewed him the roll* contra *to his report in this place, and that he acknowledged it, and said, that he trusted to serjeant Bridgman's report: whence it appears, that sir F. Moore's report is the better, and there he reports it to have been,* 39 *Eliz. Ro.* 1914.—Lord Nott. MSS.—[Note 325.]

(Pl. Com. fol. 307. a. in Sharington's case. 2 Roll. Abr. 745.)

(Post 374. b.)

(3 Rep. 59.)

THE reason wherefore the warrantie of the uncle having no right to the land entailed shall barre the issue in tayle is, for that the law presumeth that the uncle would not unnaturally disherit his lawfull heire, being of his owne bloud, of that right which the uncle never had, but came to the heire by another meane, unlesse hee would leave him greater advancement. *Nemo præsumitur alienam posteritatem suæ prætulisse.* And in this case the law will admit no proofe against that which the law presumeth. And so it is of all other collaterall warranties; for no man is presumed to doe any thing against nature.

(Ante 6. b.)

[*k*] 11 H. 4. 55. 10 Eliz. Dier, 271.

[*k*] And the like holdeth in some other cases; as if a rent be behinde for twentie yeares, and the lord make an acquittance for the last that is due; all the rest are presumed to be paid; and the law will admit no proofe against this presumption (3).

[*l*] 7 H. 4. 9.

[*l*] So if a man be within the foure seas, and his wife hath a childe, the law presumeth that it is the childe of the husband; and against this presumption the law will admit no proofe (4).

[*m*] 3 E. 3. Corone, Staunf.

[*m*] If a man that is innocent be accused of felony, and for fear flieth from the same, ☞ albeit he judicially acquitteth himselfe of the felonie, yet if it be found that he fled for the felonie, he shall, notwithstanding his innocencie, forfeit all his goods and chattels, debts and duties; for as to the forfeiture of them, the law will admit no proofe against the presumption in law grounded upon his flight: and so in many other cases. But yet the generall rule is, *Quod stabitur præsumptioni donec probetur in contrarium*; but, as you see, it hath many exceptions.

[373. b.]

Bracton, lib. 1. cap. 9.

[*n*] Rot. Parliament, 50 E. 3. num. 77.

[*n*] It hath beene attempted in parliament, that a statute might be made, that no man should be barred by a warrantie collaterall, but where assets descend from the same ancestor; but it never tooke effect (1), for that it should weaken common assurances (2).

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(3) This is to be understood of an acquittance under hand and seal, which is an estoppel; for if it be not under seal, the law will admit of proof to the contrary: but an avowry for the last day's rent is no discharge for the former; for by the avowry the avowant says so much is due, but discharges nothing, no other rent being mentioned in the avowry, but that for which he acknowledges the taking the goods. See 1 Sid. 44. 1 Lev. 43. 1 Saund. 285, 286. Lutw. 1173. *Note to the 11th edition.*—[Note 326.]

(4) But see ant. 244. a. note 2.

(1) However, it hath been effected in our days; for by 4 Ann. cap. 16. sect. 21. all warranties since the first day of Trinity Term, anno Dom. 1705, by any tenant for life, of any lands, tenements, or hereditaments, coming or descending to any person in reversion or remainder, are void and of no effect; and all collateral warranties made since then of any lands, tenements, or hereditaments, by any ancestor who had no estate of inheritance in possession, the same is void against the heir. *Note to the 11th edition.*—[Note 327.]

(2) The reader will recollect, that previously to the statute *de donis* all estates were held either in fee simple, in fee simple conditional, for life, or for years; and that estates tail, in the light in which we now consider them, had not then an existence. If a person seised *in fee simple* aliened his estate, the alienation was certainly binding both upon his lineal and his collateral heirs; his warranty therefore had effect so far as it entitled the alienee to vouch the heir of the warrantor, and, in case of eviction, to claim a recompense from him,

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ALSO, if the tenant in tayle hath issue two daughters and dieth, and the elder entreth into the whole, and thereof maketh a feoffement in fee with warrantie, &c. and after the elder daughter dieth without issue; in

him, if any real assets descended upon him from the ancestor: but with respect to the repelling or rebutting of the claim of the heir to the estate itself, as the alienations of tenant in fee simple bound the heirs as effectually without the warranty as with it, the warranty, in that respect, could have no operation.

As to the warranties of persons seised of estates held in *fee simple conditional*, it has been observed before, p. 326. b. note 1. that the condition from which that estate took its appellation did not suspend the fee from vesting in the donee immediately by the gift; and therefore if he aliened before he had issue, it not only was no forfeiture, but if afterwards he had issue, it was a bar to them. Hence the warranty of a tenant in fee simple conditional had the same effect with respect to his issue, as the warranty of tenant in fee simple absolute had upon those who claimed from him; that is, with assets, it entitled the warrantee to vouch the issue as heirs at law of the ancestor; but in other respects it had no operation, as the issue was bound by the alienation of the ancestor, as effectually without warranty as with it. With respect to the donor or reversioner, the alienations of tenant in fee simple conditional could not be binding on him without assets, because he claimed to be in by title paramount.

As to the warranties of tenant *for life or for years:* in most cases they must have been void, as commencing by disseisin. In those cases where they were not void upon that account, it is to be observed, that before the statute of uses an estate of freehold could not be created without livery of seisin; and that as the livery of seisin of tenant for life or for years was a forfeiture of the estate, the reversioner or remainder-man might enter immediately for the forfeiture; but if he did not enter during the life of the person aliening, the warranty estopped him from entering afterwards. The reader will recollect, that if a disseisor, abator, or intruder, died in the possession of the estate, his heirs so far acquired a presumptive title to the estate, that the disseisee could no longer restore his possession by entry, but was reduced to his action. By analogy to this reasoning, and a rational extension of the principles on which it was founded, the law supposed that the remainder-man or reversioner would have entered for the forfeiture of the tenant for life or years, if an equivalent were not given him: it was therefore presumed, that if he did not enter during the life of such particular tenant, he had received from him an equivalent; and this presumption being admitted, he could not afterwards, with any colour of justice, be allowed to claim the estate itself.

Such were the effects and operations of warranty at the common law.

The first material alteration in it was by the statute of Gloucester, 6 E. 1. ch. 3. by which it was enacted, that the warranty of the father, tenant by the courtesy, either in the life of his wife or afterwards, should not be a bar to the heir without assets. The next statute which made any material alteration upon the effect and operation of warranty, was the statute *de donis*. An attempt has been made in note 1, page 326. b. and notes 1 and 2 to page 327. a. to explain in what manner, and by what construction of law, estates tail derived their origin from that statute. It is obvious, that if the warranty of tenant in tail,

in this case the younger daughter is barred as to the one moitie, and as to the other moitie shee is not barred. For as to the moity which belongeth to the younger daughter, shee is barred, because as to this part shee cannot convey*

* *part—moitie which belongeth to her*, L. and M. and Roh.

without assets, had been permitted to be a bar of the estate tail, it would have been in the power of every tenant in tail to have evaded that statute, and barred his issue. By a kind of analogy, therefore, to what the legislature had done in passing the stat. of Gloucester, the judges in their construction of the statute *de donis*, held, that the warranty of tenant in tail, without assets, should not bind his issue; but by the same analogy, and to prevent the circuity which would arise if the issue had been permitted to recover the estate from the alienee, and the alienee to recover the assets from the issue, they held the issue bound by warranty with assets.——With respect to those in remainder or reversion—it is to be observed, that the statute *de donis* extends only to the alienations of tenants in tail; the alienations, therefore, of tenants for life with warranty, remained as they did at the common law, and therefore bound all upon whom the warranty descended, either with or without assets. Neither did the statute *de donis* restrain the alienations of tenant in tail, except so far as they prevented the land descending upon the issue at his death, or reverting to the donor for want of issue in tail. There is nothing in it which, either directly or indirectly, restrains the tenant in tail from barring a remainder-man in tail, by his warranty descending on him, unless perhaps it should be considered that every particular estate in remainder is carved out of and a part of the reversion, and consequently equally entitled to protection. As to a remainder-man in tail, therefore, the operation of warranty in rebutting the heir, remained as it was before the statute; it barred him both with and without assets. This is laid down and explained with great learning and force of argument by lord chief justice Vaughan, in his argument in Bole *v.* Horton. See his Reports, p. 360. The case there was, that William Vescy devised to John Vescy, his eldest son, and the heirs male of his body; and for want of such issue to William Vescy, another of his sons, and the heirs male of his body; and for want of such issue to his own right heirs. John, upon his father's death, entered, and died, leaving issue only two daughters: William then entered and aliened with warranty, and died without issue. The question was, whether the warranty rebutted the daughters. Lord chief justice Vaughan was of opinion, that the warranty, not being accompanied with assets, would not have barred his own issues in tail, if there had been any, or the two daughters, who claimed the reversion, both issues in tail and the reversioners being protected by the statute *de donis:* but he admitted, that if there had been any intermediate remainder in tail, the warranty would have rebutted all who claimed under that remainder, a remainder in tail not being under the protection of the statute. The only point before the court in this case was, upon the operation of the warranty to rebut the reversioners. Upon this the court was divided; the chief justice and justice Archer were for the demandant; and justice Wyld and justice Atkins for the tenant. The next statute which restrained the operation of warranty was 11 Henry 7. ch. 20. by which the warranty of the wife of her husband's lands, either with or without her succeeding husband, was held to be void. The last statute which has been enacted for the purpose of restraining the operation of warranty, is the 4 and 5 Ann. ch. 16. by which all warranties of tenant for life are declared void; and all collateral warranties of any ancestor who has not an estate of inheritance in possession, are declared void against the heir. But this statute does not extend to the alienation of tenant in tail in possession. The consequence is, that even at this day, if a tenant in tail in possession discontinues his estate with warranty, it is a bar with assets

convey the discent by meanes of her elder sister, and therefore as to this moitie, this is a collaterall warrantie. But as to the other moitie, which belongeth to her elder sister, the warrantie is no bar to the younger sister, because

assets to his issue, and without assets to those in remainder. Supposing, therefore, the common case of a limitation to the first and other sons successively in tail male; if the first son, when in possession, levies a fine, that is a discontinuance of the remainders to the other sons; and by reason of the warranty contained in the concord, it is a bar to them, even without assets. It is the same if he executes a feoffment, and accompanies it with a warranty. It remains to observe, that no warranty extends to bar any estate, either in possession, reversion, or remainder, unless before, or, at least, at the time that the warranty is made, it is divested or displaced. See Seymour's case, 10 Rep. 96.—These, it is presumed, are the general outlines of the doctrine of warranty. The reader will observe, by what has been said on that subject, that at common law, the operation of a warranty to rebut the heir could hold in no case where the heir claimed the estate warranted from the ancestor by descent; for, at the common law, wherever the ancestor had the inheritance, he could alien it from the issue; therefore the warranty, as to the purpose of rebutter, was perfectly inoperative. The statutes have made no alteration in these respects. Had it been held that the statute *de donis* did not restrain the effect of the warranty to rebut the issue, this principle would have been broken into, as the heir in that case would have been rebutted by his ancestor's warranty from an estate which he claimed to take from him by descent; but as the contrary construction was received, the principle remains as it did at the common law. The consequence is, that without assets the ancestor's warranty never did, and does not now bind the heir in any case, except where he takes by purchase; and that when he does take by purchase, it binds him either with or without assets, in every case where the contrary has not been enacted by statute. Upon inquiry it will be found, that the cases where the operation of warranty still prevails are reduced to two; the first, that by the construction of the statute *de donis*, the ancestor's warranty binds the issues in tail with assets; the other, that, at common law, the warranty of the ancestor, tenant in tail in possession, still continues (unless the contrary can be supported on the ground before hinted at) to bar those in remainder without assets. It is observable, that all warranties are collateral, so far as they are extraneous to the estate, and by way of contradistinction to those rights, incidents, or qualities, which by their nature are inherent in, annexed to, or issuing out of the estate which they accompany. In this sense the word collateral frequently occurs in our law books. Thus, 1 Rep. 121. b. an use at common law is said to be a trust or confidence, not issuing out of land, but a thing *collateral*, annexed in privity to the estate. In the same sense it is used in the well-known distinction between powers relating to the estate of the donee of the power and *collateral* powers. Thus, whether the warranty descends lineally or collaterally, whether the estate and the warranty descend from the same person or from different persons, and whether the warranty is considered as to its operation of rebutting the heir, or of entitling the alienee to vouch the warrantor, it is, in its nature, collateral to the estate which it accompanies. If in some cases it bars the heir from claiming, and in others it does not, it is only because the statute law has said, that in some cases where by the common law it would have operated as a bar, it shall no longer have that operation; and if, by the statute *de donis*, the warranty of tenant in tail did not bar the issue without assets, but barred it with assets, this is not from any pre-established distinction between lineal and collateral warranty, but because the judges, upon the construction of the statute *de donis*, held the issues in tail and the reversioner should not be deprived of the estate by the indirect and

because she may convey her discent as to that moitie which belongeth to her elder sister by the same elder sister, so as to this moitie which belongeth to the elder sister, the warrantie is lineall to the younger sister.

Sect. 711.

AND note, that as to him that demandeth fee simple by any of his ancestors, he shall be barred by warrantie lineall which descendeth upon him, unlesse he be restrained by some statute.

Sect. 712.

BUT hee that demandeth fee tayle by writ of formedon *in* discender, *shall not bee barred by lineall warrantie, unlesse he hath assets, by discent in fee simple by the same ancestour that made the warrantie. But collaterall warrantie is a barre to him that demandeth fee, and also to him that demandeth fee tayle without any other discent of fee simple, except in*

circuitous operation of warranty, when that statute had declared they should not be deprived of it by the direct alienation of common-law conveyances.—The chief part of the observations offered to the reader in this note are grounded on what was said by lord Vaughan in the argument above referred to: he concludes it by saying, "The doctrine of the binding of lineal and collateral "warranties, or their not binding, is an extraction out of mens brains and "speculations many scores of years after the statute *de donis*.—And if Littleton (whose memory I much honour) had taken that plain way in resolving "his many excellent cases in his Chapter of Warranty, of saying the warranty "of the ancestor doth not bind in this case, because it is restrained by the "statute of Gloucester, or the statute *de donis*; and it doth bind in this case, "as at the common law, because not restrained by either statute (for when "he wrote there were no other statutes restraining warranties, there is now a "third, 11 H. 7.) his doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of lineal and "collateral; for that in truth is the genuine resolution of most, if not of all "his cases; for no man's warranty doth bind, or not, directly, and *à priori*, "because it is lineal or collateral; for no statute restrains any warranty under "those terms from binding, nor no law institutes any warranty in those terms; "but those are restraints by consequent only from the restraints of warranties "made by statutes." Vaugh. 375.—Lord Holt is also reported to have said, "The true reason of collateral warranty was the security of purchasers, and "for their encouragement; as also, for the establishing and settling the estates "of such as were in by title, or descent cast; and this was the only security "such persons could have at common law. And because the estate of such "persons as are in by title are much favoured in law, these covenants that "were for strengthening of them were favoured likewise. And in those days "there was no need of lineal warranty; but, however the force of that is "taken away by the statute *de donis*, and common recovery is not upon the "supposition of recompense in value, and never was within the statute, but "always as much out of it as if it were so mentioned by express words." And this, he said, was my lord Hale's opinion. 12 Mod. 512.—[Note 328.]

in cases which are restrained by the statutes, and in other cases for certaine causes, as shall be said hereafter (1).

"*HATH issue two daughters.*" If husband and wife, tenants in especiall tayle, have issue a daughter, and the wife die, the husband by a second wife hath issue another daughter, and discontinueth in fee and dieth, a collaterall ancestor of the daughters releaseth to the discontinuee with warranty and dieth, the warrantie descendeth upon both daughters, yet the issue in taile shall bee barred of the whole; for in judgement of law the entire warrantie descendeth upon both of them.

5 E. 2. Garr. 78. Lib. 8. fol. 41. Sym's case. (10 Rep. 95.) (Ante 367. b.) (2 Cro. 217, 218.)

"*And the elder entreth into the whole, and thereof maketh a feoffment, &c.*" Here it is to bee understood, that when one coparcener doth generally enter into the whole, this doth not devest the estate which descendeth by the law to the other, unlesse shee that doth enter claimeth the whole, and taketh the profits of the whole; for that shall devest the freehold in law of the other parcener.

(Ant. 189. a. 243. b.) See before in the Chapter of Discent, Sect. 398.

Otherwise it is after the parceners be actually seised, the taking of the whole profits, or any claime made by the one, cannot put the other out of possession without an ☞ actuall putting out or disseisin. And in this case of *Littleton*, when one coparcener entreth into the whole, and maketh a feoffement of the whole, this devesteth the freehold in law out of the other coparcener.

[374. a.]

Now seeing the entrie in this case of *Littleton* devested not the estate of the other parcener, if no further proceeding had beene, then it is to be demanded, that seeing the feoffement doth worke the wrong, and bee the wrong either a disseisin, or in nature of an abatement, how can the warrantie annexed to that feoffement that wrought the wrong be collaterall, or binde the youngest sister for her part? To this it is answered, that when the one sister entreth in the whole, the possession being void, and maketh a feoffement in fee, this act subsequent doth so explaine the entry precedent into the whole, that now by construction of law she was only seised of the whole, and this feoffement can bee no disseisin, because the other sister was never seised; nor any abatement, because they both made but one heire to the ancestour, and one freehold and inheritance descended to them. So as in judgement of law the warrantie doth not commence by disseisin or by abatement, and without question her entrie was no intrusion.

Pl. Com. 543. (5 Rep. 51. Post. 377. a.) (Sect. 398. Post. 393 b.)

Tenant in taile hath issue two daughters, and discontinueth in fee, the youngest disseiseth the discontinuee to the use of herselfe and her sister, the discontinuee ousteth her, against whom she recovereth in an assise, the eldest agreeth to the disseisin, as she may, against her sister, and becomes joyntenant with her. And thus is the booke in the 21 Assise [*n*] to be intended, the case being no other in effect; but *A.* disseiseth one to the use of himselfe and *B.*, *B.* agreeth; by this he is joyntenant with *A.*

[*n*] 21 Ass. p. 19. (Ant. 180.)

"*And*

(1) The observations of Lord Vaughan on this Section, and the comment upon it, deserve attentive perusal. See Vaugh. 375.

☞ "*And note, that as to him that demandeth fee simple, &c*" In these two Sections there are expressed foure legall conclusions: [374. b.]

3 E. 3. 22. 4 E. 3. 28. 50. 6 E. 3. 56. 7 E. 3. 54. 57. 9 E. 3. 16. 10 E. 3. 14. 15 E. 3. Garr. 27. 20 E. 3. Ibid. 39. 25 E. 3. 50. 27 E. 3. 83. 41 E. 3. Garr. 16. Mich. 38 E. 3. Coram Rege, Abbot de Colchester's case. 45 Ass. 6. Pl. Com. 554. 19 E. 4. 10. Vid. Sect. 703. 747.

First, that a lineall warrantie doth binde the right of a fee simple.

Secondly, that a lineall warrantie doth not binde the right of an estate taile, for that it is restrained by the statute of *donis conditionalibus*.

Thirdly, that a lineall warranty and assets is a barre of the right in taile, and is not restrained (as hath beene said) by the said act.

Fourthly, that a collaterall warranty made by a collaterall ancestor of the donee, doth binde the right of an estate taile, albeit there be no assets; and the reason thereof is upon the statute of *donis conditionalibus*, for that it is not made by the tenant in taile, &c. as the lineall warrantie is.

(Moor, 96. accord. Vaugh. 382, contra. SeeVaugh.365.)

To this may be added, that the warranty of the donee in taile, which is collaterall to the donor, or to him in remainder, being heire to him, doth binde them without any assets. For though the alienation of the donee after issue doth not barre the donor, which was the mischiefe provided for by the act, yet the warranty being collaterall doth barre both of them; for the act restraineth not that warranty, but it remaineth at the common law, as *Littleton* after saith: and in like manner the warranty of the donee doth barre him in the remainder.

Fleta, lib. 2. ca. 65. Britt. 185. 4 E. 3. Gar. 63. 16 E. 3. Ass. 4. 43 E. 3. 9. 7 H. 6. 3. 11 H. 4. 20. (2 Roll. Abr. 774, 775.)

"*Assets*, (id est) quod tantundem valet," sufficient by discent. Note, assets requisite to make a lineall warranty a barre must have six qualities. First it must be assets (that is) of equall value or more at the time of the discent. Secondly, it must be of discent, and not by purchase or gift. Thirdly, as *Littleton* here saith, it must be assets in fee simple, and not in taile, or for another man's life. Fourthly, it must descend to him as heire to the same ancestor that made the warranty, as *Littleton* also here saith. Fifthly, it must be of lands or tenements, or

24 E. 3. 47. (6 Rep. 56.)

rents, or services valuable, or other profits issuing out of lands or tenements, and not personall inheritances, as annuities and the like. Sixthly, it must be in state or interest, and not in use or right of actions or rights of entry, for they are no assets until they be brought into possession. [*a*] But if a rent in fee simple issuing out of the land of the heire descend unto him whereby it is extinct, yet this is assets, and to this purpose hath in judgement of law a continuance.

[*a*] 31 E. 3. Ass. 5. 13 E. 3. Recoverie in value, 17. Lib. 8. fol. 31. Butler & Baker's case.

[*b*] A seigniory in fee almoigne is no assets, because it is not valuable, and therefore not to be extended; and so it seemeth of a seigniory of homage and fealty. But an advowson is assets, whereof [*c*] *Fleta* saith; *Item de ecclesiis quæ ad donationem domini pertinent quot sunt, et quæ, et ubi, et quantum valeat quæliber ecclesia per annum secundum veram ipsius æstimationem, et pro marcâ solidos extendatur, ut si ecclesia centum marcas valeat per annum ad centum solidos extendatur advocatio per annum* (1). And herewith

[*b*] 14 E. 3. Mesne, 7. Registrem, 293.

[*c*] Fleta, lib. 2. cap. 65. (N)

(N) *See Fleta, lib. 2. cap. 71, § 10.*

(1) Bro. *Assets per Discent*, 21. contra.

herewith agreeth *Britton*, and others have reckoned a shilling in the pound; and *Britton* addeth further, *mes si la advowson duist estre vendue, adonques serr' le reasonable price solonque le value en un an a cel extent.* Wherein it is to be observed, that antiquitie did ever reckon by markes. Britton, fol. 185. Extent. manerii. 5 H. 7. 37. 32 H. 6. 21. 33 E. 3. Garr. 102.

Sect. 713.

ALSO, if land bee given to a man, and to the heires of his bodie begotten, who taketh wife, and have issue a son betweene them, and the husband discontinues the taile in fee and dieth, and after the wife releaseth to the discontinuee in fee with warrantie, &c. and dieth, and the warranty descends to the son, this is a collaterall warrantie.

THIS case standeth upon the same reason that divers other formerly put by our author doe, viz. that because the heire claimeth only from the father *per formam doni*, and nothing from the wife, that therefore the warrantie of the wife is collaterall, and the warrantie made by any ancestor male or female of the wife bindeth; and here the warrantie descendeth after the discent of the right.

[375. a.]

☞ Sect. 714.

(9 Rep. 143. a. Ant. 187. a.)

BUT if lands bee given to the husband and wife, and to the heires of their two bodies begotten, who have issue a son, and the husband discontinue the taile and dieth, and after the wife release with warrantie and dieth, this warrantie is but a lineall warranty to the son; for the sonne shall not be barred in this case to sue his writ of formedon, *unlesse that hee hath assets by discent in fee simple by his mother, because their issue in the writ of* formedon *ought to convey to him the right as heire to his father and mother of their* * *two bodies begotten* per formam doni; *and so in this case the warrantie of the father and the warrantie of the mother are but lineall warrantie to the heire, &c.*

HERE is a point worthy of observation, that albeit in this case the issue in taile must claime as heire of both their bodies, yet the warrantie of either of them is lineall to the issue; and yet the issue cannot claime as heire to either of them alone, but of both. 35 E. 3. tit. Gar. 73. (2 Roll. Abr. 741. Ant. 187. a. Sect. 25.)

If lands be given to a man and to a woman unmarried, and the heires of their two bodies, and they intermarrie, and are disseised, and the husband release with warrantie, the wife dieth, the husband dieth, albeit the donees did take by moities, yet the warrantie is lineall for the whole, because, as our author here saith, the issue must in a *formedon* convey to him the right as heire to his father and his mother of their two bodies engendred: and therefore it is collaterall for no part.

Sect.

* *two*, not in L. and M. or Roh.

Sect. 715.

AND note, that in everie case where a man demandeth lands in fee taile by writ of formedon, *if any of the issue in taile that hath possession, or that hath not possession, make a warrantie, &c. if hee which sueth the writ of* formedon *might by any possibilitie, by matter which might be* en fait, *convey to him, by him that made the warrantie* per formam doni, * *this is a* ☞ *lineal warrantie, and not collaterall.* [375 b.]

35 E.3. Gar. 73. OF this sufficient hath beene said before, *sed nunquàm nimis dicitur quod nunquàm satis dicitur*; for it is a point of great use and consequence.

(Vaugh. 377.)
(8 Rep. 51.)
(Vaugh. 367. 377.)

Sect. 716.

ALSO, if a man hath issue three sonnes, and giveth land to the eldest sonne, to have and to hold to him and to the heires of his bodie begotten, and for default of such issue, the remainder to the middle sonne, to him and to the heires of his bodie begotten, and for default of such issue † of the middle sonne, the remainder to the youngest son, and to the heires of his bodie begotten; in this case, if the eldest ‡ discontinue the taile in fee, and binde him and his heires to warrantie, and dieth without issue, this is a collaterall warrantie to the middle son, and shall be a bar to demand the same land by force of the remainder; for that the remainder is his title, and his elder brother is collaterall to this title, which commenceth by force of the remainder. In the same manner it is, if the middle son hath the same land by force of the remainder, because his eldest brother made no discontinuance, but died without issue of his bodie, and after the middle make a discontinuance with warrantie, &c. and dieth without issue, this is a collaterall warrantie to the youngest son. And also in this case, if any of the said sonnes be disseised, and the father that made the gift, &c. releaseth to the disseisor all his right § with warrantie, ¶ this is a collaterall warrrantie to that son upon whom the warrantie descendeth, causâ quâ suprà.

☞ Sect. 717.

[376 a.]

AND so note, that where a man that is collaterall to the title, + and releaseth this with warrantie, &c. this is a collaterall warrantie.

HERE

* *&c.* added in L. and M. and Roh.
† *of the middle sonne,* not in L. and M. or Roh.
‡ *son,* added in L. and M. and Roh.
§ *&c.* added in L. and M. and Roh.
¶ *&c.* added in L. and M. and Roh.
\+ *&c.* added in L. and M. and Roh.

HERE it appeareth that it is not adjudged in law a collaterall warrantie in respect of the bloud, for the warrantie may be collaterall, albeit the bloud be lineall; and the warrantie may be lineall, albeit the bloud be collaterall, as hath beene said. But it is in law deemed a collaterall warrantie, in respect that he that maketh the warrantie is collaterall to the title of him upon whom the warrantie doth fall; as by the example which *Littleton* here putteth, and by that which hath beene formerly said, is manifest.

8 R. 2. Garr. 101. Vid. Sect. 704.

Sect. 718.

ALSO, if a father giveth land to his eldest son, to have and to hold to him and to the heires males of his body begotten, the remainder to the second sonne, &c. if the eldest sonne alieneth in fee with warranty, &c. and hath issue female, and dieth without issue male, this is no collaterall warranty to the second son, for he shall not bee barred of his action of formedon *in the remainder, because the warranty descended* (B) *to the daughter of the elder son, and not to the second sonne* (ceo n'est pas collaterall garrantie al second fits, † car il ne serra barre de son action de *formedon* en le remainder, pur ceo que le garrantie discendist al file del eigne fits, et nemy al second fits); *for every warrantie which descends, descendeth to him that is heire to him who made the warrantie, by the common law.*

HERE is rehearsed a maxime of the common law, that every warrantie doth descend upon him that is heire to him that made the warrantie, by the common law, as by this example it appeareth.

Vid. Sect. 3. 603. 735. 736, 737. (Ant. 329. a. Cro. Eliz. 72.)

"*To him that is heire to him who made the warrantie, by the common law, &c.*" Hereupon many things worthy to be knowne are to be understood.

[a] First, that if a man infeoffeth another of an acre of ground with warrantie, and hath issue two sons, and dieth seised of another acre of land, of the nature of burrough English, the feoffee is impleaded, albeit the warrantie descendeth onely upon the eldest sonne, yet may he vouch them both; the one as heire to the warrantie, and the other as heire to the land; for if he should vouch the eldest son only, then should he not have the fruit of his warranty, viz. a recoverie in value; the youngest son only he cannot vouch, because he is not heire at the common law, upon whom the warrantie descendeth (1).

[a] 40 E. 3. 14. (Mod. Rep. 96. 2 Cro. 218.)

So

† car il ne serra barre—ne luy ledera, *L. and M. and Roh.*

(B) *Vid. note A. on Sect.* 601.

(1) 38 *E.* 3. 22. 43 *E.* 3. 19. 48 *Ass.* 41. 4 *E.* 3. 55. 21 *E.* 3. 46. 21 *E.* 3. 36. 11 *H.* 7. 12. 6 *H.* 7. 2. Hale's MSS.

[b] 22 E. 4. 10. 4 E. 3. 55. 27 H. 6. 1, 2. 11 E. 3. Det. 7. (8 Rep. 8. b.)

[b] So it is of heires in gavelkind, the eldest may bee vouched as heire to the ☞ warranty, and the other sonnes in respect of the inheritance descended unto them. [376. b.]

[c] 49 Ass. 4. 38 E. 3. 22. (Hob. 25.)

[c] And in like sort, the heire at the common law, and the heire of the part of the mother, shall bee vouched: but the heire at the common law may be vouched alone in both these cases, at the election of the tenant: *et sic de similibus.*

[d] 32 E. 3. Vouch. 94. 35 H. 6. 33.

[d] In the same manner if a man dieth seised of certaine lands in fee, having issue a sonne and a daughter by one venter, and a sonne by another, the eldest sonne entreth and dieth, the land descends to the sister; in this case the warrantie descendeth on the sonne, and he may be vouched as heire, and the sister, as heire of the land: in which and the other case of burrough English, the sonne and heire by the common law having nothing by discent, the whole losse of the recoverie in value lieth upon the heires of the land, albeit they be no heires to the warrantie. Then

Pl. Com. 515.

put the case that there is a warrantie paramount, Who shall deraigne that warrantie? and to whom shall the recompence in value goe? Some have said, that as they are vouched together, so shall they avouch over, and that the recompence in value shall enure according to the losse; and that the effect must pursue the cause, as a recoverie in value by a warrantie of the part of the mother shall goe to the heire of the part of the mother, &c.

(2 Cro. 218.)

Some others hold, that it is against the maxime of law, that they that are not heires to the warrantie should joyne in voucher or to take benefit of the warrantie which descended not to them; but that the heire at the common law, to whom the warrantie descended, shall deraigne the warrantie, and recover in value; and that this doth stand with the rule of the common law.

Others hold the contrarie, and that this should be both against the rule of law, and against reason also; for by the rule of law

[e] 17 E. 2. tit. Recoverie in value, 33. 1 E. 3. 12. 33 E. 3. Judgm. 222. 14 E. 3. ib. 160. 10 E. 3. 52. 18 E. 3. 51. Lib. 1. fol. 96. Shelleye's case.

[e] the vouchee shall never sue to have execution in value, untill execution be sued against him. But in this case execution can never be sued against the heire at the common law, therefore he cannot sue to have execution over in value. Secondly, it should be against reason that the heire at the common law should have *totum lucrum*, and the speciall heires *totum damnum*. I finde in our bookes

[f] 32 E. 3. Vouch. 94. per Greene. (Plowd. 11. a. Manxel's case.)

[f] that this reason is yeelded, that the speciall heire should not be vouched only; for (say they) if the speciall heires should be vouched only, then could not they deraigne the warrantie over; which should be mischievous, that they should lose the benefit of the warrantie, if they should be vouched only. But if the heire at the common law were vouched with them, (as by the law he ought) all might be saved; and therefore studie well this point how it may be done.

[g] Vide Pl. Com. fol. 514. (3 Rep. 5. 10 Rep. 35. Dr. and Stud. 41. b. 8 Rep. 101. b. See Cro. Eliz. 670.)

[g] If tenant in generall taile be, and a common recoverie is had against him and his wife, where his wife hath nothing, and they vouch, and have judgement to recover in value, tenant in taile dieth, and the wife surviveth: for that the issue in taile had the whole losse, the recompence shall enure wholly to him; and the wife, albeit she was partie to the judgement, shall have nothing in the recompence, for that she loseth nothing.

[h] 17 E. 3. 59. 20 E. 3. Vouch. 129. 32 E. 3. Vouch. 94. 5 H. 7. 2.

[h] If the bastard eigne enter and take the profits, he shall be

vouched

vouched only, and not the bastard and the mulier; because the bastard is in appearance heire, and shall not disable himselfe.

[i] If a man be seised of lands in gavelkinde, and hath issue three sonnes, and by obligation bindeth himselfe and his heires and dieth, an action of debt shall be maintainable against all the three sonnes, for the heire is not chargeable unlesse he hath lands by discent.

[i] 11 H. 7. 12. 11 E. 3. tit. Det. 7. Dy. 5 El. 238. (Moor, 74.)

[k] So if a man be seised of land on the part of his mother, and binde himselfe and his heires by obligation, and dieth, an action of debt shall lie against the heire on the part of the mother, without naming of the heire at the common law. And so note a diversitie betweene a personall lien of a bond, and a reall lien of a warrantie.

[k] 11 H. 7. 12. (2 Cro. 25. b. 218. 1 Siderf. 238. 279. 420. Hob. 25.)

Sect. 719.

* *NOTE, if land bee given to a man, and to the heirs males of his bodie begotten, and for default of such issue, the remainder thereof to his heires females of his body begotten, and after the donee in tayle maketh a feoffement in fee with warrantie accordingly, and hath issue a son and a daughter and dieth, this warrantie is but a lineall warrantie to the sonne to demand by a writ of* formedon *in the discender; and also it is but lineall to the daughter to demand the same land by writ of* formedon *in the remaynder,* unlesse (A) the *brother dieth without issue male* (sinon † frere deviast sans issue male), *because shee claymeth as heire female of the bodie of her father ingendred. But in this case, if her brother in his life release to the discontinuee, &c. with warrantie, &c. and after dieth without issue, this is a collaterall warranty to the daughter, because shee cannot convey to her the right which shee hath by force of the remainder by any meanes of discent by her brother, for that the brother is collaterall to the title of his sister, and therefore his warranty is collaterall* (ceo est un collateral garrantie a le file, pur ceo que el ne poit conveyer a luy le droit que el ad per force de le remaynder per ascun meane de discent per son frere, ‡ pur ceo ‡ que le frere est collateral a le title sa soer, et pur ceo son garrantie est collateral), *&c.*

HERE

* *Note—Also,* L. and M. and Roh.

† sinon—si son, *L. and M. Roh. Pinson, Redman, and MSS. This reading* (si son) *which materially alters the sense of the above passage of Littleton, was much relied on by lord Vaughan in his Reports,* 368, 369, *and is also accordingly confirmed by edit.* 1577, *by R. Tottel;* 1583, *by W. West;* 1594, *by C. Yetsweirt; and by that of* 1639. *It is however observable, that the text stood as above in the first edition of Coke upon Littleton* 1628, *and in all the editions to the 9th inclusive.*

‡ et *added in L. and M. and Roh.*

‡ que *not in L. and M. or Roh.*

(A) *Upon this part of sect.* 719, *Mr. Ritso observes, that, for "unless the brother dieth without issue male," we should read, "if the brother dieth, &c." for it is only in the event of the brother's dying without issue male, that the heire female can have any claim at all. See Mr. Ritso's Intr. p.* 114, *and the reading above under* †.

[l] 24 E. 3. 36. 27 E. 3. Age, 108. 38 E. 3. 26. 40 E. 3. 9. 37 H. 8. Br. Nosme, 1 & 40. & tit. Done & Rem. 61. (Ant. 17. b. 22. b. 2 Roll. Abr. 417. 1 Roll. Abr. 627, 628.)

HERE it appeareth, that [l] whensoever the ancestor taketh any estate of freehold, a limitation after in the same conveyance to any of his heires, are words of limitation, and not of purchase, albeit in words it be limited by way of remainder (1);

and

(1) The doctrine of law expressed in the text is generally called THE RULE IN SHELLEY'S CASE;—and has been discussed by several gentlemen of the greatest eminence in the profession.

I. In *sir William Blackstone's argument in the case of Perrin* v. *Blake*, published by Mr. Hargrave among his law tracts, fol. 500, it is observed, that, "where "there is a gift to *A.* and his heirs for ever, or to *A.* and the heirs of his body "begotten, the first words (to *A.*) create an estate for life; the latter (to his "heirs, or the heirs of his body) create a remainder in fee, or in tail, which "the law, to prevent an abeyance, refers to and vests in the ancestor himself, who "is thus tenant for life, with an immediate remainder in fee or in tail; and then "by the conjunction of the two estates, or the merger of the less in the greater, "he becomes tenant in fee, or tenant in tail in possession." This exposition of the expression in question sir Wm. Blackstone afterwards applies, with great ability, in his investigation of the rule in Shelley's case. He lays it down as a great fundamental maxim upon which the construction of every devise must depend, that the intention of the testator shall be fully and punctually observed, so far as the same is consistent with the established rules of law, and no farther. He makes a distinction between those rules of law which are to be considered as the fundamental rules of the property of this kingdom, and are therefore of that essential, permanent and substantial kind, which cannot be exceeded or transgressed by any intention of a testator, however clearly or manifestly expressed; and those rules of a more arbitrary, technical, and artificial kind, which the intention of a testator may control. He then supposes that there is a third class of rules, of a still more flexible nature. Among the rules of the first class he reckons these; that every tenant in fee simple, or fee tail, shall have the power of alienating his estates, by the several modes adapted to their respective interests; that no disposition shall be allowed which in its consequence tends to a perpetuity; that lands shall descend to the eldest son or brother alone, or to all the daughters or sisters in partnership. Among the rules of the second class he reckons those rules of interpretation by which the courts invariably construe particular modes of expression to denote a particular intention in the testator. Thus, says he, if a man devises his land, being freehold, to another generally, without specifying the duration of his estate, the courts consider it as evidence that he intended the devisee should be only tenant for life; but if he devises, in like manner, a chattel interest, the courts consider it to be evidence of his intention that the devisee should have the total property. Among the rules of the third class he reckons the rule in Shelley's case. Having admitted that the second and third class of rules allow of exceptions, when it appears to be the testator's intention that the operation of his devise should be different from that which the legal operation of the words in which it is penned would be, he adds, that this intention shall not have this effect, unless it is manifest and certain: so that if his intention that his words should operate contrary to their technical and legal import, does not appear by express words, or by necessary implication, the legal operation of the words must take effect. He applies this rule to the case of Perrin *v.* Blake. He argues that it does not appear by any evidence that the testator intended his words should not have their legal operation: he says, the question

is

and therefore here the remainder, to the heires females, vesteth in the tenant in taile himselfe. And it is good to bee

[377. a.] ☞ knowne, that for learning sake, and to find out the reason of the law, these limitations to the heires males of the bodie, and after to the heires females of the bodie

1 H. 6. 4. 11 H. 6. 13. 14. 28 H. 6. Devis. 18.

Statham, Devise. Pl. Com. 414. 20 H. 6. 43. Vid. Litt. ca. Taile, Sect. 24. 37 H. 8. Br. Done & rem. 61. & tit. Nosme, 1 & 40. (Ant. 25. a. b.) (Vaugh. 368. g. 376. Ant. 374. a.)

may

is not whether the testator intended the ancestor should or should not have a power of alienating the lands devised to him, or should have only an estate for his life. He admits it to be clear, that he intended the ancestor should not have a power of alienating the lands, and that he should take only an estate for his life: but the real question, he says, is, how the heirs were intended to take, whether as descendants or purchasers. If the testator intended they should take as purchasers, the ancestor remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, says he, by operation and consequence of law the inheritance is vested in the ancestor. He says, that in the case of Perrin and Blake, it is neither clearly expressed nor manifestly to be implied from any part of the testator's will, that he intended the heirs should take as purchasers; he therefore concludes, that the words in question should be construed according to their legal operation: and consequently, that in conformity to the rule laid down in Shelley's case, they should operate not as words of purchase, but as words of descent, and that the ancestor therefore should take an estate in tail.

II. *Mr. Hargrave*, in his observations concerning the rule in Shelley's case, remarks, that those who wish to avoid the rule, avow that they consider it as subordinate to the intention of the testator, as a rule of interpretation, as merely a technical construction of words, which yields to the intention whenever they are opposed to each other; that as soon as they discover that it is not the testator's intention that the first taker should have a power of barring the entail to his heirs, they think the victory over the rule is complete. On the other hand, those who wish to support the rule insist that it is a rule of interpretation, established on decrees of the most authoritative decisions, which cannot be departed from without levelling the great land-marks, by which the titles to real property are ascertained, and establishing in their room a monstrous latitude of uncertain and arbitrary construction. He says, he finds something to approve and something to condemn on both sides of these discordant comments upon the rule; and that in both there is one common error. To the opponents of the rule he admits, that where the rule would disappoint a lawful intention sufficiently expressed, it ought not to be effected. But he asks, whether the intention is lawful. The rule, as he considers it, is a conclusion of law upon certain principles—so absolute, as not to have any thing to say to the intention, if these premises really belong to the case; and these premises, he insists, are an intention by heirs of the body, or other words of inheritance, to comprehend the whole line of heirs to the tenant for life, and so to build a succession upon his preceding estate of freehold. This being so, if in such cases the word *heirs* is used in that its large and proper sense, it is a contradiction to the rule, to intend that the remainder to the heirs shall operate by purchase, and such intent is not lawful; so that it is incumbent on those who oppose this application of the rule, to show, that the word *heirs* is used in a qualified sense, and intended merely to describe certain persons, who, at the death of the tenant for life, may answer that description, and to give a succession of heirs to them: this being shown, the rule, he says, no longer applies. But nothing less than its appearing, that by the heirs of the

may be put: but it is dangerous to use them in conveyances, for great inconveniences may arise thereupon; for if such a tenant in tayle hath issue divers sons, and they have issue divers daughters, and likewise if tenant in tayle hath issue divers daughters,

body or heirs general, the whole line and succession of heirs to the tenant for life, or, in other words, the whole of his inheritable blood, was not meant, can deliver the case from the rule. He says, that the genuine rule in Shelley's case is part of an ancient policy of the law to guard against the creation of estates of inheritance, with qualities, incidents, or restrictions, foreign to their nature. Thus it is one of the properties of an estate in fee simple, that it may be alienated by the party seised, so that a condition not to alien is void at law. Thus curtesy and dower are incidents to estates of inheritance, and inseparably annexed to them; that these known examples of incidents, inseparable from inheritance, lead to a discovery of a foundation for the rule, which in a moment renders it paramount to and independent of private intention. It is one branch of a policy of law, adopted to prevent annexing to a real descent the qualities and properties of a purchase, and so is calculated to render impossible the creation of an amphibious species of inheritance: that is, an estate of freehold, with a perpetual succession to heirs, without the other properties of inheritance; in other words, an inheritance in the first ancestor, with the privilege of vesting in the heirs by purchase the succession of one to another, without the legal effects of a descent, a compound of descent, and purchase.—Such a commixture would, he says, have put an end to all those lines of distinction by which we so easily and certainly discriminate inheritances from mere estates of freehold. It would have been a continual source of fraud upon feudal tenure. When the heir came into the tenure by descent, the lord was entitled to those grand fruits of military tenure, wardship and marriage; but if he took by purchase, only the trifling acknowledgment of relief was due to the lord. If the heir were allowed to succeed by purchase, it would defeat the specialty creditors of the ancestor; it would have suspended all actions for the inheritance of land. If private intention had been permitted to annex to real heirship the contradiction of taking by purchase, what principle of our law would have remained to resist stripping the title by succession of all the other effects and consequences legally appropriated to it? Why might it not have given to purchase the qualities of descent? It is a positive rule of our law, that a man cannot raise a fee simple to his own right heirs as purchasers, either by legal conveyance, or by conveyance to uses. By this it is meant, that where the ancestor wills that at his death his heirs shall, by gift from him, come to that very inheritance which the law of descent and succession throws upon them, it is construed as a vain and fruitless attempt to give that to the heirs which the law vests in them. It amounts to a prohibition upon the ancestor against making his heirs purchasers, by giving at his death what the law confers without his aid. But this rule applies only to the acts of the ancestor; it was therefore requisite to have a like barrier as to acts between persons not standing in that relation towards each other. This is effected by the rule in Shelley's case. Thus explained, says he, the rule in Shelley's case can no longer be treated as a medium for discovering the testator's intention. The ordinary rules for the interpretation of deeds should be first resorted to. When it is once settled that the donor or testator has used words of inheritance, according to their legal import; has applied them intentionally to comprise the whole line of heirs to the tenant for life; has made him the terminus, by reference to whom the succession is to be regulated; then the rule in Shelley's case applies, and the heir shall not take by purchase. But if it shall be decided that the testator or donor did not mean to involve the whole line of heirs to the tenant for life; did not mean to engraft a succession on his

ters, and each of them hath issue sonnes, none of the daughters of the sons, nor the sonnes of the daughters, shall ever inherite to either of the said estates tayle: and so it is of the issues of the issues, for that (as hath beene said) the issues inheritable must make

his estate, and to make him the ancestor or terminus; but instead of this, intended to use the word heirs in a limited, restrictive, and qualified sense; intended to point at that individual person who should be the heir at the moment of the ancestor's decease; intended to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork of a succession of heirs; to construe him or her the ancestor, terminus, or stock, for the succession to take its course from;—in every one of these cases, the premises are wanting upon which the rule in Shelley's case interposes its authority, and the rule therefore becomes extraneous matter.

III. Previously to Mr. Hargrave's publication, the rule in question had been discussed with infinite learning and ability, by *Mr. Fearne, in his Essay on Contingent Remainders.* In this justly celebrated work, Mr. Fearne observes, that the rule in Shelley's case is supposed to have been originally introduced to prevent frauds upon the tenure; and that if such a limitation had been construed a contingent remainder, the ancestor might, in many cases, have destroyed it for his own benefit; if not, he might have let it remain to his heirs in as beneficial a manner as if it had descended to him, at the same time that the lord would have been deprived of those fruits of the tenure which would have accrued to him upon a descent. He then minutely and accurately examines all the cases upon the subject, which had come before the courts of law and equity, and investigates very fully the principles upon which they were determined. He says, "that in the case of Perrin and Blake, the question "is not whether the words, *heirs of the body*, may not, under certain cir- "cumstances, be taken as words of purchase; but whether those words, "standing perfect, independent and unexplained, and preceded by a limita- "tion of the legal freehold to the ancestor in the same will, have ever been "construed as words of purchase." To this he replies, "that not one of the "cases, till that of Perrin and Blake, can fairly be urged in support of an "affirmative answer to that question."

IV. "Our attention," (to adopt Mr. Fearne's masterly statement of it), "is "next called to some observations of very high authority, upon the appli- "cation of the rule. Lord chancellor Thurlow, in the case of Jones v. Morgan, "1 Bro. Cha. Ca. 206. laid down some strong-featured positions, describing "the outlines of a distinction applicable to all the cases in which that rule "had been, or can be agitated. His lordship drew an inference from all the "cases, that, where the estate is so given, that after the limitation to the first "taker it is to go to every person who can claim as heir to the first taker, "the word "heirs" must be words of limitation:—That all heirs, taking *as* "*heirs*, must take by descent. In cases, he said, where he could bring it to "the point that the testator, by the word "heirs" meant 1st, 2d, 3d, and "other sons, there he would change the words of the will; but, in the case "before him he thought the word "heirs" was the very thing meant.—Sup- "pose, said his lordship, William had had a son, which son had had a son and "died, leaving sir William the testator, the eldest son of the son would have "been heir. If there had been a title, he would have taken it; but the estate, "if the words had been words of purchase, (that is, if they were construed to "import limitations to the first and other sons of William successively in tail "male), must have gone to the second son; the devise to the first son being a

make their clayme eyther onely by males, or onely by females, so as the females of the males, or males of the females, are wholly excluded to bee inheritable to eyther of the said estates tayle; but where the first limitation is to the heires males, let the limitation

" lapsed devise, like the case of White & White; but sir William Morgan " meant the estate to go to whoever should be heir."

" The chancellor thought the argument immaterial, that the testator meant " the first estate to be an estate for life. He took it, that, in all cases, the " testator did mean so. He rested it upon what the testator meant afterwards; " —if he meant that every other person, who should be heir, should take, " he then meant, what the law would not suffer him to give, or the heir to take, " as a purchaser.—His lordship said, that in conversing with a great authority, " he asked, what would become, in the case stated, of the grandson; that " the answer was, he should take as heir. Lord Thurlow observed he " knew he might; but then he must take by descent. All possible heirs, he " said, must take as heirs, and not as purchasers: that in all cases where the " limitation is of an estate of freehold to a man, and afterwards to his heirs, &c. " (whether general or special), so as to give it to the heirs as a denomination " or class, the heirs shall be in by descent, and not by purchase. And that " the case stated by Anderson in Shelley's case of a limitation to the use of *A.* " for life, remainder to the use of his heirs and of their heirs female, was the " only one to the contrary, and in that case the word " heirs" must be a " description of the persons, in order to let in the limitation to the heirs " female."

" Now,"—continues Mr. Fearne,—" if the inference I have drawn from the " very operative tendency of the law to hereditary descent, in its mode of " approaching it, where the requisite ground for its perfect accomplishment is " wanting, be just; if, from such premises, unopposed by any single repugnant " decision or judicial opinion, the conclusion that the capacity of an heir to " take the inheritance by purchase, so as to transmit it through the same line " as by descent, is confined to those cases only where the ancestor takes no " estate of freehold, be sufficiently founded, lord Thurlow's doctrine embraces " the subject to the full extent of his expression. For then, wherever the " ancestor takes the freehold, the inheritance will not go to all the heirs, &c. " in the course of inheritable succession, unless by an actual descent. And " consequently, if after the first taker, it is to go to every person who can " claim as heir to him, the intended succession can only be effectuated by " taking the words " heirs," &c. as words of limitation. If after him all heirs, " &c. are to take as such, that is, as answering that description, they can only " take by descent. If the law will not admit of all possible heirs, &c. taking " the inheritance, after its inception by a freehold in the ancestor, otherwise " than by descent, it follows, that, wherever the limitation to the heirs, &c. " after a freehold to the ancestor, is admitted to reach the whole denomina- " tion or class of heirs described, they must take by descent and not by " purchase."

V. The very masterly discussions referred to in this note, will make the reader fully acquainted with the general merits of the case in question, and of the several points of legal learning, upon the discussion of which it either immediately or incidentally depends. But as the subject is necessarily of a very abstruse and intricate nature, and the arguments used in support of the different opinions respecting it are necessarily complicated and interwoven with one another, *the following discrimination of the leading points*, upon which the decision of the case must ultimately turn, will, perhaps, be useful to those who wish to obtain an accurate knowledge of the doctrine in dispute.

V. 1. Let

tation be, for default of such issue, to the heires of the bodie of the donee, and then all the issues, be they females of males, or males of females, are inheritable.

If

V. 1. Let us first suppose, that after a devise to a man for life, and a subsequent devise to the heirs of his body, the testator in express words declares it to be his intention, that, by the devises in question, he means to give the ancestor an estate for his life only, and to give an estate in fee by purchase to his heirs: Is the rule in question of that very rigid and forcible nature as to be unaffected and *uncontrolled by these express words?* If the answer to this question is, that the express declaration of the testator will, in this case, control the legal operation of the words, heirs of the body, the next question is, Can any words short of an express declaration have this effect? or, in other language, Can that rule be *controlled by words of implication?* If the answer is in the affirmative, the next inquiry is, Whether to form such an implication as will control the rule, it is sufficient that it appears to be the testator's intention that the *ancestor* should *take an estate for his life only?* Or, must it also appear to be his intention that the heirs should take, not as descendants, but as *purchasers?* Must it further appear, *how* or *what estates* he intends the heirs to take? And *how* and *what estates* may the heir take by the law of England, his ancestor taking by the same instrument an estate for his life only?

Such, perhaps, will be the process of inquiry, if it is admitted, that there are cases where, in devises of this nature, the heirs will take by purchase: but if that is not admitted; if it is asserted, that where a testator has once devised to a man for life, and afterwards to the heirs of his body, *no* other words, however positive and express, shall control the legal operation of the words, heirs of his body;

V. 2. It will then remain to inquire into the ground of the supposed inflexibility and rigidity of the rule.—Is it that it is *against the law* of the land, that lands should be conveyed to the ancestor for life with such estate or estates in remainder to the heirs of his body, as those heirs must be supposed to take, if they take as purchasers?—To resolve this question with accuracy, it should first be settled what estate or estates the heirs of the body would take under this construction; and then it should be supposed that such estate or estates are devised by the most accurate and scientific legal expressions: if devises so worded would be held contrary to law, the necessary conclusion is, that *the object* intended to be effected by the testator *is against law.*

V. 3. If it appears that such estate or estates are not contrary to the law, but it still is contended that a devise to one for life, and after his decease to the heirs of his body, shall make the heirs take by descent, contrary to the testator's intention, the only remaining ground to support that conclusion is, that to make the heirs take by descent in devises of this nature, is a point of construction so fixedly and unalterably settled by judicial determination, that it is not now in the breast of any court to deviate from it. By investigating the rule in question under the above heads of inquiry, a regular and distinct view may, it is conceived, be obtained of the different points of law which relate to it, and of the different grounds upon which an opinion upon it may be framed.—It is greatly to be lamented that there should be so much uncertainty and difficulty in the application of a rule of law, to which resort must be so often had on the construction of wills. All parties agree that the rule has an existence; but, from the liberality which is allowed in the construction of wills, it has been contended that it does not extend to those devises to which it cannot be applied, without defeating the intention of the testator. It is certain that no rule of law has a more ancient origin, or is more generally established, than that if a testator expresses his intention defectively, either

If a man give lands to a man, to have and to hold to him and the heires males of his bodie, and to him and to the heires females of his bodie, the estate to the heires females is in remaynder, and the daughters shall not inherite any part, so long as there is issue male;

by not using technical and artificial terms, or by using them improperly, yet if his intention can be collected from his will, the law, however defective his language may be, will construe his words according to his intention; and if the object of it is warranted by the established rules of law and equity, will admit its full operation and effect. It is equally certain, on the other hand, that if the testator's intention appears to be to effect that, which the rules of law and equity do not admit, neither the courts of law nor the courts of equity can allow its operation. The first thing, therefore, to be ascertained, is, what the object of the testator is; the next, whether it is such as the rules of law and equity admit.

V. 4. To determine the last point, as soon as it is settled what the testator's intention is, let him be supposed to have expressed it, not in the words actually made use of by him, but in the most accurate and scientific language. If, when so expressed, its operation will be allowed, both at law and in equity, it must be admitted, on all hands, that it should have its operation and effect, notwithstanding any inaccuracy or impropriety used by the testator in his method of expressing it. But if, when expressed in artificial and scientific language, the law will not give it effect, it must equally be admitted, that it is no longer in the power of the courts to give it an operation; the fault of the testator's will being, not that he has expressed his intention inaccurately, but that the object of his intention is unlawful.

V. 5. To apply this reasoning to the case of Perrin *v.* Blake, what was the testator's intention? Supposing the heirs in that case to take by purchase, there are, it is conceived, but three constructions to be put upon such a devise.

The *first is*, to suppose, that the devise to the heirs of the body of the ancestor, to whom the life estate is limited, gives estates to his sons successively in tail, with remainders over in tail to his daughters as tenants in common. Devises of this nature are, unquestionably, conformable to law. They are the modifications of property most frequently introduced in the settlements of real estates. It follows, that if the words of the testator are construed in this sense, they are unobjectionable in point of law. But the courts of law have not thought themselves warranted to construe them in this sense; this construction, therefore, must be laid aside.

The *second construction is*, to suppose, that the testator's intention is to give the ancestor an estate of freehold, and to vest the inheritance in the person who, at the time of the ancestor's decease, should be the heir of his body, and to make that person the stock of the inheritance. It must be admitted, that this is perfectly lawful; and there is no doubt but a disposition of this nature, if framed in proper language, would be good, not only in a will, but in a deed. The question then will be, Whether that was the intention of the testator? It is obvious, that by the words heirs of the body, the testator means to comprehend *all* the heirs of the body of the devisee; but if the construction here contended for be admitted, only a particular series or line of such heirs will be admitted. None will be admitted but the person who happens at the time of the ancestor's decease to be the heir of his body, and the heirs of the body of that person; all the other heirs of the body of the ancestor will be utterly excluded. Thus, supposing him to have several sons, the eldest son would, at the time of the testator's decease, answer to the description of heir of his body; he, therefore, would take an estate by purchase; he would be the stock of the inheritance, and from him the lands would descend upon all his issue. But the

devise

male; for the estate to the heires males is first limited, and shall be first served; and it is as much to say, and after to the heires females, and males in construction of law are to be preferred.

Sect.

devise would reach no farther; it would not comprehend the other sons of the ancestor, or their issue. Thus, if this construction should be received, the intention of the testator will, to a great degree, be absolutely defeated. If there are no ulterior limitations or devises after the devise to the heirs of the body of the tenant for life, the reversion in fee will descend on the eldest son; and he may, consequently, dispose of it from his brothers and their issue. If there are any such ulterior limitations or devises, the persons claiming under them would take before, and to the total rejection of the other brothers and their issue. Of the second construction, therefore, must be repeated what was said of the first, that it is unobjectionable, in point of law, but that it is not conformable to the intention of the testator.

The *third construction is*, to suppose, that the inheritance will first vest in the person answering, at the time of the decease of the ancestor, to the description of heir of his body; and that, on failure of issue of that person, it will vest in him who answers that description at the time of such failure of issue, and so on, while there are any such heirs remaining. This construction is conformable in some respects to the case of John de Mandeville, mentioned by sir Edward Coke, ante 26. b. (and see the note in p. 505, of Mr. Douglas's Reports). The *question* then is, Whether there is any thing unlawful in this intention? To ascertain this, let it be tried by the test above mentioned, that is, let us suppose it expressed in the most accurate and technical language. This will give the first son or his issue, at the time of the ancestor's decease, an estate taile; and upon failure of that line of issue, the lands will vest for an estate tail in the person who, at the time of the failure of the issue of the first-taking heir, will answer the description of heir of the body of the tenant for life, and so on till all the heirs of his body, and all their issue, are exhausted.—It is obvious, that a limitation of this nature differs materially from the limitations adopted in the first construction, viz. to the sons successively in tail male, with remainder to the daughters; for in that case the estate vests immediately in the first taker, and the other sons, and all the daughters, take vested remainders in tail. But, according to the construction we are now speaking of, all, after the first taker, must be considered as taking, if the expression may be allowed, *quasi per formam doni*, conformably to the construction put on the limitation in Mandeville's case. Supposing even that they take by purchase, all the estates after that of the first taker must be contingent. In fact, it is not very easy to ascertain how they would take, and it might be found difficult to frame the language of the limitation. But certainly none of the other children, or their heirs, if this construction should be received, would take vested estates during the life of the first taker, or the continuance of issue of his body: for, till the events in question happened, it must be uncertain who, at the particular times in question, would answer to the description of heir of the body of the tenant for life; whereas, according to the first construction, all the children would answer the description under which they are designed, immediately upon their respective births. Such is the effect of this third construction.—Is there any thing in the devise, construing it in this manner, and supposing it to be properly and accurately framed, that combats with any known rule of law? It is certain that such a limitation would be good, if the life estate, instead of being limited to the ancestor of the persons to whom the inheritance is afterwards limited, were limited to a stranger; as in the common case of a devise to *A.* for life, remainder to the right heirs, or the heirs of the body of *I. S.*—Why should its being a devise to the ancestor make a difference? It may even be contended, that a limitation and

(9 Rep. 127.)
(Plowd. 403. a.)

☞ Sect. 720. [377. b.]

ALSO, I have heard say, that in the time of king Richard *the second, there was a justice of the common place, dwelling in* Kent, *called* Richel, *who had issue divers sonnes, and his intent was, that his eldest sonne should have certaine lands and tenements to him, and to the heires of his bodie*

devise of this nature have been allowed in equity. In the case of Tipping *v.* Cosin, Carth. 272. there was a limitation, and in lady Jones *v.* lord Say and Sele, 8 Vin. 262. there was a devise of a trust estate to the ancestor for life, with a legal remainder after his decease to the heirs of his body. In both cases it was admitted, that on account of the different qualities of their estates, the freehold being equitable, and the inheritance legal, they did not coalesce so as to be within the rule in Shelley's case; but it was allowed to be a good remainder in tail, in the heirs of the body of the ancestor; and in the former of these cases the verdict was for the person claiming the remainder. It may be answered (and certainly with great appearance of reason), that, on account of the different nature and quality of the estates, the mischiefs intended to be obviated by the rule in Shelley's case could not follow from admitting the heirs to take in these cases by purchase. Considering it with respect to the feudal principles, which are supposed to have given occasion to the rule, the lord would not have lost the fruits of his tenure, nor would the fee have been put into abeyance. This case, therefore, proves nothing in favour of the legality of the estates to be raised by the construction here contended for. This point is exhausted by Mr. Hargrave's treatise upon it. If the reader be convinced by it that the estates to be raised by this third construction are not such as the law admits, it follows, that supposing the devise in question to operate so as to give the heirs an estate by purchase, it must be construed in one of the two former modes. Now these modes are not reconcileable with what is acknowledged to be the general scope and object of the testator's intention. The consequence is, that the devise must be left to its legal operation, and the heir must take by descent.

V. 6. But if the reader should be of opinion that the estates which, if the third construction is admitted, will be created by the testator's will, are such as the law allows, still there will remain a formidable objection to the admission of that construction. It will appear, that by a series of adjudications, from the 18 Ed. II. to the case of Coulson *v.* Coulson, 17 Geo. II. inclusively, devises of the nature in question have been construed to vest the inheritance in the ancestor. Admitting therefore that the reason or foundation of the construction in question is not now discoverable, there still is great reason to contend that it is binding on the courts. This is by no means peculiar to the rule in Shelley's case. There are many other rules of construction received by the courts, which are arbitrary, and some of them not reconcileable to plain reason. Still, being adopted as rules of construction, the courts (sometimes even with an avowed reluctance) consider themselves to be bound to submit to them.

VI. It remains to observe, that *the suggestions here submitted* to the reader, *are intended to apply only to the devises of legal estates*, and to those devises only in which the argument to except them from the rule in Shelley's case depends at the most on the two following circumstances: 1st, that it evidently appears to

bodie begotten; and for default of issue, the remainder to the second sonne &c. and so to the third sonne, &c. and because he would that none of his sons should alien, or make warrantie to bar or hurt the others that should be in the remainder, &c. he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee taile, &c. or if any of his sons alien, &c. that then their estate should cease and be void, and that then the same lands and tenements immediately should remain to the second son, and to the heires of his body begotten, * et sic ultra, *the remainder to his other sonnes, and livery of seisin was made accordingly.*

"*I HAVE heard say, &c.*" Those things that one hath by credible heare say, by the example of our author, are worthy of observation. This invention devised by justice *Richel* in the reigne of king *Richard* the second, who was an Irishman borne, and the like by *Thirning*, chiefe-justice in the reigne of *Henry* the fourth, were both full of imperfections; for *Nihil simul inventum est et perfectum*, and *Sæpe viatorem nova non vetus orbita fallit:* and therefore new inventions in assurances are dangerous. And hereby it may appeare, that it is not safe for any man (be he

21 H. 6. f. 33. L. 6. f. 42. b. Sir Anthony Mildmaye's case.

(1 Rep. 84.)

* *this being upon the same condition, scilicet, that if the second son alien, &c. that then his estate should cease, and that then the same lands and tenements should remain to the third son, and to the heirs of his body begotten*, added in L. and M. and Roh.

to be the testator's intention to give the ancestor an estate for his life only: and 2dly, that it also evidently appears to be his intention that the heirs of his body should take by purchase. If the testator's intention appears to be to give the ancestor an estate for life only, and to give an estate by purchase to the heirs of his body; and if, *besides this*, his intention is, that by the devise to the heirs the inheritance should vest in that individual heir who, at the time of the decease of the tenant for life, shall be the heir of his body, and the heirs of the body of that person, and that the devise should reach no farther; or his intention is, that the inheritance should descend upon the sons of the tenant for life successively in tail, with or without remainders to the daughters; and this ulterior intention appears *from any other part* of the will, either by plain declaration, or clear implication; then, as there is nothing unlawful in this disposition of his property, there is no rule of law or equity that stands in the way of such construction.—But this ulterior construction is not to be implied from the mere circumstances of an estate for life only being given to the ancestor, and its appearing either by express words or implication, that it was the testator's intention to give an estate by purchase to the heirs.—It may be said this brings the matter to as much uncertainty as attended it before: but surely that is not the case. Numberless as the cases respecting the point in question are, there are few indeed, in which any ground for this ulterior construction of the words, "heirs of the body," occurs. See those cited by Mr. justice Blackstone in Mr. Hargrave's Tracts, 505, 506.

Since the first publication of this note, all the learning respecting this celebrated rule of law, particularly with a view to its application to decided cases, and to those which occur, or are likely to occur on it, in practice, has been ably collected and arranged by Mr. Preston, in his *Succinct View of the Rule in Shelley's Case.*—[Note 329.]

he never so learned) to be of counsell with himselfe in his owne case, but to take advice of other great and learned men.

Non prosunt dominis quæ prosunt omnibus, artes.

And the reason hereof is, *in suo quisque negotio hebetior est, quàm in alieno.*

[m] 2 H. 4. f. 11. in Action sur le case.

[m] And the same judge, in his owne name, &c. brought an action upon his case against others, and obtained a verdict so as the right of the cause was tried on his side; yet for that upon his owne shewing in his count the action did not lye, *ex assensu omnium justiciariorum præter querentem Richel*, judgement was given against him; but let us now leave this judge for example to others, and let us return to our author.

☞ Sect. 721. [378. a.]

BUT it seemeth by reason, that all such remainders in the forme aforesaid are void and of no value, and that for three causes. One cause is, for that every remainder which beginneth by a deed, it behoveth that the remainder be in him to whom the remainder is entailed by force of the same deed, before the livery of seisin is made to him which shal have the freehold; for in such case the growing and the being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second sonne at the time of the livery of seisin in the case aforesaid, &c.

HERE our authour is of opinion, that these remainders in the forme aforesaid, are void and of no value for three causes.

(Plowd. 25. a. 29. a. 2 Cro. 360.)

"*One cause is, &c.*" Here hee setteth downe a rule concerning remainders, viz. every remainder which commenceth by a deed ought to vest in him to whom it is limited, when livery of seisin is made to him that hath the particular estate.

[n] 7 R. 2. Scire facias. (Ant. 354. b.)

First, *Littleton* saith by deed, [n] because if lands bee granted and rendred by fine for life, the remainder in taile, the remainder in fee, none of these remainders are in them in the remainder, untill the particular estate be executed.

(Cro. Eliz. 360.)

Secondly, that the remainder bee in him, &c. at the time of the livery.—This is regularly true, but yet it hath divers exceptions. First, unlesse the person that is to take the remainder be not *in rerum naturâ:* [o] as if a lease for life be made, the remainder to the right heires of *I. S. I. S.* being then alive, it sufficeth that the inheritance passeth presently out of the lessour, but cannot vest in the heire of *I. S.* for that living his father he is not *in rerum naturâ*, for *non est hæres viventis*; so as the remainder is good upon this contingent, viz. if *I. S.* die during the life of the lessee.

(2 Roll. Abr. 419.)
[o] 32 H. 6. tit. Feoffments & Faits, 99. 27 E. 3. 87. 11 R. 2. Detinue, 46. 2 H. 7. 13. 12 H. 7. 27. 12 E. 4. 2. 21 H. 7. 11. 7 H. 4. 23. 11 H. 4. 74. 18 H. 8. 3. 27 H. 8. 42. 38 E. 3. 26. 30 Ass. 47. 6 R. 2. Qu. Jur. clam. 20. (1 Rep. 94.)

[p] Pl. Com. Colthirst's case, fol. 25. 29. (3 Rep. 20. 2 Rep. 57. a. b.)

[p] And so it is if a man make a lease for life to *A. B.* and *C.* and if *B.* survive *C.* then the remainder to *B.* and his heires. Here is another exception out of the said rule; for albeit the person be certaine, yet inasmuch as it depends upon the dying of *B.* before *C.* the remainder cannot vest in *C.* presently. And the

the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibilitie of the death of one man before another, which is a common possibilitie.

A man letteth lands for life upon condition to have fee, and warranteth the land *in formâ prædictâ*, afterward the lessee performeth the condition whereby the lessee hath fee, the warranty shall extend and increase according to the state. And so it is in that case if the lessor had died before the performance of the condition, the warrantie shall rise and increase according to the estate, and yet the lessor himselfe was never bound to the warrantie, but it hath relation from the first livery. And by this it appeareth that a warranty being a covenant reall executory, may extend to an estate *in futuro*, having an estate whereupon it may worke in the beginning. But if a man grant a seigniorie for yeares, upon condition to have fee ☞ with a warranty *in formâ prædictâ*, and after the condition is performed, this shall not extend to the fee, because the first estate was but for yeares, which was not capable of a warranty (A). And so it is, if a man make a lease for yeares, the remainder in fee, and warrant the land *in formâ prædictâ*, he in the remainder cannot take benefit of the warranty, because he is not partie to the deed; and immediately he cannot take, if he were partie to the deed, because he is named after the *habendum*, and the estate for yeares is not capable of a warrantie. And so it is if land be given to *A.* and *B.* so long as they joyntly together live, the remainder to the right heires of him that dieth first, and warrant the land *in formâ prædictâ*; *A.* dieth, his heire shall have the warrantie; and yet the remainder vested not during the life of *A.* for the death of *A.* must precede the remainder, and yet shall the heire of *A.* have the land by discent.

(8 Rep. 73.)

(Hob. 130, 131.)

[378. b.]

(1 Rep. 17.)

Sect. 722.

THE second cause is, if the first sonne alien the tenements in fee, then is the freehold and the fee simple in the alienee, and in none other; and if the donor had any reversion, by such alienation the reversion is discontinued: then how by any reason may it be (donques coment per ascun reason poit * ceo estre) *that such remainder shall commence his being and his growing immediately after such alienation made to a stranger, that hath by the same alienation a freehold and fee simple, &c.? And also if such remainder should bee good, then might hee enter upon the alienee, where he had no manner of right before the alienation, which should bee inconvenient.*

"*IF the first sonne alien, &c.*" By the alienation of the donee two things are wrought.

First, the franktenement and fee is in the alienee.

Secondly, the reversion is devested out of the donor. [*q*] And therefore

[*q*] 21 H. 7. 11 27 H. 8. 24.

* ceo *not in L. and M. or Roh.*

(A) *Vid. Sect.* 350, *and lord Coke's comment thereon.*

therefore by the alienation that transferreth the freehold and fee simple to the alienee, there can no remainder be raised and vested in the second sonne. [r] As if a man make a lease for life upon condition that if the lessor grant over the reversion, that then the lessee shall have fee; if the lessor grant the reversion by fine, the lessee shall not have fee; for when the fine transferreth the fee to the conusee, it should be absurd, and repugnant to reason, that the same fine should worke an estate in the lessee; for one alienation cannot vest an estate of one and the same land to two severall persons at one time.

[r] 6 R. 2. Quid juris clam. 20. (Perk. Sect. 729. fol. 275, 276. Dyer, 209. a. Plowd. 487.) Argumentum ex absurdo. (5 Rep. 8. a.)

In a man's owne grant, which is ever taken most forcibly against himselfe, the reason of *Littleton* doth hold; for it hath beene resolved by the justices, [s] that if a man seised of an advowson in fee by his deed granteth the next presentation to *A.* and before the church becometh void, by another deed grant the next presentation of the same church to *B.* the second grant is void, for *A.* had the same granted to him before; and the grantee shall not have the second avoydance by construction, to have the next avoydance which the grantor might lawfully grant, for the grant of the next avoydance doth not import the second presentation. [t] But if a man seised of an ☞ advowson in fee take wife; now by act in law is the wife intitled to the third presentation, if the husband die before. The husband grant the third presentation to another, the husband die, the heire shall present twice, the wife shall have the third presentation, and the grantee the fourth: for in this case it shall be taken the third presentation, which he might lawfully grant: and so note a diversitie betweene a title by act in law and by act of the partie; for the act in law shall worke no prejudice to the grantee.

[379. a.]

[s] 20 H. 8. Presentments al Eglises. Br. 52. 33 H. 8 ib. 55. 29 H. 8. Dier, 35. 11 Eliz. 282. 283. (5 Rep. 56.)

[t] 15 H. 7. 7. 19 E. 3. Quar. imp. 154. (3 Cro. 790, 791.) (2 Cro. 691. contra Winch, 94. S. C. Hob. 120. Ant. 189. a.)

(Ant. 214. b. 218. a.)

"*Also if such remainder should be good, &c.*" The force of this argument is, that seeing the estate of the alienee (albeit the words of the condition be, that the state should cease and be void) being an estate of inheritance in lands or tenements, cannot cease or be void before the state be defeated by entrie; then if this remainder should be good, then must it give an entrie upon the alienee to him that had no right before, which should be against the expresse rule of law, viz. that an entrie cannot be given to a stranger to avoid a voydable act, as before hath beene said in the Chapter of Conditions.

Vide Sect. 87, &c.

"*Which should bee inconvenient.*" Here note three things: First that whatsoever is against the rule of law is inconvenient. Secondly, that an argument *ab inconvenienti* is strong to prove it is against law, as often hath beene observed (N). Thirdly, that new inventions (though of a learned judge in his owne profession) are full of inconvenience, *Periculosum est res novas et inusitatas inducere.*

Eventus varios res nova semper habet.

(N) *As to the limited force of the argument* ab inconvenienti, *see ante, note* 1. *to* 66. a.

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THE third cause is, when the condition is such, that if the elder sonne alien, &c. that his estate shall cease or bee void, &c. then after such alienation, &c. may the donor enter by force of such condition †, as it seemeth; and so the donor or his heires in such case ought sooner to have the land than the second sonne, that had not any right before such alienation; and so it seemeth that such remainders in the case aforesayd are void ‡.

HERE it is to bee observed, that part of the condition that prohibiteth the alienation made by tenant in taile is good in law, with such distinction as hath beene before said in the Chapter of Conditions. And the consequent of the condition, viz. that the lands should remaine to another, &c. is void in law, and by the opinion of *Littleton* the donor may re-enter for the condition broken; for *Utile per inutile non vitiatur:* which being in case of a condition for the defeating of an estate, is worthy of observation. (1 Rep. 48. 62. 120. 10 Rep. 35. 9 Rep. 127. 6 Rep. 40. 2 Rep. 50. Ant. 224. a.) (1 Roll. Abr. 408.)

And it is to bee noted, that after the death of the donor, the condition descendeth to the eldest sonne, and consequently his alienation doth extinguish the same for ever; wherein the weaknesse of this invention appeareth: and therefore *Littleton* here saith, that it seemeth that the donor may re-enter, and speaketh nothing of his heires. A man hath issue two sonnes, and maketh a gift in taile to the eldest, the remainder in fee to the puisne, upon condition, that the eldest shall not make any discontinuance, with warrantie to barre him in the remainder; and if he doth, that then the puisne sonne and his heires shall re-enter, the eldest makes a feoffment in fee with warrantie, the father dieth, the eldest sonne dieth without issue, the puisne may enter; but if the discontinuance had beene after the death of the father, the puisne could not have entred. In this case foure points are to be observed. First, as *Littleton* here saith, the entrie for the breach of the condition is given to the father, and not to the puisne sonne. Secondly, ☞ that by the death of the father the condition descends to the elder sonne, and is but suspended, and is revived by the death of the eldest sonne without issue, and descendeth to the youngest sonne. Thirdly, that the feoffment made in the life of the father cannot give away a condition that is collaterall, as it may doe a right (A). Fourthly, that a warrantie cannot binde a title of entrie for a condition broken (as hath beene said); but if the discontinuance had beene made after the death of the father, it had extinct the condition: which case is put to open the reason of our author's opinion (1). (10 Rep. 40. b.) [379. b.] (10 Rep. 109.) 41 E. 3. fol. Vid. Sect. 446. (10 Rep. 95.)

In

† *&c.* added in L. and M. and Roh. ‡ *&c.* added in L. and M. and Roh.

(A) *Vid. ante* 265. *a.* 265. *b.*

(1) In some of the former notes there has been found occasion to anticipate many of the observations which otherwise would have occurred upon this and the

In these last three Sections our author hath taught us an excellent point of learning, that when any innovation or new invention starts up, to trie it with the rules of the common law (as our author here hath done); for these be true touchstones to sever the pure gold from the drosse and sophistications of novelties and new

the three preceding Sections. See ante 203. b. n. 1. 216. a. n. 2. 223. b. n. 1. and particularly 327. a. n. 2.—It may however be further observed, that this is one of the many attempts which have been made at different times to prevent the exercise of that right of alienation which is inseparable from the estate of a tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1 Burr. 84. He observes, that the power to suffer a common recovery is a privilege inseparably incident to an estate tail: it is a *potestas alienandi*, which is not restrained by the statute *de donis*, and has been so considered ever since Taltarum's case [12 E. 4. 14. b. p. 16.]. And this power to suffer a common recovery cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. That it cannot be restrained by condition, appears by Co. Litt. 223. b. 224. a. and Sonday's case, 9 Rep. 128.—That it cannot be restrained by limitation, appears by Cro. Jac. 696. Foy *v.* Hinde, and by Sonday's case, and other books.—That it cannot be restrained by custom, appears by the case of Taylor and Shaw, in Carter 6, and 22.—That it cannot be restrained by recognizance, or by statute, appears by Pool's case, cited in Moore, 810.—That it cannot be restrained by covenant, appears by the case of Collins *v.* Plummer, 1 Peere Wms. 104.—That an attempt to suffer a common recovery cannot be restrained, appears by Corbet's case, in the 1 Rep. 83. b. Sir Anthony Mildmay's case, in the 6 Rep. 40, and the case of Pierce *v.* Win, in 1 Ventr. 321. And that a conclusion or agreement to suffer a recovery cannot be restrained, appears by Mary Portington's case, in the 10 Rep. 35.—One of the last attempts to establish a perpetuity was made in the will of John duke of Marlborough, where a power was given to trustees, on the birth of the sons of the several persons therein mentioned, to revoke the uses limited to those sons in tail male; and in lieu thereof, to limit the estates to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally and successively in tail male. Lord Northington, in 1759, declared this clause, as it tended to a perpetuity and was repugnant to the estate limited, was void and of no effect. There was an appeal from this decree to the lords. And after hearing counsel upon it, the judges were ordered to attend, and their opinion was asked, "Whether by the rules of law "an estate tail limited to the use of persons unborn by any deed or will, can, "by virtue of any power given by such deed or will to trustees, be revoked "upon the births of such persons, and a new estate limited to such persons "for their lives respectively, with remainder to their issue successively in tail "male?" The lord chief justice of the common pleas delivered the unanimous opinion of the judges in the negative. The utmost stretch towards a perpetuity which the courts have hitherto allowed, is through the medium of an exercise of a power of appointment limited in a deed or will. If the objects of the power be not restrained to any particular description of persons, but designed generally to be such persons as the party to whom the power is given shall appoint, there is no question but he may appoint life estates, with remainders over, in the same manner as he might do by a substantive original conveyance, notwithstanding the persons to whom the life estates are appointed were not in existence at the time of the execution of the conveyance in which the power is contained. But it seems to be otherwise, if the objects of the power are restrained to any particular description of persons, as to the children of the appointer. See Alexander *v.* Alexander, 2 Ves. sen. 640. and Robinson *v.* Hardcastle, in Mr. Brown's Rep. of Cases determined in Chancery during the 26th

new inventions. And by this example you may perceive, that the rule of the old common law being soundly (as our author hath done) applyed to such novelties, it doth utterly crush them and bring them to nothing; and commonly a new invention doth offend against many rules and reasons (as here it appeareth) of the common law; and the antient judges and sages of the law have ever (as it appeareth [*] in our bookes) suppressed innovations and novelties in the beginning, as soone as they have offered to creepe up, lest the quiet of the common law might be disturbed: and so have [a] acts of parliament done the like, whereof by the authorities quoted in the margent, you may in stead of many others, upon this occasion take a little taste. But our excellent author, in all his three bookes, hath said nothing but *Ex veterum sapientium ore et more.*

(Plowd. 413. Ant. 282. b.)

[*] 31 E. 3. Gager deliverance, 5. 22 Ass. 12. 38 E. 3. 1. 2 H. 4. 18, &c.

[a] 1 E. 3. cap. 15, stat. 3. 18 E. 3. cap. 1 & 6. 4 H. 4. ca. 2. 11 H. 6. c. 23. 2 E. 4. cap. 8. &c.

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26th year of his late majesty's reign, p. 22.—The modes formerly used to prevent the wife's dower seem open to objection. Sometimes the estate is limited to a purchaser and a trustee and their heirs, but as to the estate of the trustee and his heirs in trust for the purchaser and his heirs. This exposes the purchaser to the chance of the trustee's dying in his life; in which case the right of dower will attach upon the estate. Sometimes the estate is limited to the purchaser and a trustee, and the heirs of the trustee, but in trust for the purchaser. Sometimes it is limited immediately to the trustee and his heirs, in trust for the purchaser and his heirs; but each of these modes is objectionable, as they keep the legal fee from the purchaser, and expose him to all the inconvenience of its escheating to the crown for want of heirs of the trustee, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the conveyances required to be made of it. Sometimes even it may be considered to pass in the general devise of the trustee's will, and by that means become settled at law to uses in strict settlement, and therefore not to be regained but by a fine or common recovery, and till the existence of a tenant in tail not to be regained without the aid of parliament. It cannot therefore be desirable that the legal fee should be outstanding in a trustee. To prevent this, the estates may be first limited to such uses as the purchaser shall appoint, and for want of appointment, to the use of a trustee, his heirs and assigns, during the life of the purchaser, in trust for him, and subject thereto to the use of the purchaser, his heirs and assigns. If this method be adopted, no doubt will remain of the wife's right of dower being effectually prevented; the purchaser during his life will have the absolute command of the legal fee, and at his death it will descend upon his heir.—Another mode is suggested by Mr. Fearne in his Essay on Contingent Remainders, 6th edition, p. 347, note. "The lands," says he, "may be limited to the use of the appointees of the purchaser (in "the fullest manner); and in default of appointment, to the use of him and his "assigns during his life; and from and after the determination of that estate, "by any means, in his life-time, to the use of some person and his heirs, "during the natural life of the purchaser, in trust for him and his assigns; "and from and after the determination of the estate so limited in use to the "said trustee and his heirs, to the use of the purchaser, his heirs and assigns, "for ever."—[Note 330.]

(2 Inst. 293. cap 3.)

Sect. 724.

ALSO, at the common law, before the statute of Gloucester, *if tenant by the curtesie had aliened in fee with warrantie, after his decease this was a barre to the heire, as it appeareth by the words of the same statute* (Item, a le common ley, devant l'estatute de *Gloucester*, si tenant per le curtesie ust alien en fee ovesque garrantie*, apres son decease ceo fuit un barre al heire, † sicome appiert per les parols de mesme l'estatute): *but it is remedied by the same statute, that the warrantie of tenant by the curtesie shall bee no barre to the heire, unlesse that hee hath assets by discent by the tenant by the curtesie; for before the sayd statute, this was a collateral warrantie to the heire, for that hee could not convey any title of discent to the tenements by the tenant by the curtesie, but only by his mother, or other of his ancestors* ‡; *and this is the cause why it was a collateral warrantie.*

Sect. 725.

BUT if a man inheritor taketh wife, who have issue a sonne betweene them (les queux ont § fits enter eux), *and the father* ☞ *dieth, and the sonne entreth into the land, and endow his mother, and after the mother alieneth that which shee hath in dower, to another in fee, with warrantie accordant, and after dieth, and the warrantie descendeth to the sonne, now the son shall be barred to demand the same land by cause of the sayd warrantie; because that such collaterall warrantie of tenaunt in dower is not remedied by any statute. The same law is it, where tenant for life maketh an alienation with warrantie, &c. and dieth, and the warranty descendeth to him which hath the reversion or the remainder* ||, *they shall be barred by such warrantie* ⊣.

[380. a.]

(11H.7. cap.20. Ant. 365. b.)

OF this and the subsequent Section sufficient hath beene sayd before in this Chapter, *Sect.* 697.

"*Is not remedied by any statute.*" But by a statute made since, this case is remedied, as you see before, *Sect.* 697.

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* accord. *added in L. and M. and Roh.*
† &c. *added in L. and M. and Roh.*
‡ *&c.* added in L. and M. and Roh.
§ issue *added in L. and M. and Roh*
|| *&c.* added in L. and M. and Roh.
⊣ *&c.* added in L. and M. ond Roh.

Sect. 726.

ALSO, in the case aforesaid, if it were so that when the tenant in dower aliened, ‡ &c. his heire was within age, and also at that time that the warrantie descended upon him hee was within age: in this case the heire may after enter upon the alienee, notwithstanding the warrantie descended, &c. because no lachesse shal be adjudged in the heire within age, that hee did not enter upon the alienee in the life of tenant in dower. But if the heire were within age at the time of the alienation, &c. and after he commeth to full age in the life of tenant in dower, and so being of full age he doth not enter upon the alienee in the life of tenant in dower, and after the tenant in dower dieth, &c. there peradventure the heire shall be barred by such warrantie; because it shall bee accounted his folly, that he being of full age did not enter in the life of tenant in dower, &c.

HERE note this diversitie: if the heire bee within age at the time of the discent of the warrantie, he may enter and avoyd the estate either within age, or at any time after his full age; and *Littleton* saith well, that the infant in this case may enter upon the alienee; for if he bring his action against him, he shal be barred by this warrantie, so long as the state whereunto the warrantie is annexed continue, and be not defeated by entrie of the heire: but if hee be within age at the time of the alienation with warrantie, and become of full age before the discent of the warranty, the warranty shal barre him for ever. Our author putteth his cases where the entrie of the infant is lawfull; [*a*] for where the entrie of the infant is not lawfull when the warrantie descendeth, the warrantie doth binde the infant, as well as a man of full age; and the reason thereof is, because the state whereunto the warrantie was annexed, continueth and cannot be avoided but by action, in which action the warrantie is a barre: and for the same reason likewise it is of a feme covert, if her entrie be not lawful, a warrantie descending on her during the coverture, doth bind her. [*w*] And albeit the husband be within age at the discent of the warrantie, yet if the entrie of the wife be taken away, the warrantie shall binde the wife.

18 E. 4. 13. 35 H. 6. 63. 28 Ass. 28. 32 E. 3. Gar. 30. (1 Rep. 120. 140.) (2 Roll. Abr. 773.) 35 H. 6. 63.

[*a*] 3 H. 7. 9. 35 H. 6. 63. Br. tit. War. 54. 33 H. 8. tit. War. Br. 84. Lib. 1. fol. 67. a. in Archer's case, & 140. Chudley's case. (1 Rep. 66.)

[*w*] 18 E. 3. 3. (F. N. B. 192. g. 2 Inst. 483.)

[380. b.]

[*q*] And herein a diversitie is to bee observed betweene matters of record done or suffered by an infant, and matters *in fait*: for matters *in fait* he shall avoid either within age, or at full age, as hath beene said: but matters of record, as statutes merchants and of the staple, recognizances knowledged by him, or a fine levied by him, recoverie against him by default in a reall action (saving in dower) must be avoyded by him, viz. statutes, &c. by *audita querela*, and the fine and recoverie (1) by writ of error

[*q*] 20 E. 3. Audit. quær. 27. F. N. B. 104. k. 6 E. 3. 39. 17 E. 3. 76. 17 Ass. 53. 17. 21 E. 2. 4. 13 E. 3. Aud. quær. 26. 18 E. 3.

Infant. 61. 16 H. 7. 5. 15 E. 4. 5. 8 H. 6. 30. 1 H. 7. 15. (10 Rep. 43. Siderf. 321, 322. F. N. B. 104. k. Moor, 76. 460. 9 Rep. 30. b. 12 Rep. 122, 123.) 6 H. 8. Saver de default, Br. 50. 3 H. 6. 10. 1 Mar. Dy. 104. (Ant. 131. a. Noy, 16.) (Cro. Jac. 59. Yelv. 88. contra.)

during

‡ *&c.* added in L. and M. and Roh.

(1) Since our author wrote, the law seems to be otherwise understood; for it is now the common practice for infants, having obtained a privy seal for

during his minoritie and the like. And the reason thereof is, because they are judiciall acts, and taken by a court or a judge, therefore the nonage of the partie, to avoyd the same, shall be tried by inspection of judges, and not by the countrey. And for that his nonage must be tried by inspection, this cannot be done after his full age: and so is the law clerely holden at this day, though there be some difference in our bookes. But if the age be inspected by the judges, and recorded that he is within age, albeit he come of full age before the reversall, yet may it be reversed after his full age. [*] And so was it resolved by the whole court of king's bench in the case of *Kekewiche*.

[*] Pasch. 13 Ja. R. in the king's bench.

If lands had beene given to the husband and wife and their heires, and the husband had made a feoffment to another, to whom a collaterall ancestor of the wife had released and died, and the husband died, (and this had beene before the statute of 32 *H.* 8.) this warrantie had so bound her waiveable right, as she could not waive her estate, and claime dower. Otherwise it is of an estate determined: for if a disseisor make a lease to the husband and wife during the life of the husband, and the husband dieth, she may disagree to this estate determined, to save herselfe from dammages. And so note a diversitie betweene an estate determined, and an estate bound by warrantie.

(Ante, 171. b. 246. a. 337. b. 350. b.)

"*No lachesse shal be adjudged in the heire within age.*" *Laches*, or *lasches*, is an old French word for slacknesse or negligence, or not doing. And the rule (that no negligence shall be adjudged in an infant) is true, where he is thereby to be barred of his entrie in respect of a former right, as by a discent; or of his former right, (as *Littleton* doth here put an example) by a warrantie where his entrie is congeable. But otherwise it is of conditions, charges and penalties going out of or depending upon the originall conveyance, for the laches or negligence shall be adjudged in those cases aswell in the infant as in any other.

[*y*] Pl. Com. Stowel's case, 355, &c. (2 Rep. 44. Moor, 92. 4 Rep. 4. b. 9 Rep. 85.)

[*y*] *Vid. Pl. Com. Stowel's case per totum.* And see further there, where an infant being tenant for life or yeares, shall be punished for doing or suffering of waste; and where he claimeth by purchase, a *cessavit* shall lie against him, if he pay not his rent by two yeares. And some have said, if he have the tenancie by discent, and he himselfe cesse, a *cessavit* doth lie, and he shall not have his age because it is of his owne cesser, 31 *E.* 3. *Age*, 54. But other bookes (as some conceive them) be against that: *Vid.* 9 *Edw.* 3. 50. 28 *E.* 3. 99. 14 *E.* 3. *Age*, 88. 2 *E.* 2. *Age*, 132, ☞ and others, which books doe not prove that the *cessavit* doth not lye in that case, but the contrary, that hee shall have his age, to the end he may at his full age certainly know what to plead, or what arrerages to tender; for the land was originally charged with the seigniorie and services.

[381. a.]

Sect.

that purpose to suffer common recoveries; and the law seems to have been so settled ever since Blount's case, which is reported in Hobart's Reports, page 196; which recovery was afterwards held good on a writ of error brought, and infancy assigned for error; as may be seen in W. Jones, 318. Cro. Car. 307. where the case is reported under the names of the earl of Newport *v.* sir Henry Mildmay. See 2 Salk. 567. *Note to the 11th edition.*—[Note 331.]

* Sect. 727.

(Ant. 52. b. 325.)

BUT now by the statute made 11 H. 7, cap. 10, *it is ordained, if any woman discontinue, alien, release, or confirme with warrantie any lands or tenements which she holdeth in dower for terme of life, or in taile of the gift of her first husband, or of his ancestors, or of the gift of any other seised to the use of the first husband, or of his ancestours, that all such warranties, &c. shall be void; and that it shall bee lawfull for him which hath these lands or tenements, after the death of the same woman to enter.*

THIS is an addition to *Littleton*, and therefore to be passed over. And hereof sufficient hath beene said before, *Sect.* 697.

Sect. 728.

ALSO, it is spoken in the end of the said statute of Gloucester, *which speaketh of the alienation with warrantie made by the tenant by the courtesie in this forme. Also, in the same manner, the heire of the woman after the death of the father and mother shall not bee barred of action, if hee demandeth the heritage or the marriage of his mother by writ of entry, that his father alienated in his mother's time, whereof no fine is levied in the king's court: and so by force of the same statute, if the husband of the wife alien the heritage or marriage of his wife in fee with warrantie, &c. by his deed in the countrey, it is cleere law, that this warranty shall not bar the heire, unlesse hee hath assets by discent* †.

"*WHEREOF no fine is levied in the king's court, &c.*" Here are three things worthy of observation concerning the construction of statutes. First, that [*a*] it is the most naturall and genuine exposition of a statute to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers. As here the question upon the generall words of the statute is, whether a fine levied onely by a husband seised in the right of his wife with warranty shall barre the heire without assets, And it is well expounded by the former part of the act, whereby it is enacted that alienation made by tenant by the courtesie with warrantie shall not bar the heire, unlesse assets ☞ descend. And therefore it should be inconvenient to intend the statute in such manner, as that he that hath nothing but in the right of his wife should by his fine levied with warrantie barre the heire without assets. And this exposition is *ex visceribus actûs*.

[381. b.]

(Ant. 115. a. 360. a. 365. b. 369. a.)
[*a*] Pl. Com. f. 75. 7 E. 3. 89. (3 Rep. 31. 59. 4 Rep. 50. b. 58. 76.) Vide Bracton, lib. 4. f. 321. Fleta, lib. 5. cap. 34. (6 Rep. Gregory's case. 5 Rep. 60. 7 Rep. 37. 8 Rep. 20. 118. 138. Plowd. 204, 205, 206. a. 465. 487. a. 11 Rep. 62. b.)

Secondly,

* This Section not in L. and M. or Roh.

† &c. added in L. and M. and Roh.

Secondly, the words of an act of parliament must bee taken in a lawfull and rightfull sense; as here the words being (whereof no fine is levied in the king's court) are to be understood, whereof no fine is lawfully or rightfully levied in the king's court. And therefore [*b*] a fine levied by the husband alone, is not within the meaning of the statute, for that fine should worke a wrong to the wife; but a fine levied by the husband and wife is intended by the statute, for that fine is lawfull and worketh no wrong. [*c*] So the statute of *W.* 2. *cap.* 5, saith *(Ita quod episcopus ecclesiam conferat)* is construed, *Ita quod episcopus ecclesiam legitimè conferat*; and the like in a number of other cases in our bookes. And generally the rule is, *Quod non præstat impedimentum quod de jure non sortitur effectum.*

(10 Rep. 43.)
[*b*] Pl. Com. 246. b. Seignior Barkleye's case. Li. 9. fol. 26. in case del Abbot de Strata mercella.
[*c*] 11 H. 4. 80. 9 E. 4. 12. 21 H. 6. 28. 4 E. 4. 31. 12 H. 4. Formedon, 15.

(6 Rep. 20.) Thirdly, that construction must be made of a statute in suppression of the mischiefe, and in advancement of the remedie, as by this case it appeareth. For a fine levied by the husband only is within the letter of the law; but the mischiefe was, the heire was barred of the inheritance of his mother by the warrantie of his father without assets; and this act intended to apply a remedy, viz. that it should not barre unlesse there were assets, and therefore the mischiefe is to be suppressed, and the remedie advanced. *Et qui hæret in literâ, hæret in cortice*, as often before hath beene said.

(2 Inst. 294.)

Sect. 729.

BUT the doubt is, if the husband alien the heritage of his wife by fine levied in the king's court with warrantie, &c. if this shall barre the heire without any discent in value. And as to this, I will here tell certaine reasons, which I have heard said in this matter. I have heard my master sir* Richard Newton, *late chiefe-justice of the common pleas, once say in the same court, that such warrantie as the husband maketh by fine levied in the king's court shall barre the heire, albeit hee hath nothing by discent* (coment que il † ad riens per discent), *because the statute saith (whereof no fine is levied in the king's court)* ‖; *and so by his* ☞ *opinion this warrantie by fine* ⊣ *remaineth yet a collaterall warrantie, as it was at the common law, not remedied by the said statute, because the said statute excepteth alienations by fine with warrantie.* [382. a.]

Sect. 730.

AND some others have said, and yet doe say the contrary, and this is their proofe, that as by the same chapter of the said statute it is ordained, that the warrantie of the tenant by the courtesie shall be no barre to

* *&c.* added in L. and M. and Roh.
† ad—n'ad, *L. and M. and Roh.*
‖ *&c.* added in L. and M. and Roh.
⊣ *&c.* added in L. and M. and Roh.

to the heire, unlesse that he hath assets by discent, &c. although that the tenant by the courtesie levie a fine of the same tenements with warrantie, &c. as strongly as hee can, yet this warrantie shall not barre the heire, unlesse that hee hath assets by discent, &c. And I believe that this is law; and therefore they say, that it should be inconvenient to intend the statute in such manner, as a man that hath nothing but in right of his wife might by fine levied by him of the same tenements (per fine levie per luy † de mesmes ‡ les tenements) *which he hath but in right of his wife with warrantie, &c. barre the heire of the same tenements without any discent of fee simple, &c. where the tenant by the courtesie cannot doe this.*

Sect. 731.

(Plowd. 57. b. Ant. 115. a. 360. a. 369. a. 381. b.) (10 Rep. 43. Ant. 381. b.) (2 Inst. 294.)

BUT they have said, that the statute shall bee intended after this manner, scilicet, *where the statute saith* (lou le statute § dit), *whereof*
[382. b.] *no fine is levied in the king's court, that is to say,* ☞ *whereof no lawfull fine is rightfully levied in the king's court. And that is, whereof no fine of the husband and his wife is levied in the king's court, for at the time of the making of the said statute, every estate of lands or tenements that any man or woman had, which should descend to his heire, was fee simple without condition, or upon certain conditions in deed or in law. And because that then such fine might rightfully be levied by the husband and his wife, and the heires of the husband should warrant, &c. such warrantie shall barre the heire,* ‖ *and so they say that this is the meaning of the statute, for if the husband and his wife should make a feoffement in fee by deed in the countrie, his heire after the decease of the husband and wife shall have a writ of entrie* sur cui in vitâ, *&c. notwithstanding the warrantie of the husband, then if no such exception were made in the statute of the fine levied, &c. then the heire should have the writ of entrie, &c. notwithstanding the fine levied by the husband and his wife, because the words of the statute before the exception of the fine levied, &c. are generall, viz. that the heire of the wife after the death of the father and mother is not barred of action, if he demand the heritage or the marriage of his mother by writ of entrie, that his father aliened in the time of his mother, and so albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and so it should bee in that case of the statute, unlesse that such*
[383. a.] ☞ *words were, viz. whereof no fine is levied in the king's court; and so they say, that this is to be understood, whereof no fine by the husband and his wife is levied in the king's court, the which is lawfully levied in such case; for if the justices have knowledge, that a man that hath nothing but in the right of his wife, will levie a fine in his name onely, they will not neither ought they to take such fine to be levied*

† mesme *added in L. and M. and Roh*

‡ mesmes *not in L. and M. or Roh.*

§ dit—parle, *L. and M. and Roh.*

‖ *&c.* added in L. and M. and Roh.

levied by the husband alone without his wife (car si les justices ont conusans, que home que n'ad riens forsque en droit sa feme, voile levier un fine en son nosme solement, ils ne voylont, ne * unque devoyent prender tiel fine d'estre levie per le baron solement sans † sa feme), *&c.* Ideo quære *of this matter, &c.* ‡

"*I HAVE heard my master, sir Richard Newton, &c.*" who was a gentleman of an ancient family; in Latine, *de novâ villâ*; in French, *de neufe ville*; and a reverend learned judge, and worthily advanced to be chiefe-justice of the court of common pleas, whom our authour remembers with great reverence, as by his words you may perceive, calling him his master, and citeth his opinion delivered once in the court of common pleas, which our author heard and observed (whose example therein it is necessary for our student to follow; but the latter opinion (as hath beene before observed) being *Littleton*'s owne, is against the opinion of the lord *Newton* [*d*], and the law is holden cleerely with our authour at this day; and our authour (as in all other cases) hath good authoritie in law to warrant his opinion: *Nullius hominis authoritas tantum apud nos valere debet, ut meliora non sequeremur si quis attulerit.*

[*d*] Bract. 321. Fleta, lib. 5. cap. 34. 8 E. 2. Gar. 81. 18 E. 3. 51. 7 E. 3. 84. Pl. Com. 57. (3 Rep. 77.)

"*For if the justices have knowledge, &c.*" Hereby it appeareth [*e*] that the judge, if hee knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third person.

Sect. 731. [*e*] 33 H. 6. 52. 5 E. 3. 56. 2 Eliz. Dier, 178.

1 H. 7. 9. 1 Mar. 80. 4 E. 3. 41. 7 Eliz. Dier, 246. Vide Sect. 87, &c.

"*That it should be inconvenient.*" *Argumentum ab inconvenienti*, is very forcible in law, as often hath beene observed (N).

Of the rest of these three Sections sufficient hath beene said before.

Sect. 732.

ALSO, it is to be understood, that in these words, where the heire demands the heritage, or the marriage of his mother, this word (or) is a disjunctive, and is asmuch to say, if the heire demand the heritage of his mother, viz. the tenements that his mother had in fee simple by discent or by purchase, or if the heire demaund the marriage of his mother, that is ☞ to say, the tenements that were given to his mother in frankmarriage. [383. b.]

SOME doe expound heritage of the mother to be the lands which the mother hath by discent; and that construction is true, but the statute, by the authoritie of *Littleton*, extendeth also where the mother hath it by purchase in fee simple; for so saith *Littleton* himselfe, that this word (inheritance) is not only intended

(Ant. 16. a.) Vide Sect. 9.

* unque *not in L. and M. or Roh.* † nosme *added in L. and M. and Roh.* ‡ *&c.* not in L. and M. or Roh.

(N) *But see ante note* 1 *to* 66. *a.*

intended where a man hath lands by discent, but where a man hath a fee simple by purchase, because his heires may inherit him. And albeit it be true, that the statute extendeth to an estate in frankmarriage acquired by purchase, yet doth it extend also to all estates in taile, aswell by discent as by purchase; for that frankmariage is put but for an example.

Sect. 733.

ALSO, where it is contained in divers deedes these words in Latin (come est move † en divers faits ceux parolx en Latyne) Ego et hæredes mei * warrantizabimus et in perpetuum defendemus; *it is to bee scene what effect this word* (defendemus) *hath in such deeds; and it seemeth that it hath not the effect of warrantie, nor comprehendeth in it the cause of warranty* (et il semble que il n'ad pas l'effect de garrantie, ne emprent en luy † la cause de garrantie); *for if it should be so, that it tooke the effect or cause of warrantie, then it should bee put into some fines levied in the king's court* (donques il serroit ‡ mitte en ascuns fines levies en la court le roy): *and a man never saw that this word* (defendemus) *was in any fine* (et home ne veiet ‖ ceo unque que cest parol *defendemus* fuit en ascun fines), *but only this word* (warrantizabimus); *by which it seemeth, that this word and verbe* (warrantizo) *maketh the warrantie, and is the cause of warrantie, and no other word in our law* (per que semble, que cest parol § et verbe *warrantizo*, ¶ fait la garrantie, et est la cause de garrantie, et nul auter verbe en nostre ley).

"*EGO et hæredes mei warrantizabimus, et in perpetuum defendemus.*" Wherein three things are to be observed. First, that *hæredes mei* are words of necessitie, for otherwise the heires are not bound. [a] Secondly, though in the clause of the warrantie it bee not mentioned to whom, &c. yet shall it be intended to the feoffee. [b] Thirdly, that the feoffor may by expresse words warrant the land for the life of the feoffee, or of the feoffor, &c. but the recoverie in value shall bee in fee. [c] Of this *Bracton* writeth in this manner: *Et ego et hæredes mei warrantizabimus tali et hæredibus suis tantùm, vel tali et hæredibus et assignatis et hæredibus assignatorum, vel assignatis assignatorum et eorum hæredibus, et acquietabimus et defendemus eis totam terram illam cum pertinentiis, contra omnes gentes, &c. Per hoc autem quod dicit (ego et hæredes mei) obligat se et hæredes ad warrantiam propinquos et remotos, præsentes et futuros, ei succedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) suscipit in se obligationem ad defendendum suum tenentem in possessione rei datæ et assignatos suos et eorum hæredes et omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat se et hæredes suos ad acquietandum*

[a] 6 E. 2. Vouch. 238. 12 E. 2. ib. 262. 14 H. 4. 15.
[b] 38 E. 3. 14.
[c] Bract. fol. 37. 238. & Lib. 5. 380, 381. Brit. fol. 106. b. Flet. lib. 5. cap. 15, & Lib. 6. cap. 23. 35 H. 8. 8. Gar. 90. F. N. B. 134. b. Brit. ubi sup. Flet. ubi sup. 11 H. 6. 48. 6 E. 2. Gar. 262.

† move mote, *L. and M. and Roh.*
* &c. *added in L. and M. and Roh.*
† la *not in L. and M. or Roh.*
‡ mitte—mote, *L. and M. and Roh.*
‖ ceo *not in L. and M. or Roh.*
§ et verbe *not in L. and M. or Roh.*
¶ *as*, &c. added in L. and M.; &c. only added in Roh.

acquietandum si quis ☞ plus petierit servitii vel aliud servitium quam in cartâ donationis continetur. Per hoc autem quod dicit (defendemus) obligat se et hæredes suos ad defendendum si quis velit servitutem ponere rei datæ contra formam suæ donationis. [*d*] Hereby it appeareth, that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as *Ego et hæredes mei warrantizabimus, &c.* in Latine doe create a warrantie; so, I and my heires shall warrant, &c. in English, doth create a warrantie also. [384. a.]

[*d*] 46 E. 3. 28. 11 H. 4. 41. 6 E. 2. Vouch. 262. 2 E. 4. 15. a. (Moor. 175.)

[*e*] If a man be bound to *A.* in an obligation to defend such lands to *A.* whereof the obligor had infeoffed him for twelve yeares, &c. in this case if he be ousted by a stranger without being impleaded, the obligation is forfeit: but if he bee bound to warrant the land, &c. the bond is not forfeited, unlesse the obligee be impleaded, and then the obligor must be readie to warrant, &c.

[*e*] 2 E. 4. 15. tit. Det. 71. (2 Roll. Abr. 396. Cro. Car. 5. Dyer, 255. a. Ant. 201. b. 4 Rep. 80. 9 Rep. 61.)

"*Then it should bee put into some fines, &c.*" Here *Littleton* draweth an argument from the forme and words of a fine; and his reason is this: that seeing that a fine is the highest and surest kinde of assurance in law, if *defendemus* had the force of a warrantie, it would have beene contained in fines: and on the other side, seeing this word *warrantizo* is contained in fines to create a warrantie, that therefore that word doth imply a warrantie, and not the other.

46 E. 3. 28. Vide Sect. 1.

"*And no other word in our law.*" Here it appeareth, that no other verbe in our law doth make a warrantie, but *warrantizo* only, which is only appropriated to create a warrantie.

Sect. 697. [*] 31 E. 3. Vouch. 24. 12 Rich. 2. tit. Cont. de Vouch. 35. 29 E. 3. 48. 30 E. 3. 6. b. Symken Symons case. 8 E. 3. 61. 12 E. 3. Vouch. 27. Temps. E. 1. Vouch. 302. 3 H. 6. 17. [*f*] Lestat. de Bigamis, c. 6.

But, *Qui benè distinguit benè docet*; and here of necessitie you must distinguish, [*] first betweene a warrantie annexed to a freehold or inheritance, (whereof *Littleton* here speaketh) and a warrantie annexed to a ward, which is a chattell reall; for there, grant, demise, and the like, doe make a warrantie. And of warranties annexed to freeholds and inheritances, some be warranties in deed, and some be warranties in law. A warrantie in deed, or an expresse warrantie, (whereof *Littleton* here speaketh) is created only by this word *warrantizo*; but warranties in law are created by many other words: they be therefore called warranties in law, because in judgment of law they amount to a warrantie without this verbe *warrantizo.* [*f*] As *dedi* is a warrantie in law to the feoffee and his heires during the life of the feoffor, but *concessi* in a feoffment or fine implyeth no warrantie. (1) But before

2 H. 7. 7. 6 H. 7. 2. 48 E. 3. 2. 31 E. 1. tit. Vouch. 290. F. N. B. 134. b. 6 E. 2. Vouch. 258. (Vaugh. 118.) (F. N. B. 134. b.)

the

(1) What is said by sir Edward Coke in this place, and the determination of the judges in Nokes' case, 4 Rep. 80. and lord chief justice Vaughan's argument in Hayes *v.* Bickerstaff, in his Reports, page 126. should remove the scruples too often entertained on the part of trustees, respecting the propriety of their conveying by the word *grant.* From the passages here referred to, it most clearly appears, that the word *grant,* when used in the conveyance of an estate of inheritance, does not imply a warranty; and that if it did, the insertion of any express covenant on the part of the grantor, would qualify and

the statute of *quia emptores terrarum*, if a man had given lands by the word *dedi*, to have and to hold to him and to his heires, of the donor and his heires, by certain services, then not only the donor but his heires also had beene bound to warrantie; but if before that

and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction. There is therefore no reasonable ground for trustees objecting to convey by the word *grant*; but serious objections may be raised in some cases to purchasers taking a conveyance from them without it. These are stated in the following passage from Bridgman's Complete Conveyancer, vol. 1. 323.—"Sir Jeffrey Palmer's "resolution concerning the words *give* and *grant* in a conveyance. "Sir, "I conceive that care ought to be taken in a conveyance, of what nature "soever it be, that there be not therein *give* and *grant*; for they imply a "*general warranty*, and shall not be qualified by the *special warranty* following; "as hath of late been thrice adjudged. H. T."—Sir Jeffrey Palmer's answer. "*Give* implies a *personal warranty*, and so is not always used. The word *grant*, "in a lease for years, is a *covenant in law*; or (as you may call it) a *general war-* "*ranty*, if it be not qualified by a *covenant* or *warranty in fait:* but if there be "a *covenant* or *warranty in fait*, then it is restrained to the words of the *covenant* "subsequent. But in an *estate of inheritance* where the *fee* passeth, there the "word *grant* is neither a *covenant in law*, nor *warranty*. For if it should be a "*covenant in law*, or *warranty* in itself, it would be there restrained and qualified "by the *warranty* and *covenants in fait*. And a *deed* to pass an *inheritance* "where *common* is cannot be without it; for if it be *common in gross*, it cannot "pass by the livery, but must pass by the word *grant*. And I never yet saw a "*feoffment* without it. Jeffrey Palmer." This dictum of sir Jeffrey Palmer has been sometimes cited to prove that it is not safe for purchasers to take a conveyance by lease and release, or bargain and sale enrolled, if the conveyance be from the trustees, and they do not convey by the word *grant*. It is said that commons, or advowsons, or other things which be in grant, will not, if they are severed from the inheritance, pass without the word *grant*. But this is a mistake, and by no means warranted by sir Jeffrey Palmer's dictum, which evidently applies only to conveyances by feoffment; in which case commons in gross, &c. lying in grant would not pass by the livery, and therefore without the word *grant*, or some other word of a similar operation, would not pass by the charter of feoffment. But in the case of a lease and release, there is no doubt, that any thing which lies in *grant* will vest in the vendee, by the lease for a year, and that a release without the word *grant*, would operate by way of enlargement to give the releasee the fee. So in the case of a bargain and sale enrolled, any thing which lies in grant will vest in the bargainee by the statute of uses without the word grant. Upon the whole therefore there is no such peculiar operation in this famous monosyllable, as to make it either dangerous for a trustee to convey by it, or essential for a purchaser to require it. How a *covenant* shall be expounded with regard to the context, or to synonimous or other words, see Com. Dig. Cov. (D.) Vin. Abr. Covenant (L. 4.)

To explain more fully, what is said above, it may be proper to state at length the operation of the word "grant" or "give," in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years.—1*st. As to the operation of the word "grant" or "give," in conveyances of estates in fee simple*, it is to be observed, that, till the practice of subinfeudation was abolished by the statute *quia emptores terrarum*, lands might be granted, either to be held of the grantor himself, or to be held of the chief lord of the fee. When they were granted to be held of the grantor himself, at least if the grant were made by the word "*dedi*," there, without any other warranty, the feoffor and his

that statute a man had given lands by this word *dedi*, to a man and to his heires for ever, to hold of the chiefe lord, there the feoffor had not beene bound to warrantie but during his life, as at this day he is.

And

his heirs were bound to warranty. This is enacted by the statute *de bigamis*, ch. 6. and we have lord Coke's authority, that this statute was only declaratory of the common law, in this respect. The reason for implying warranty, in this case, is by his lordship said to be, that "where *dedi* is accompanied with a "perdurable tenure of the feoffor and his heirs, there *dedi* importeth a per-"durable warranty for the feoffor and his heirs to the feoffee and his heirs." 2 Inst. 275. The warranty in this instance was therefore a consequence of tenure, (ant. 101. b.) and so necessary a consequence of it, that, where an express and qualified warranty was introduced, it did not restrain or circumscribe the implied warranty. Where lands were granted to be held of the chief lord of the fee, there the tenancy was of the chief lord, and no tenure subsisted between the grantor and the grantee. Warranty, therefore, being a consequence of tenure, did not hold in these cases between the grantor and grantee, as there was no tenure between them to raise it. Still, the grantor was supposed to be bound by his own gift. The word "give," therefore, imported, in this case, a warranty to him. But this was personal to the grantor; it did not apply to the heir, and it could not affect him without working that involuntary alienation, which, in a case of that nature, the jurisprudence of those times did not readily admit. The statute "*quia emptores ter-*"*rarum*," put an end to the subinfeudation of fee simple estates, and of course put an end to the warranty we have been speaking of, as incident to grants of lands in fee simple, to be held of the grantor and his heirs. The consequence was, that, after the statute *quia emptores terrarum*, there was no case, except that of homage auncestrel, in which warranty, unless it arose from the express contract of the parties, bound more than the donor, or bound him longer than the term of his life. 2dly, *But with respect to estates tail and leases for life*, the judges took this important distinction, that, where a person seised in fee granted for life or in tail, reserving the reversion in himself, the grantees of the particular estates held of the reversioner, and he of the chief lord: where a person granted for life or in tail, with the remainder over in fee simple, both the tenants of the particular estates, and the remainder-men, held of the chief lord. In the former case, therefore, the tenure between the donor and the donees still subsisting, the law remained as it did before the statute, that is, when those estates were created by the word "*dedi*," both the donor and his heirs, were, in consequence of the tenure, obliged to warranty. Thus it stood in respect of grants in fee simple, in tail, or for life; and in all these cases the warranty must be understood in its strict legal import, as implying an obligation in the lord to acquit his tenant against the superior lord, where there was a seigniory paramount, and to give the tenant a recompense in case of eviction. 3dly, *But in leases for years*, (to which the subject now leads,) the case is very different. A lease for years, (See Bacon's Abr. tit. Leases and Terms for Years) is a contract between lessor and the lessee for the possession and profits of lands, &c. on the one side, and a recompense by rent, or other consideration, on the other. As the lessor contracts that the lessee shall hold the land, he cannot claim it in opposition to his covenant.—Thus he parts with the land during the term; but his supposed parting with the land, and the interest of the lessee in it during the term parted with, was rather a consequence of law accruing from the contract, than the contract for the enjoyment, a consequence of law, accruing from the parting with the land. The tenant, therefore, had only the perception of the profits, and was considered to hold the possession for the reversioner. The consequence was, that

whoever

And albeit the words of the statute of *bigamis* be, *in cartis autem ubi continentur (dedi et concessi, &c.)* yet if *dedi* be contained alone, it doth import a warrantie; for the statute doth conclude, *ipse tamen feoffator in vitâ suâ ratione proprii doni sui tenetur warrantizare*;

whoever recovered the freehold, reduced the term whether the recovery were true or feigned. As the possession was not considered to be in the lessee, there was originally no means by which he could recover it. His only remedy was in consequence of the contract, which constituted the lease. By virtue of that, the words "yielding and paying," &c. were construed a covenant in favour of the lord, which enabled him to recover his rent by an action of covenant or an action of debt, and the words, "grant, demise, &c." were construed a covenant in favour of the tenant, which enabled him to recover damages as a recompense for the possession lost. In this sense they are said to imply a warranty. From the warranty of freehold estates it differs in its nature, as that arises from tenure, this from contract; and in its operation, as that, being a consequence of tenure, is not modelled by express warranties, this, arising from the contract of the parties, is considered to be modified and regulated by any express covenants inserted in the lease. See Spencer's case, 5 Rep. 17. 1 Lev. 57. and Clarke *v.* Samson, 1 Ves. sen. 101. Lord Coke, ant. 101. b. and post. 389. a. expressly says, that warranty cannot be annexed to chattels real or personal; for, says his lordship, if a man warrants them, the party shall have covenant or action upon the case. Thus, therefore, the law stands since the statute *quia emptores*. In all cases of homage auncestrel, if any such now exist, (which is at least doubtful), the doctrine of warranty remains as it did before the statute, that is,—if the grant was made by the word "*dedi*," it imports a warranty. In other cases it may be expressed as the parties think proper; if it be not expressed, then, in conveyances in fee simple, it is not implied by the word "grant," or any other word except the word "give;" and then it holds only during the life of the grantor; in gifts in tail, and in leases for life, by the word "give," where the reversion is left in the donor, the tenure between him and the donee or lessee still continues. Of that tenure it is a necessary consequence of law, and is not considered to be restrained by any express covenants. In leases for years rendering rent, warranty, considering it to import a covenant for the quiet enjoyment of the term, is of the essence itself of the lease; but the lease being originally founded on contract, any of its terms may be varied by the parties themselves at their pleasure, and is in fact considered as varied *pro tanto* by the insertion of any express covenant. But the effect of an express covenant in restraining the effect of an implied general covenant is not to be confounded with the effect of a particular covenant in restraining the effect of an express general covenant, as the latter is not restrained by a subsequent covenant, unless it can be considered as part of the general covenant. See Nokes's case, 4 Rep. 80. and 1 Saund. 60.—It may happen, that *a person having a term of years only, conveys the lands as an estate in fee simple* to another and his heirs, by the word "grant." But this cannot amount to a warranty of the lands, for the term. The operation of the word "grant," in implying a warranty in the creation or assignment of a term, arises from implication only, that is, from the law's presuming, by the party's using the word "grant," that he intended to warrant the lands as a term. But his expressly treating the land in the deed as a fee simple estate, and expressly conveying it as such, necessarily rebuts every implication of its being his intention or undertaking to convey it as a term of years. In what has been said above, the grantor is considered as the real owner of the land, receiving the purchase money, or other consideration of the estate or interest parted with. In this case, independently of all construction of particular words, there is great reason to consider him bound

to

warrantizare; so as *dedi* is the word that implieth warrantie, and not *concessi*. Also where the words of the statute bee further, *sine clausulâ quæ continet warrantiam*, the meaning of the statute is, that *dedi* doth import a warrantie in law, albeit there bee an expresse warrantie in the deed.

For if a man make a feoffement by *dedi*, and in the deed doth warrant the land against *I. S.* and his heires, yet *dedi* is a generall warrantie

to warrant the property he parts with, as he receives the benefit of it. In the case of a trustee, this ground of raising or implying an obligation of warranty necessarily fails. Upon the whole, to apply what has been said to the point mentioned at the beginning of the note, it appears clear, that whenever there is a deed, on the face of which the trustee is party, and conveys, merely as trustee, there is no substantial objection to his conveying by the word "grant." If the lands are freehold, it is clear that no warranty or covenant is imported by it; if it happens that they are held for a term of years only, all implication of an intention or undertaking to convey them for the term, is necessarily rebutted by their being treated in the deed, and conveyed by the party as a fee simple estate; and if any such warranty or covenant would otherwise be implied, it would be restrained, by his covenant that he himself has done no act to encumber, to a warranty or covenant against his own acts. To obviate, however, every doubt which may be entertained on this ground, it is usual to make the trustee convey "according to his estate, right, or interest, but not further or "otherwise,"—or to express that he grants, &c. "not as warranting the title, "but in order to pass or convey the lands." Whenever the former words are inserted, care should be taken to make them referrible to the trustee only, and not to the owner of the fee; who, in express contradiction from the guarded mode of conveyance applied to the trustee, should be made to "grant," &c. "fully and absolutely."

It remains to inquire what remedy a person purchasing under a defective title has, exclusively of the purchaser's warranty or covenants, or where the title is subject to a defect, which the warranty or covenants do not reach. In every case where the seller conceals from the purchaser the instrument or the fact which occasions the defect, or conceals from him an encumbrance to which the estate is subject, it is a fraud, and the purchaser has the remedy of an action on the case, in the nature of an action of deceit. But a judgment obtained after the death of the seller, in an action of this nature, can only charge his property as a simple contract debt, and will not, therefore, except under very particular circumstances, charge his real assets. A bill in chancery, in most cases, will be found a better remedy. It will lead to a better discovery of the concealment, and the circumstances attending it, and may in some cases enable the court to create a trust in favour of the injured purchaser. But where the nstrument or the fact, which occasions the defect of the title, or the instrument creating the encumbrance, is produced, the purchaser has fair notice given him of it, and if the covenants do not extend to it, he appears to be without remedy, unless he can avail himself of the covenants of the earlier vendors, many of which are inherent to the lands, and to some of which, as the covenant for quiet enjoyment, there is no objection, on account of their antiquity, where the breach is recent. It sometimes happens, that a purchaser consents to take a defective title, relying for his security on the vendor's covenants. Where this is the case, this should be particularly mentioned to be the agreement of the parties; as it has been argued, that, as the defect in question was known, it must be understood to have been the agreement of the purchaser to take the title, subject to it, and that the covenants for the title should not extend to warrant it against this particular defect. On the general doctrine respecting the usual covenants for title, see Mr. Sugden's Law of Vendors, Ch. 13.—[Note 332.]

warrantie during the life of the feoffor: and so was the statute expounded in both points. [g] *Hil.* 14 *El.* in the court of common pleas, which I myselfe heard and observed. [h] And if a man make a lease for life reserving a rent, and adde an expresse warrantie, here the expresse warrantie doth not take away the warrantie in law, for he hath election to vouch by force of either of them. And in *Nokes'* case note a diversitie betweene a warrantie that is a covenant reall, and a warrantie concerning a chattell. [i] Also this word *excambium* doth imply a warrantie.

[g] Hil. 14 El. in Com. Banc.
[h] Lib. 4. fol. 80. in Nokes' case. 8 E. 3. 69. 9 E. 3. 15. 10 E. 3. 11. 20 E. 3. Cont. de Gar. 7. 31 E. 3.

Vouch. 280. 32 E. 3. ib. 102. 43 E. 3. 3. 2 E. 3. tit. Cui in vita, 17. 3 E. 3. Formedon, 44. [i] 4 E. 2. Vouch. 245. 22 E. 3. 3. 14 H. 6. 2. 20 H. 6. 14. Lib. 4. fol. 122. in Bustard's case. 15 E. 3. Bar. 255. 43 E. 3. 3. Lib. 1. f. 96. Lib. 5. fol. 17. Spencer's case. Lib. 8. fol. 75. Sr. Stafford's case.

Also a partition implyeth a warrantie in law, as in the Chapter of Parceners appeareth. And homage auncestrell doth draw to itselfe warrantie, as hath beene said in the Chapter of Homage Auncestrell.

And it is to be observed, that the warrantie wrought by this word *dedi*, is a speciall warrantie, and extendeth to the heires of the feoffee during the life of the donor only. But upon the exchange and homage ancestrell the warrantie extendeth reciprocally to the heirs, and against the heirs of both parties; and in none of the cases the assignee shall vouch by force of any of these warranties, but in the case of the exchange and *dedi*, the assignee shall rebutt, but not in the case of homage auncestrell.

[384. b.]

[k] And so no man shall have a writ of *contra formam collationis*, but only the feoffee and his heires which be privie to the deed; but an assignee may rebutt by force of the deed.

[k] 28 Ass. 33. 14 H. 4. 5. 18 E. 3. 18. 4 E. 2. Avowr. 201 & 202. 19 E. 3. Avowr. 201, 202. 11 E. 3. Avowr. 100. 30 H. 6. 7. 33 H. 8. Dyer, 51. 10 H. 7. 11. b. F. N. B. 163. a.

[l] If a man make a gift in taile, or a lease for life of land, by deed or without deed, reserving a rent, or of a rent service by deed, this is a warrantie in law, and the donee or lessee being impleaded, shall vouch and recover in value. And this warrantie in law extendeth not only against the donor or lessor, and his heires, but also against his assignees of the reversion; and so likewise the assignee of lessee for life shall take benefit of this warrantie in law.

[l] 6 E. 2. Cont. de Vouch. 105. 5 E. 3. 67. 4 E. 2. ibid. 102. 6 E. 3. 11. 50. 7 E. 3. 6. 18 E. 3. 8. 22 E. 3. 3. 3 H. 7. 13. 6 H. 7. 2. 14 E. 3. Garr. 32. F. N. B. 134. g. 5 E. 3. 87. 20 E. 3. tit. Counterplea de Gar. 7.

[m] When dower is assigned there is a warrantie in law included, that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable (1).

[m] 4 E. 3. 36. 33 E. 3. tit. Cont. de Vouch. 122. 43 Ass. 32. 50 E. 3. 7. F. N. B. 149. m.

And it is to be understood, that a warrantie in law and assets is in some cases a good bar. [n] In a formedon in the discender the tenant may plead, that the ancestor of the demandant exchanged the land with the tenant for other lands taken in exchange,

[n] 14 H. 6. 2. 15 E. 3. Bar. 255.

(1) Tenant by the curtesy cannot vouch, because he shall not recover in value, 10 H. 7. 10. b. but he may pray in aid of him in the reversion. Hob. Rep. 21.—[Note 333.]

exchange, which descended to the demandant, whereunto he hath entred and agreed; or if he hath not entred and agreed unto the lands taken in exchange, then the tenant may plead the warrantie in law, and other assets descended.

[o] 38 E. 3. 22, 23, 24. 13 E. 3. Gar. 35.

[o] If tenant in taile of lands make a gift in taile, or a lease for life, rendring a rent, and dieth, and the issue bringeth a formedon in the discender, the reversion and rent shall not barre the demandant; because by his formedon he is to defeat the reversion and rent, *Et non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.*

[p] 16 E. 3. Age, 45. 18 E. 3. 8. 31 E. 3. Gar. 29.

[p] But if other assets in fee simple doe descend, then this warrantie in law and assets is a good barre in the formedon.

(1 Rep. 10.)

Here foure things are to be observed: first, that no warrantie in law doth barre any collaterall title, but is in nature of a lineall warrantie: wherein the equitie of the law is to observed.

Secondly, that an expresse warrantie shall never binde the heires of him that maketh the warrantie, unlesse (as hath beene said) they be named: as for example, *Littleton* here saith *(Ego et hæredes mei)*; but in case of warranties in law, in many cases the heirs shall bee bound to warrantie, albeit they be not named.

Vide Lib. 4. fol. 121. Bustard's case.

Thirdly, that in some cases warranties in law doe extend to execution in value, of speciall lands, and not generally of lands descended in fee simple, as you may see at large in my Reports.

[q] 45 E. 3. 20. b.

[q] Fourthly, that warranties in law may be in some cases created without deed, as upon gifts in taile, leases for life, eschanges, and the like.

And seeing somewhat hath beene said out of *Bracton* and other antient authors, concerning assignees, it is necessarie to shew who shall take advantage of a warrantie, as assignee by way of voucher, to have recompence in value.

[r] 14 E. 3. Gar. 33. 13 E. 1. Gar. 83.

[r] If a man infeoffe *A.* and *B.* to have and to hold to them and to their heires, with a clause of warrantie, *prædictis* A. *et* B. *et eorum hæredibus et assignatis:* in this case if *A.* dieth, and *B.* surviveth and dieth, and the heire of *B.* infeoffeth *C.* he shall vouch as assignee, and yet he is but the assignee of the heire of one of them; for in judgement of law the assignee of the heire is the assignee of the ancestor, and so the assignee of the assignee shall vouch *in infinitum*, within these words, (his assignees).

Lib. 5. fol. 17. b. in Spencer's case. 38 E. 3. 21.

[s] 12 E. 2. Vouch. 263. 19 E. 2. Gar. 85. 13 E. 1. ib. 93. Lib. 5. fol. 17. Spencer's case. 7 E. 3. 34. 10 E. 3. 9.

[s] If a man infeoffeth *A.* to have and to hold to him, his heires and assignes; *A.* infeoffeth *B.* and his heires, *B.* dieth, the heire of *B.* shall vouch as assignee to *A.:* so as heires of assignees, and assignees of assignes, and assignees of heires, are within this word (assignes); which seemed to be a question in *Bracton*'s time. And the assignee shall not only vouch, but also have a *warrantia cartæ.*

14 E. 3. Garr. 33. Bract. ubi sup. 9 E. 2. Garr. de Chart. 30. 36 E. 3. Gar. 1. 4 H. 8. Dy. 1. F. N. B. 135.

If a man doth warrant land to another without this word (heires), his heires shall not vouch (N): and regularly if he warrant land to a man and his heires, without naming assignes, his assignee shall not vouch. [t] But if the father be infeoffed with

[t] 43 E. 3. 23. 26 E. 3. 68.

(Ante, 174. a. b. Post. 390. a.) 40 E. 3. 14. 24 E. 3. 36. 11 H. 4. 94. 39 E. 3. 17. 5 E. 3. Age, 19. Pl. Com. 418.

warrantie

(N) *The doctrine in the text was discussed in the recent case of Doe v. Prestwidge,* 4 *Maule and Selwyn,* 178.

warrantie to him and his heires, the father infeoffeth his eldest son with warrantie and dieth, the law giveth to the sonne advantage of the warrantie made to his father, because by act in law the warrantie betweene the father and the sonne is extinct.

But note, there is a diversitie betweene a warrantie that is a covenant reall, which bindeth the partie to yeeld lands or tenements in recompence, and a covenant annexed to the land, which is to yeeld but dammages, for that a covenant is in many cases extended further than the warrantie. As for example:

[u] It hath beene adjudged, that where two coparceners made partition of land, and the one made a covenant with the other, to acquite her and her heires of a suit that issued out of the land, the covenantee aliened, in that case the assignee shall have an action of covenant, and yet he was a stranger to the covenant, because the acquitall did runne with the land.

[u] 42 E. 3. b. per Finchden.

[385. a.] ☞ (5 Rep. 18. a. in Spencer's case.)

[x] *A.* seised of the mannor of *D.* whereof a chappell was parcell, a prior with the assent of his covent covenanteth by deed indented with *A.* and his heires to celebrate divine service in his said chappell weekely, for the lord of the said mannor, and his servants, &c. In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedie by covenant doth runne with the land, to give dammages to the partie grieved, and was in a manner appurtenant to the mannor. [y] But if the covenant had beene with a stranger to celebrate divine service in the chappell of *A.* and his heires, there the assignee shall not have an action of covenant; for the covenant cannot be annexed to the mannor, because the covenantee was not seised of the mannor. See in *Spencer*'s case before remembred, divers other diversities betweene warranties and covenants which yeeld but dammages.

[x] 42 E. 3. 3. a. Laur. Pakenham's case. 2 H. 4. 6. 6 H. 4. 1 & 2. Ralfe Brabson's case. Lib. 5. fol. 17, 18. Spencer's case.

[y] 2 H. 4. 6. Hen. Horne's case. 6 H. 4. 1. Lib. 5. fol. 17, 18. Spencer's case.

And here it is to be observed, that an assignee of part of the land shall vouche as assignee. [*] As if a man make a feoffement in fee of two acres to one, with warrantie to him, his heires and assignes, if he make a feoffement of one acre, that feoffee shall vouche as assignee; for there is a diversitie betweene the whole estate in part, and part of the estate in the whole, or of any part. As if a man hath a warrantie to him, his heires, and assignes, and he make a lease for life, or a gift in taile, the lessee or donee shall not vouch as assignee, because he hath not the estate in fee simple whereunto the warranty was annexed; but the lessee for life may pray in aide, or the lessee or donee may vouch the lessor or donor, and by this means he shall take advantage of the warranty. But if a lease for life, or a gift in taile be made, the remainder over in fee, such a lessee or donee shall vouch as assignee, because the whole estate is out of the lessor, and the particular estate and the remainder doe in judgement of law to this purpose make but one estate.

[*] 18 E. 3. 52. 10 E. 3. 58. 5 E. 3. 40. 12 E. 3. Counterplea de Vouch. 42. 14 E. 3. Voucher, 108. 5 E. 3. ibid. 178. 13 E. 3. ibid. 129. 40 E. 3. 22. 41 E. 3. Vouch. 69 & 100. 32 E. 3. ibid. 96. (Hob. 25.) And this diversitie was agreed, Hill. 14 Eliz. in Communi Banco, which I heard and observed.

[a] If a man infeoffe three with warrantie to them and their heires, and one of them release to the other two, they shall vouch; but if he had released to one of the other, the warrantie had beene extinct for that part, for he is an assignee.

[a] 40 E. 14. 40 Ass. 5. 33 H. 6. 4. 37 H. 8. Alienation sans licence, 31.

[b] If a man doth warrant land to two men and their heires, and the one make a feoffement in fee, yet the other shall vouch for his moitie. If a man at this day be infeoffed with warrantie

8 H. 4. 8. [b] 11 R. 2. Detin. 46. 7 E. 3. 35. 46 E. 3. 4.

to

to him, his heires, and assignes, and he make a gift in taile, the remainder in fee, the donee make a feoffement in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee, but he that commeth in, in privitie of estate; but he must vouch his feoffor, and he to vouch as assignee, but such an assignee may rebutte. If the warrantie be made to a man and his heires without this word (assignes), yet the assignee, or any tenant of the land may rebutte. And albeit no man shall vouch or have a *warrantia cartæ*, either as partie, heire, or assignee, but in privitie of estate, yet any that is in of another estate, be it by disseisin, abatement, intrusion, usurpation, or otherwise, shall rebutte by force of the warrantie, as a thing annexed to the land, which sometime was doubted [*c*] in our bookes. But herein is a diversitie to be observed, when in the cases aforesaid he that rebutteth claimeth under the warrantie; and when he that would rebutte claimeth above the warranty, for there he shall not rebutte. And therefore if lands be given to two brethren in fee simple, with a warranty to the eldest and his heires, the eldest dieth without issue, the survivor albeit he be heire to him, yet shall he neither vouch nor rebutte, nor have a *warrantia cartæ*, because his title to the land is by relation above the fall of the warrantie, and he commeth not under the estate of him to whom the warrantie is made, as the disseisor, &c. doth.

(See Vaugh. 388.)

[*c*] 38 E. 3. 21. 26 E. 3. 56. Lib. 10. fo. 96. b. Seymour's case. 7 E. 3. 34, 35. 8 E. 3. 10. 46 E. 3. 4. 10 E. 3. 42. 45 E. 3. 18. 10 Ass. 5. 35 Ass. 9. 22 Ass. 39. 88. 31 Ass. 13.

[*d*] If a man make a gift in taile at this day, and warrant the land to him, his heires and assignes, and after the donee make a feoffement and dieth without issue, the warrantie is expired as to any voucher or rebutter, for that the estate in taile whereunto it was knit is spent: otherwise it is, if the gift and feoffement had beene made before the statute of *donis conditionalibus*; for then both the donee and feoffee had a fee simple; and so are our bookes to be intended in this and the like cases.

[*d*] Lib. 3. fol. 62, 63. Lincolne College case.

[*e*] If *A.* be seised of lands in fee, and *B.* releaseth unto him, or confirmeth his estate in fee with warrantie to him, his heires and assignes; all men agree this warrantie to be good: but some have holden, that no warrantie can be raised upon a bare release or confirmation without passing some estate or transmutation of possession. [*f*] But the law, as it appeareth by *Littleton* himselfe, is to the contrary, and that both the party, and (as some doe hold) his assignee shall vouch; but he that is vouched in that case must be present in court, and ready to enter into the warranty and to answer, and the tenant must shew forth the deed of release or confirmation with warrantie, to the intent the demandant may have an answer thereunto, and either deny the deed, or avoid it; for that at the time of the confirmation made, he (A) to whom it was made had nothing in the land, &c. for otherwise the demandant may counterplead the voucher by the statute of *W.* 1. viz. that neither vouchee nor any of his ancestors had any ☞ seisin whereof he might make a feoffement (B). And this is grounded upon the said statute of *W.* 1, the words whereof be, *S'il neit son*

[*e*] 14 E. 3. Garr. 108. 12 H. 7. 1.

[*f*] 11 H. 4. 22. 10 E. 3. 52. 21 E. 3. 27. Vid. Sect. 706. 738 & 745.

W. 1. cap. 40.

Vide 20 E. 1. Statute de vocat. ad warrant.

[385. b.]

(A) *Here "to" seems to be printed by mistake instead of "by." See Mr. Ritso's Intr. p. 121.*

(B) *Yet by 20 E. 1. (statute of vouchers), which recites that the averment therein mentioned (being the averment or counterplea spoken of in the text) had not been used to be admitted unless the party vouched had been absent, by reason of the statute of W. 1. above cited, it was ordained, that such averment should be admitted, whether the party vouched were absent or present, without any respect had unto his absence or presence.*

son garrantor en present (1), *que luy voile garranter de son gree, et maintenant enter en respons*, otherwise the tenant must be driven to his *warrantia cartæ*.

[*g*] But a warrantie of it selfe cannot enlarge an estate; as if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heires, yet doth not this enlarge his estate.

[*g*] 22 H. 6. 15. 19 H. 6. 73. 26 H. 6. 73. 2 H. 4. 13. 41 E. 3. Garr. 15. 44 E. 3. 10.

43 E. 3. 17. 43 Ass. 42. 12 Ass. 17. 12 E. 3. Taile, 3. 22 E. 4. 16. b. 44 Ass. Bassingborn's. Ass. Lib. 10. fol. 97. Seymour's case.

[*h*] If a man make a feoffement in fee with warrantie to him, his heires and assignes by deed (as it must be), and the feoffee enfeoffeth another by paroll, the second feoffee shall vouche, or have a *warrantia cartæ* (as hath beene said) as assignee, albeit he hath no deed of the assignment, because the deed comprehending the warrantie, doth extend to the assignees of the land; and he is a sufficient assignee, albeit he hath no deed.

[*h*] Lib. 3. fol. 63. Lincolne College case.

[*i*] If a man infeoffe two, their heires and assignes, and one of them make a feoffement in fee, that feoffee shall not vouch as assignee (2).

[*i*] 29 E. 3. 70. 17 E. 2. Joinder in action, 1. 11 E. 4. 8.

If a man make a feoffement in fee to *A.* his heires and assignes, *A.* infeoffeth *B.* in fee, who re-infeoffeth *A.* he or his assignes shall never vouche, for *A.* cannot be his owne assignee. But if *B.* had infeoffed the heire of *A.* he may vouche as assignee; for the heire of *A.* may be assignee to *A.* inasmuch as he claimeth not as heire.

[*k*] If a man make a feoffement by deed of lands to *A.* to have and to hold to him and his heires, and bind him and his heires to warrant the land *in formâ prædictâ*; this warrantie shall extend to the feoffee and his heires; but if he had warranted the land to the feoffee the warrantie had not extended to his heires, except the words had beene to him and his heires.

[*k*] 14 H. 4. 3.

If a man letteth lands for life, the remainder in taile, the remainder *eâdem formâ*, this is a good estate taile, *quia idem semper refertur proximo præcedendi* (3).

(Ant. 20. b.)

Sect. 734.

ALSO, if tenant in taile be seised of * *lands devisable by testament after the custome, &c. and the tenant in the tayle alieneth the same tenements to his brother in fee* (et le tenant en tayle alien † mesmes les tenements a son frere en fee), *and hath issue, and dieth, and after his brother deviseth by his testament the same tenements to another in fee, and bindeth him*

* *lands—tenements*, L. and M. and Roh. † mesmes *not in L. and M. or Roh.*

(1) *i. e.* if he have not his *warrantor* present.

(2) The other may vouch for his moiety, as is observed in the preceding page; but if they make partition, both have lost it. Hob. 25.—[Note 334.]

(3) A man enfeoffeth three by deed, and warranteth the land to them, *et cuilibet eorum*, this is a joint warranty, because the estate or interest was joint; but if the estates were several, the warranty would be several. 5 Rep. 19.—[Note 335.]

him and his heires to warrantie, &c. and dieth without issue; it seemeth that this warrantie shall not barre the issue in the taile, if hee will sue his writ of formedon, *because that this warrantie shall not descend to the issue in tayle, in so much as the uncle of the issue was not bound to the same warrantie in his lifetime: neither could hee warrant the tenements in his life, insomuch as the devise could not take any execution or effect until after his decease* (4) (pur ceo que cest garrantie ne discendera my al issue en le tayle, entant que le uncle del issue ne fuit my oblige a le garrantie en sa vie: ne ‡ que il ne puissoit garranter les tenements en sa vie, entant que le devise ne puissoit prender ascun execution ou effect, forsque apres son decease). *And insomuch as the uncle in his life was not* ☞ *held to warrantie, such warrantie may not descend from him to the issue in the tayle, &c. for nothing can descend from the ancestour to his heire, unlesse the same were in the ancestour* (1). [386. a.]

(6 Rep. 33. 2 Cro. 570. 10 Rep. 95.)

HERE our author declareth one of the maximes of the common law, that the heire shall never be bound to any expresse warrantie, but where the ancestor was bound by the same warranty; for if the ancestor were not bound, it cannot descend upon the heire, which is the reason here yeelded by *Littleton*. [*l*] If a man make a feoffment in fee, and binde his heires to warrantie, this is void by the warrant of this maxime, as to the heire, because the ancestor himselfe was not bound. Also, if a man binde his heires to pay a summe of money, this is void. And of the other side, if a man binde himselfe to warranty, and binde not his heires, they be not bound; for he must say, as it appeareth before, *Ego et hæredes mei warrantizabimus, &c.* [*m*] And *Fleta* saith, *Nota quòd hæres non tenetur in Angliâ ad debita antecessoris reddenda, nisi per antecessorem ad hoc fuerit obligatus, præterquàm debita regis tantum: A fortiori* in case of warrantie, which is in the realtie.

[*l*] 31 E. 1. Grant, 85. (Hob. 130. Ant. 213. b.)

Bracton, li. 2. fol. 37. 238. Britt. fo. 106. b.

[*m*] Fleta, lib. 2. cap. 55. (N) Britton, fo. 65. b. 11 H. 6. 48. (4 Rep. 80. Ante 209. a.)

But a warrantie in law may binde the heire, although it never bound the ancestour, and may be created by a last will and testament. [*n*] As if a man devise lands to a man for life or in taile reserving a rent, the devisee for life or in taile shall take advantage of this warrantie in law, albeit the ancestor was not bounden, and shall binde his heires also to warrantie, although they be not named. Also an expresse warrantie cannot be created without deed, and a will in writing is no deed, and therefore an expresse warrantie cannot be created by will.

[*n*] 18 E. 3. 8.

Sect.

‡ que il ne *not in L. and M. or Roh.*

(N) *Vid. Fleta, lib.* 2. *cap.* 62. § 10.

(4) Upon a similar principle it was held, that a person could not devise land in frankmarriage, because the donee could not hold of the donor. Ant. 21. b.—[Note 336.]

(1) It is a general rule, that the heir cannot take any thing by descent when the ancestor is secluded from taking. Ant. 99. b.—If a father and his heir apparent join in a warranty, the heir is doubly bound by his own warranty, and as heir to his father. Moore, 20.—[Note 337.]

Sect. 735.

ALSO, a warranty cannot goe according to the nature of the tenements by the custome, &c. but onely according to the forme of the common law (un garrantie ne poit aler * solonque la nature des tenements per le custome, &c. mes tantsolement solonque le forme del common ley). *For if the tenant in taile be seised of tenements in borough English, where the custome is, that all the tenements within the same borough ought to descend to the youngest sonne, and he discontinueth the taile with warranty, &c. and hath issue two sonnes, and dyeth seised of other lands or tenements in the same borough in fee simple to the value or more of the lands entailed, &c. yet the youngest sonne shall have a* formedon *of the † lands tailed, and shall not bee barred by the warrantie of his father, albeit assets descended to him in fee simple from his said father* [386. b.] ☞ *according to the custome, &c. because the warranty descendeth upon his elder brother who is in full life ‡, and not upon the youngest.* ‖ *And in the same manner is it of collaterall warranty made of such tenements, where the warranty descendeth upon the eldest sonne, &c. this shall not barre the younger son, &c.*

Sect. 736. (8 Rep. 86.)

IN the same manner is it of lands in the county of Kent, that are called gavelkinde, which lands are dividable betweene the brothers, &c. according to the custome ⊣; if any such warrantie be made by his ancestor, such warrantie shall descend onely (B) *to the heire which is heire at the common law,* § *that is to say, to the elder brother, according to the conusance of the common law, and not to all the heires that are heires of such tenements according to the custome* ¶.

HEREUPON a diversitie is to be observed betweene the lien reall, and the lien personall, for the lien reall, as the warrantie, doth ever descend to the heire at the common law; [n] but the lien personall doth binde the special heires, as all the heires in gavelkind, and the heire on the part of the mother, as hath beene said. Vid. Sect. 603. 718 & 737. (2 Rep. 25.) [n] 11 E. 3. Det. 7. 11 H. 7. 12.

[o] If two men make a feoffment in fee with a warranty, and the one die, the feoffee cannot vouche the survivor only, but the [o] 17 E. 3. Joint. 41. 16 H. 7. 13.

29 E. 3. 46. 12 H. 7. 3. 22 E. 3. 1. 17 E. 3. 8. 30 E. 3. 40. 19 H. 6. 55. Lib. 3. fol. 14. Matthew Herbert's case. (1 Leon. 322. March. 125. Allen, 41. Savil. 692. Clay. 3.)

heire

* solonque—sans, *L. and M. and Roh.*

† *lands, tenements,* L. and M. and Roh.

‡ *&c.* added in L. and M. and Roh.

‖ *And* not in L. and M. or Roh.

⊣ *&c.* added in L. and M. and Roh.

§ *that is to say, to the elder brother, according to the conusance of the common law,* not in L. and M. or Roh.

¶ *&c.* added in L. and M. and Roh.

(B) *See ante note A. on Sect. 601.*

heire of him that is dead also (1); but otherwise, if two joyntly binde themselves in an obligation, and the one die, the survivor only shall be charged.

Sect. 737.

ALSO, if tenant in taile hath issue two daughters by divers venters, and dieth, and the daughters enter, and a stranger disseiseth them of the same tenements, and one of ¶ *them releaseth by her deed to the disseisor all her right, and binde her and her heires to warrantie, and die without issue: in this case the* ☞ *sister which surviveth may well enter, and oust the disseisor of all the tenements, because such warrantie is no discontinuance nor collaterall warrantie to the sister that surviveth, for that they are of halfe bloud, and the one cannot be heire to the other, according to the course of the common law. But otherwise it is, where there be daughters of tenant in taile by one venter.*

[387. a.]

THE reason of this is in respect of the halfe bloud, whereof sufficient hath beene said in the first booke, in the Chapter of Fee Simple.

(Ante 12. a. 14. a. & b.)

Two brothers be by demy venters; the eldest releaseth with warrantie to the disseisor of the uncle, and dieth without issue, the uncle dieth, the warrantie is removed, and the younger brother may enter into the land.

Sect. 738.

ALSO, if tenant in taile letteth the lands to a man for terme of life, the remainder to another in fee (si tenant en taile lessa les tenements a un * home pur terme de vie, le remainder a un auter en fee), *and a collaterall ancestor confirmeth the state of the tenant for life, and bindeth him and his heires to warrantie for term of the life of the tenant for life, and dieth, and the tenant in taile hath issue and dies; now the issue is barred to demand the tenements by writ of* formedon *during the life of tenant for life, because of the collaterall warrantie descended upon the issue in taile. But after the decease of the tenant for life, the issue shall have a* † *writ of* formedon, *&c.*

HERE

¶ *them—the daughters,* L. and M. and Roh.

* home *not in L. and M. or Roh.*

† *writ of* not in L. and M. or Roh.

(1) This seems to be contradicted in Moore, 20. where it is said, that if two are vouched, and one of them makes default, the grand *cape ad valentiam* shall issue against him who made the default; and if one of them dies, the heir and the survivor of them may be vouched, or the survivor of them only, at the election of him who hath the warranty.—[Note 338.]

HERE it appeareth, that a warrantie may be raised by a confirmation which transferreth neither estate nor right, whereof sufficient hath beene said before. (Vide Sect. 733. & 706. (Ant. 385.)

"*To warrantie for terme of the life, &c.*" [*p*] This proveth that a warrantie may be limited, and that a man may warrant lands aswell for terme of life or in taile, as in fee (1). ([*p*] 38 E. 3. 14. 16 E. 3. Vouch. 87.

If tenant in fee simple that hath a warrantie for life, either by an expresse warrantie or by *dedi*, be impleaded and vouch, hee shall recover a fee simple in value, albeit his warrantie were but for terme of life, because the warrantie extended in that case to the whole estate of the feoffee in fee simple (2); but in the case that *Littleton* here putteth, the tenant for life shall recover in value but an estate for life, because the warrantie doth extend to that estate only. (4 Rep. 80. Ant. 383. Hob. 156.) (2 Cro. 453.)

"*A writ of formedon, &c.*" Here is implyed, that a collaterall warrantie giveth no right, ☞ but shall barre only for life, and after the partie is restored to his action. [387. b.] (F. N. B. 211. b. 217. b. 219. c.)

It is also to bee observed, that a warrantie may descend to the heires of him that made it during the life of another.

Sect. 739. (9 Rep. 120.)

AND upon this I have heard a reason, that this case will prove another case, viz. if a man letteth his lands to another, to have and to hold to him and to his heires for terme of another's life, and the lessee dieth living celuy a que vie, &c. *and a stranger entreth into the land that the heire of the lessee may put him out,* † *&c. because in the case next aforesaid, inasmuch as a man may binde him and his heires to warrantie to tenant for life only, during the life of the tenant for life* (durant la vie le tenant a ‡ terme de vie), *and this warrantie descendeth* (B) *to the heire of him which made the warrantie, the which warrantie is no warrantie of inheritance, but only for terme of another's life: by the same reason where lands are let to a man, to have and to hold to him and his heires for terme of another's life, if the* ‖ *lessee die living* celuy a que vie, *his heires shall have the lands living* celuy a que vie, &c. *For they have said, that if a man grant an annuitie*

† *&c.* not in L. and M. or Roh. ‖ *lessee— father,* L. and M. and Roh.
‡ terme *not in L. and M. or Roh.*

(B) *See ante note A. on Sect. 601.*

(1) From this it appears, that the warranty ceases on the expiration of the estate to which it is annexed. In Smith *v.* Tyndal, Salk. 685, 686, it was resolved that no warranty extinguishes a right, but only binds or bars it so long as the warranty continues in force; for if the warranty be released, the ancient right revives.—[Note 339.]

(2) Though the warranty be temporary, yet the thing warranted and to be recovered is perpetual; for it is a warranty of a fee, though not a warranty in fee. Hob. 126.—[Note 340.]

annuitie to another, to have and to take to him and his heires for terme of another's life, if the grantee die, &c. that after § *his death his heire shall have the annuitie during the life of* celuy a que vie, &c. Quære de istâ materiâ.

☞ "*I HAVE heard a reason.*" Here our student is taught after the example of our author, to observe everie thing that is worth the noting. [388. a.]

"*If a man letteth his lands to another, &c.*" This case is without question, [*q*] that the heire of the lessee shall have the land to prevent an occupant. And so it is (as *Littleton* here saith) in case of an annuitie, or of any other thing that lieth in grant, whereof there can be no occupant. And of this somewhat hath beene said in the Chapter of Discents (1).

[*q*] 17 E. 3. 48. 18 E. 3. 12. 11 H. 4. 42. 7 H. 4. 46. 8 H. 4. 15. Dy. 8 El. 253. 13 H. 8. 3. 27 H. 8. 21 H. 8. tit. Estat. Br. 50. 19 E. 3. tit. Account. 56. 33 Ass. p. 17. 22 H. 6. 33. 39 E. 3. 37. Vide Sect. 387. (Ante 41. b.)

Sect. 740.

*BUT where such lease or grant is made to a man and to his heires for terme of yeares, in this case the heire of the lessee or the grantee shall not after the death of the lessee or the grantee have that which is so let or granted, because it is a chattell reall, and * chattels realls by the common law shall come to the executors of the grantee, or of the lessee, and not to the heire* †.

HERE is a generall rule, that chattels reals aswell as chattels personals shall goe to the executors or administrators of the lessee, and not to his heires. For as estates of inheritance or freehold descendible shall go to the heire, so chattels, aswel reall as personall, shall goe to the executors or administrators.

11 E. 3. tit. Ass. 88. 11 Ass. 21. 10 El. Dy. 276. (9 Rep. 86. 5 Rep. 25. 33.)

[*r*] But if the king's tenant by knight's service *in capite* be seised of a mannor, whereunto an advowson is appendant, and the church become void, the tenant dieth, his heire within age, the king shall present to the church, and not the executor or administrator: but if the land be holden of a common person, in that case the executor shall present, and not the gardeine.

[*r*] 24 E. 3. 26. F. N. B. 33. b. F. N. B. 34. a. Ant. 90. Sect. 125.)

[*s*] If a bishop hath a ward fallen and dieth, the king shall not have the ward nor the successor, but the executor, and the ward shall be assets in his hands. So it is of the heriot, releefe, and the like. [*t*] But if a church become void in the life of a bishop, and so remaine untill after his decease, the king shall present thereunto, and not the executor or administrator; for nothing can be taken for a presentment, and therefore it is no assets.

[*s*] 40 E. 3. 14.

[*t*] 9 H. 6. 58. 11 H. 4. 7.

Sect.

§ *his death* not in L. and M. or Roh. † *&c.* added in L. and M. and Roh.
* *all* added in L. and M. and Roh.

(1) But several alterations have been made in the law of occupancy by statutes passed since sir Edward Coke's time. See ant. 41. b. note 5.

Sect. 741.

ALSO, in some cases it may bee, that albeit a collaterall warrantie be made in fee, &c. yet such a warrantie may be defeated and taken away. As if tenant in taile discontinue the taile in fee, and the discontinuee is disseised, and the brother of the tenant in taile releaseth by his deed to the disseisor all his right, &c. with warrantie in fee, and dieth without issue, and the tenant in taile hath issue and die; now the issue is barred of his action by force of the collaterall warrantie descended upon him. But if afterwards the discontinuee entreth upon the disseisor, then may the heire in taile have well his action of formedon, &c. *because the warrantie is taken away and defeated, for when a warrantie is made to a man upon an estate which hee then had, if the estate be defeated, the warrantie is defeated* (1).

"*AND dieth without issue, &c.*" Here (as before in this Chapter hath been noted) the collaterall warrantie doth descend upon the issue in taile, before any right doth descend unto him, wherein this diversitie is to bee observed. Where the right is in *esse* in any of the ancestors of the heire at the time of the ☞ discent of the collaterall warrantie, there albeit the warrantie descend first, and after the right doth descend, the collaterall warrantie shall binde, as here in this case of our author expressely appeareth. But where the right is not in *esse* in the heire, or any of his ancestors, at the time of the fall of the warrantie, there it shall not binde. Vide Sect. 707. [388. b.] (12 Rep. 95.)

[*u*] As if lord and tenant be, and the tenant make a feoffement in fee with warrantie, and after the feoffor purchase the seigniorie, and after the tenant cesse, the lord shall have a *cessavit*; for a warrantie doth extend to rights precedent, and never to any right that commenceth after the warrantie: whereof more shall be said in this Section. Also a warrantie shall never barre any estate that is in possession, reversion or remainder, that is not devested, displaced, or turned to a right before, or at the time of the fall of the warrantie. [*u*] 7 E. 3. 48. 30 H. 8. 42. (10 Rep. 96.)

[*w*] If a lease for life be made to the father, the remainder to his next heire, the father is disseised and releaseth with warrantie and dieth; this shall barre the heire, although the warrantie doth fall, and the remainder commeth in *esse* at one time. [*w*] Lib. 1. fol. 67. Archer's case.

[*y*] If there be father and sonne, and the sonne hath a rent service, suit to a mill, rent charge, rent secke, common of pasture, or [*y*] Temps E. 1. Voucher, 296. 31 Ass. 13.

(1) In the former cases put by Littleton, the warranty determined upon the natural expiration of the estate to which it was annexed: here it determines by the estate being defeated. But if an estate be bound by a warranty, and afterwards the estate to which the warranty is annexed be defeated as to a particular estate only, the warranty shall not be defeated. As if tenant for life, remainder to *A.* be disseised, and an ancestor of *A.* releases to the disseisor with warranty and dies, and afterwards tenant for life enters or recovers, yet the remainder will be bound by the warranty. See 2 Rol. Abr. 740. l. 40. 741. l. 5. And see Com. Dig. *tit. Garranty, (I. 5.)*—[Note 341.]

22 Ass. 36. 41 Ass. 6. 23 E. 3. tit. Gar. 74. Lib. 10. fol. 97. E. Seymour's case. (9 Rep. 106.)

or other profit *apprender* out of the land of the father, and the father maketh a feoffment in fee with warrantie, and dieth, this shall not barre the sonne of the rent, common, or other profit apprender, *quamvis clausula specialis warrantiæ vel acquietanciæ in cartis tenentium inseratur, quia in tali casu transit terra cum onere:* and he that is in seisin or possession need not to make any entrie or claime: and albeit the sonne after the feoffment with warrantie, and before the death of the father, had beene disseised, and so being out of possession, the warrantie descended upon him, yet the warrantie should not binde him, because at the time of the warrantie made the sonne was in possession.

[*] 45 E. 3. 31. 21 H. 7. 11. Vide Sect. 698.

[*] So if my collaterall ancestor release to my tenant for life, this shall not binde my reversion or remainder, because that the reversion or remainder continued in me. But if he that hath a rent, common, or any profit out of the land in taile, disseise the tenant of the land, and maketh a feoffment of the land, and warrant the land to the feoffee and his heires, [a] regularly the warrantie doth extend to all things issuing out of the land, that is to say, to warrant the land in such plight and manner, as it was in the hand of the feoffor, at the time of the feoffment with warrantie; and the feoffee shall vouch, as of lands discharged of the rent, &c. at the time of the feoffment made.

[a] 21 E. 4. 26. 21 H. 7. 9. 3 H. 7. 4. 7 H. 4. 17. 30 H. 8. Dier, 42. 30 E. 3. 30. 9 E. 3. 78. 45 E. 3. Voucher, 72. F. N. B. 125. 14 H. 8. 6. (Ant. 366. b. Moor, 56.)

A woman that hath a rent charge in fee entermarrieth with the tenant of the land, an estranger releaseth to the tenant of the land with warrantie; he shall not take advantage of this warrantie either by voucher or *warrantiæ cartæ*; for the wife, if her husband die, or the heire of the wife living the husband, cannot have an action for the rent upon a title before ☞ the warrantie made; for if the heire of the wife bring an assise of *mordancester*, this action is grounded after the warrantie, whereunto, as hath beene said, the warrantie shall not extend.

[389. a.]

(Ant. 366. b.)

So it is if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffment of the land with warrantie, this warrantie cannot extend to the rent, albeit the feoffement was made of the land discharged of the rent; for if the condition be broken, and the grantor be intituled to an action, this must of necessitie be grounded after the warrantie made.

(Ant. 202.)

But in the case aforesaid, when the woman grantee of the rent marrieth with the tenant, and the tenant maketh a feoffment in fee with warrantie, and dieth, in a *cui in vitâ* brought by the wife (as by law she may), [b] the feoffee shall vouche as of lands discharged at the time of the warranty made, for that her title is paramont: so if tenant in taile of a rent charge purchase the land, and make a feoffement with warrantie, if the issue bring a *formedon* of the rent, the tenant shall vouche *causâ quâ supra*.

[b] 7 H. 4. 17.

[*] But some doe hold, that a man shall not vouche, &c. as of land discharged of a rent service.

[*] 10 E. 4. 9. b. 18 E. 3. 55. 44 E. 3. 19.

[c] Also, no warrantie doth extend unto meere and naked titles, as by force of a condition with clause of re-entry, exchange, mortmaine, consent to the ravisher and the like, because that for these no action doth lye; and if no action can be brought, there can be neither voucher, writ of *warrantiæ cartæ*, nor rebutter, and they continue in such plight and essence as they were by their originall creation, and by no act can be displaced or devested out of their originall essence, and therefore cannot be bound by any warrantie.

[c] Lib. 10. fol. 97. E. Seymore's case. 22 Ass. pl. 38. 31 Ass. p. 13. 41 Ass. p. 6. 33 E. 3. Gar. 74. (2 Cro. 593. Dyer, 224. a. 3 Inst. 216. 10 Rep. 98. b. Ant. 205. a. Plowd. 363. b.)

And

[d] And albeit a woman may have a writ of dower to recover her dower, yet because her title of dower cannot be devested out of the originall essence, a collaterall warrantie of the ancestor of the woman shall not barre her. So it is of a feoffment *causâ matrimonii prælocuti*.

[d] 34 E. 3. tit. Droit, 72. 21 E. 4. 82. (4 Rep. Vernon's case.)

[e] A warrantie doth not extend to any lease, though it be for many thousand yeares, or to estates of tenant by statute staple, or merchant, or *elegit*, or any other chattel, but only to freehold or inheritances, as it appeareth in all *Littleton*'s cases which he putteth in this Chapter. And this is the reason, that in all actions which lessee for yeares may have, a warrantie cannot be pleaded in barre, as in an action of trespasse, or upon the statute of 5 *R.* 2. and the like. But in those actions when the freehold or inheritances doe come in question, there the warrantie may be pleaded: but in such actions which none but a tenant of the freehold can have, as upon the statute of 8 *H.* 6. assise, or the like, there a warrantie may be pleaded in barre (1).

[e] 21 E. 4. 18. 82. 1 H. 7. 12. 22. 11 H. 7. 15, 16. 20 H. 7. 2. b. 14 H. 7. 22. 43 E. 3. 25. per Finch, in Quar. Imp. 15 H. 7. 9. Lib. 10. fol. 97. (Ant. 101. 366. Hob. 14. 28. 2 Saund. 180.)

"*When a warrantie is made to a man upon an estate which hee then had, if the estate be defeated, the warrantie is defeated.*" Here it appeareth, that although a collaterall warrantie be descended, [f] yet if the state whereunto the warrantie was annexed be defeated, albeit it be by a meere stranger (as in this case that *Littleton* here puts by the discontinuee) the warrantie is defeated; and although the discontinuance remaine, and no remitter wrought to the heire, yet the warrantie is defeated, and barre removed, so as the issue in taile may have his *formedon*, and recover the land. *Sublato principali tollitur adjunctum* (2).

[f] 3 H. 7. 9. b. 16 E. 3 tit. Continual Claime, 10. 9 H. 4. 8. Pl. Com. 158. (10 Rep. 95.)

Sect. 742.

IN the same manner it is, if the discontinuee make a feoffement in fee, reserving to him a certain rent, and for default of payment a re-entrie, &c. and a collaterall warrantie of the ancestour is made to the feoffee that hath the estate upon condition, &c. and* (A) *dieth without issue, albeit that this warranty shall descend upon the issue in tayle, yet if after the rent*

* *warrantie of the ancestour is made—ancestour releaseth*, L. and M. and Roh.

(A) *Here, it seems, the words* "the ancestor" *should be understood. For, as Mr. Ritso observes, it is not the discontinuee who is here spoken of, nor the feoffee who hath the estate upon condition, but the collaterall ancestor of the tenant in tail, who made the warranty. See Mr. Ritso's Intr. p.* 114, *and the reading above under* *.

(1) The feoffee with warranty cannot take any advantage of the warranty unless he be tenant of the land. 26 H. 8. 3. b.—[Note 342.]

(2) If a man makes a feoffment with warranty, non-feoffment is a good plea; for if the feoffment be avoided, the warranty also is avoided, for that depends upon the feoffment. But if the man makes a lease for years, and covenants that he will warrant and defend the land to the lessee; if the lessee be ousted, whether it be by one that hath or that hath not title, he shall have a writ of covenant. Brownlow's Rep. part 2. fol. 165.—[Note 343.]

rent be behind, and the ☞ discontinuee enter into the land, then shall the issue in tayle have his recovery by writ of* formedon, *because the collaterall warranty is defeated. And so if any such collaterall warrantie be pleaded against the issue in taile, in his action of* formedon, *he may shew the matter as is aforesaid, how the warrantie is defeated, &c. and so hee may well maintaine his action, † &c.* [389. b.]

(10 Rep. 95.) HERE *Littleton* putteth another case upon the same ground and reason, viz. where the state whereunto the warrantie is annexed is defeated, there the warrantie it selfe is defeated also, which is one of the maximes of the common law.

Sect. 743.

ALSO, if tenant in taile make a feoffement to his uncle, and after the uncle make a feoffement in fee with warranty, &c. to another, and after the feoffee of the uncle doth re-enfeoffe againe the uncle in fee, and after the uncle enfeoffeth a stranger in fee without warrantie, and dieth without issue, and the tenant in tayle dieth, if the issue in tayle will bring his writ of formedon *against the stranger that was the last feoffee, ‖ and that by the uncle, the issue shall not be barred by the warranty that was made by the uncle to the first feoffee of his uncle, for that the said warrantie was defeated and taken away, because the uncle tooke backe to him as great an estate from his first feoffee to whom the warrantie was made, as the same feoffee had from him* (pur ceo que l'uncle a luy ‡ reprist cy grand estate de son § primer feoffee a que le garrantie fuit fait, sicome mesme le feoffee avoit de luy). *And the cause why the warranty is defeated is this, viz. that if the warrantie should stand in his force, then the uncle should warrant to himselfe, which cannot be.*

(Vaugh. 389.) ☞HERE *Littleton* putteth another case where a warrantie may be defeated, as when the uncle taketh backe as large an estate as he had made, the warrantie is defeated, because he cannot warrant land to himselfe. [g] And so it is if the uncle had made the warrantie to the feoffee, his heires and assignes, and taken backe an estate in fee, and after infeoffed another, yet the warrantie is defeated, for that he cannot be assignee to himselfe, and a man shall not regularly vouche himselfe as assignee of a fee simple, and the law will not suffer things inutile and unprofitable. [h] And yet if the father be infeoffed with warrantie to him and his heires, the father, infeoffeth his heire apparant in fee (A) and dieth, he (as it hath [390. a.]

[g] Temps E. 1. Voucher, 266. 40 E. 3. 14. 44 E. 3. 38. 25 E. 3. 43. b. 26 E. 3. 68. 14 E. 3. Voucher, 106. 16 E. 3. Voucher, 87.

19 E. 3. Vouchee, 122. 17 E. 3. 73, 74. 20 H. 6. 29. (2 Roll. Abr. 739.)

[h] 40 E. 3. 14. a. 41 E. 3. 25. a. (Ant. 384. Roll. Abr. 98. a.)

beene

* *&c.* added in L. and M. and Roh.

† *&c.* not in L. and M. or Roh.

‖ *&c.* added in L. and M. and Roh.

‡ reprist—prist, *L. and M. and Roh.*

§ dit *added in L. and M. and Roh.*

(A) *It seems that the feoffment of the father to his heir apparent must be understood to be made with warranty. For otherwise the father's death, which appears to be the act in law meant by lord Coke, would not determine any warranty between the father and son.*

beene said) shall vouch himselfe, and the heire in borow English, by reason the act in law determined the warrantie betweene the father and the sonne (B).

[i] But if a man maketh a feoffement in fee with warrantie to the feoffee, his heires and assignes, and the feoffee re-enfeoffeth the feoffor and his wife, or the feoffor and any other stranger, the warrantie remaineth still; or if two doe make a feoffement with warrantie to one and his heires and assignes, and the feoffee re-enfeoffe one of the feoffors, the warrantie doth also remaine. [i] 11 H. 4. 20. 42. 17 E. 3. 47. 59. 18 E. 3. 56. 29 E. 3. 46. 39 E. 3. 9. (Vaugh. 389.)

Sect. 744.

BUT if the feoffee had made an estate to (C) *his uncle for terme of life, or in taile, saving the reversion, &c. or a gift in tayle to the uncle, or a lease for terme of life, the remainder over, &c. in this case the warrantie is not altogether taken away* (en cest cas le garrantie n'est * pas tout ousterment anient), *but is put in suspence during the estate that the uncle hath. For after that, that the uncle is dead without issue,* † *&c. then he in the reversion, or he in the remainder, shall barre the issue in taile in his writ of* formedon *by the collaterall warranty in such case, &c. But otherwise it is where the uncle hath as great estate in the land of the feoffee to whom the warrantie was made, as the feoffee hath himselfe.* Causa patet.

"*FOR terme of life, or in taile.*" Here it appeareth, [k] that by taking a [l] lease for life, or a gift in taile, the warrantie is suspended. [k] 16 E. 3. Vouch. 87. 44 E. 3. 38. 26 E. 3. 56. 17 E. 3. 47. 10 E. 3. 30. 12 E. 3. Counter plea de Vouch. 42. 14 E. 3. ib. 12. (4 Rep. 52.)

A man infeoffeth a woman with warrantie, they intermarry and are impleaded, upon the default of the husband, the wife is received, she shal vouch her husband, &c. notwithstanding the warranty was put in suspence. [m] And so on the other side, if a woman infeoffe a man with warrantie, and they intermarry and are impleaded, the husband shall vouche himselfe and his wife by force of the said warrantie. [l] 6 E. 2. Vouch. 257. 3 E. 3. ib. 201. 5 E. 3. ib. 178. 18 E. 3. 52. 14 E. 3. Vouch. 109. 31 E. 3. ib. 25. 43 E. 3. 7. 44 E. 3. 38. 32 E. 3. Voucher, 102. [m] 4 E. 2. Voucher, 243. 246.

[n] An infant *en ventre sa mere* may be vouched if God give him a birth, and if not, such a one heire to the warrantie; but he cannot be vouched alone without the heire at the common law, for proces shall be presently awarded against him. (Ant. 348. a.) [n] Temps. E. 1. Gard. 153. 31 E. 1. Briefe, 873. 8 E. 2. Vouch. 237.

"*But is put in suspence*" [o] Tenant in tayle maketh a feoffement

11 E. 3. ibid. 13. 11 E. 3. Quar. imp. 158. 38 E. 3. 7 & 29. 41 E. 3. in Dower. 9 H. 6. 24. Pl. Com. Stowel's case, per Saunders & Browne. [o] 21 E. 3. 36. a. & b. 38 E. 3. 21. 44 E. 3. 26. 45 E. 3. Title, 32. 44 E. 3. ib. 31. 33 E. 3. ib. 4. (3 Leon. 10. Cro. Car. 145.)

* pas *not in L. and M. or Roh.* † *&c.* added in L. and M. and Roh.

(B) *Vid. ante* 110. *b.* 140. *b.* 376. *b.* 384. *b.* 385. *b.*

(C) *Here* "his" *seems printed by mistake instead of* "the." *See Mr. Ritso's Intr. p.* 114.

ment in fee with warrantie, and disseiseth the discontinuee, and dyeth seised, leaving assets to his issue. Some hold that in respect of this suspended warrantie and assets, the issue in taile shall not be remitted, but that the discontinuee shall recover against the issue in taile, and he take advantage of his warrantie, if any hee hath, and after in a *formedon* brought by the issue, the discontinuee shall barre him in respect of the warrantie and assets; and so every man's right saved (1).

[390. b.]

Sect. 745.

ALSO, if the uncle after such feoffment made with warrantie, or a release made by him with warranty, be attaint of felony, or outlawed of felony, such collaterall warrantie shall not bar nor grieve the issue in the taile, for this, that by the attainder of felony, the bloud is corrupted betweene them, &c.

Sect. 733. 706. "*OR a release made by him with warrantie.*" Note a warrantie grounded upon a release. Hereof you shall reade before in this Chapter.

8 E. 2. Voucher, 237. (Plowd. 397. a.) "*Be attaint of felony, or outlawed, &c.*" Note, according to *Littleton* here, there be two manner of attainders: the one is after appearance, and that in three manners; by confession, by battell, or by verdict: the other upon proces to bee outlawed, which is an attainder in law. But (as hath beene said) there is a great diversitie, as to the forfeiture of land, betweene an attainder of felony by outlawry upon an appeale, and upon an inditement: for in the case of an appeale the defendant shall forfeit no lands, but such as he had at the time of the outlawrie pronounced; but in case of inditement, such as hee had at the time of the felony committed. And the reason of this diversitie is evident; for that in the case of appeale there is no time alleaged in the writ when the felony was done, and therefore of necessitie it must relate in that case only to the judgement of the outlawry: but in the case of inditement there is a certain time alleaged, and therefore in that case it shall relate to the time alleaged in the inditement when the felony was committed. But in the case of the inditement there is also a diversitie to be observed: [*o*] for, as hath beene said, it shall relate to the time alleaged in the inditement for avoyding of estates, charges, and incumbrances, made by the felon after the felony committed; but for the meane profits of the land it shall relate only to the judgement, aswell in this case of outlawrie as in other cases. And where *Littleton* saith *(attaint of felony)* if a man be convicted of felony by verdict, and delivered to the ordinary to make purgation, [*p*] hee cannot be vouched, for that the time of his purgation (if any should be) is uncertaine, and the demandant cannot

(5 Rep. 109. Ant. 13. a. b.)

[*o*] 33 E. 3. Forfeiture, 30. 38 E. 3. 31. 3 E. 4. 25. 19 E. 4. 2. Pl. Com. 488. b.

[*p*] 8 E. 2. Voucher, 237. Vid. 38 E. 3. 29. b. Simile.

(1) *But clearly, if the warranty were never executed, as in the case of fine* sur render *with warranty and assets, there shall be a remitter.* Lord Hale's MSS. —[Note 344.]

cannot be delayed upon such an uncertaintie; but the tenant is not without remedie, for hee may have his *warrantia cartæ*.

"*Attaint.*" Of this word hath beene spoken in the second Booke in the Chapter of Villenage.

Upon severall attainders of felonies there lye three severall writs of escheate, viz. [*] first, when he hath judgement to be hanged: secondly, when he is outlawed: thirdly, when he abjureth the realme.

[*] Dame Hale's case in Pl. Com. fol. 262.

[q] The defendant in an appeale of death did wage battell, and was slaine in the field, yet judgement was given that he should be hanged; and the justices said, that it is altogether necessarie that such a judgement be given, for otherwise the lord could not have a writ of escheate. [r] And in eire it hath been seene, that a man hath beene attainted after his death by presentment, &c. (2) The difference betweene a man attainted and convicted is, that a man is said convict before hee hath judgement; as if a man bee convict by confession, verdict, or recreancie. And when he hath his judgement upon the verdict, confession, or ☞ recreancie; or upon the outlawrie, or abjuration, then is he said to be attaint. And thus is the law taken at this day, notwithstanding [s] some diversitie of opinions in our bookes.

[q] 8 E. 3. Judgement, 225.

[r] 15 E. 3. Petition, 2.

[391. a.]

[s] 40 E. 3. 12. 3 E. 3. Corone, 365. 8 E. 2. ibid. 293. 21 H. 7.

If a felon be convicted by verdict, confession, or recreancie, he doth forfeit his goods and chattels, &c. presently. [t] For where a reason hath beene yeelded in our bookes, that the praying of his clergie was a refusall of the judgement of the law, and a flight in law, and for that cause he forfeited his goods and chattels, that doth not hold; for if a man be convict of pettie treason, or murder, or any other crime, for which he cannot have his clergie, yet by the verie conviction he forfeiteth his goods and chattels before attainder. And [u] *Stanford* (speaking of a felon convict by verdict) saith, that he shall forfeit his goods which he had at the time of the verdict given, which is the conviction in that case; and by the statute of 1 *R.* 3. *cap.* 3. no sheriffe, bailiffe, &c. shall seise the goods of a felon before hee bee convicted of the felony; whereby it appeareth, that the goods may be seised as forfeit after conviction. And the [x] old statute is worthy of noting: *Provisum est in curiâ nostrâ coram justiciariis nostris, quòd de cetero nullus homo captus pro morte hominis vel aliâ felonià pro quâ debet imprisonari, disseisietur de terris et tenementis vel catallis suis quousque convictus fuerit.* So as by a conviction of a felon, his goods and chattels are forfeited; but by attainder, that is by judgement given, his lands and tenements are forfeited, and his bloud corrupted, and not before.

[t] Dame Hale's case, ubi sup. 8 H. 4. 2. (12 Rep. 121. 9 Rep. 129.)

[u] Staunf. Pl. Cor. fol. 192. Lib. 5. fol. 110. Foxleye's case. Vide 7 H. 4. 11. 1 R. 3. cap. 3. (3 Inst. 228.)

[x] Statute de catallis felonum vet. Magna Carta, fol. 66. 2. part.

If

(2) In Lambarde's Justice of Peace, ch. 10. it is said, that if a man be attainted of murder or felony, it is needless to arraign him of new of any other felony, because it is needless to condemn him who already is attainted, except in special cases, either for the advantage of the king, or the commodity of the subject. The author then proceeds to state several examples of both the exceptions. In 4 Rep. fol. 57. sir Edward Coke observes, that though a man be killed in rebellion, he shall not forfeit his lands nor goods; but if the chief justice (sovereign coroner of England, upon the view of the body, make record thereof, and return it into the king's bench, he shall forfeit lands and goods, as Fineux, chief-justice, did, temp. H. 7.—[Note 345.]

[y] Staunf. Pl. Cor. 139. 115.

[y] If the party upon his arraignment refuse to answer according to law, or say nothing, he shall not be adjudged to be hanged, but for his contempt, to *peine fort et dure*, which worketh no attainder for the felony, nor forfeiture of his lands, or corruption of bloud. But in case of high-treason, if the partie refuse to answer according to law, or say nothing, hee shall have such judgement by attainder, as if he had beene convicted by verdict or confession (1).

(3 Rep. 10. b.)

[*] Glanvil. lib. 14. ca. 15. Marlb. ca. 25. W. 1. c. 15. [a] 3 E. 4. 14. 18 E. 4. 10. 23 Ass. 49. 1 E. 3. 13. Staunf. Pl. Cor. 102. E. 8 H. 4. 2. [b] 22 Ass. 49. (3 Inst. 47. 4 Rep. 40, 41, 42. 44.)

"*Felony.*" [*] *Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum*, in which sense murder is said to be done *per feloniam*, and is so appropriated by law, as *felonicè* cannot be expressed by any other word. [a] And in antient times this word *(felonicè)* was of so large an extent as it included high-treason; and therefore in our antient bookes, by the pardon of all felonies, high-treason, or counterfeiting of the great seale, and of the king's coine, &c. was pardoned. [b] But afterwards it was resolved, that in the king's pardon or charter, this word *(felonie)* should only extend to common felonies, and that high-treason should not be comprehended under the same, and therefore ought to be specially named. And yet that a pardon of all felonies should extend to petite treason; wherefore by the law at this day under the word (felony) in commissions, &c. is included petite treason, murder, homicide, burning of houses, burglarie, robberie, rape, &c. chance-medly, *se defendendo*, and petite larceny. [c] For such of these crimes for which any shall have this judgement, to be hanged by the necke till he be dead, he shall forfeit all his lands in fee simple, and his goods and chattels: for felony by chance-medly, or *se defendendo*, or petite larceny, he shall forfeit his goods and chattels, and no lands of any estate of freehold or inheritance. And all felonies punishable according to the course of the common law, are either by the common law, or by statute. There is also a felony punishable by the civill law, because it is done upon the high sea, as pyracie, robberie, or murder, whereof the common law did take no notice, because it could not be tried by twelve men. If this pyracie be tried before the lord admirall in the court of the admiraltie, according to the civill law, and the delinquent there attainted, yet shall it worke no corruption of bloud, nor forfeiture of his lands; otherwise it is if he be attainted before commissioners by force of the statute of [d] 28 *H.* 8. By the expresse purview of that statute, about the end of the reigne of queene *Elizabeth*, certaine English pyrats, that had robbed on the sea merchants of *Venice*, in amitie with the queen, being not knowen, obtained a coronation pardon, whereby amongst other things, the king pardoned them all felonies. It was [e] resolved by all the judges of England upon conference and advisement, that this did not pardon the pyracie; for seeing it was no felonie whereof the common law tooke conusance, and the statute of 28 *H.* 8, did not alter the offence, but ordaine a triall and inflict punishment, therefore it ought to be pardoned specially, or by words which tant amount, and not by the generall name of felony; and according to this resolution the delinquents were attainted and executed.

[c] Staunf. Prær. 45. b. 16 E. 3. Coron. 116. & 3 E. 3. Coron. 302.

(5 Rep. 120. 9 Rep. 65.)

(Vide Ant. 74. 3 Inst. 112. 1 H. P. C. 354, 355. Vol. 2. 12. 368. Salk. 85. contra.)

[d] 28 H. 8. cap. 15. (3 Inst. 112.)

[e] Hill. 2 Jac. Regis.

Vide Mich. 7 & 8 Eliz. Dier, 241. 14 Eliz. Dier, 308. (4 Rep. 43.)

Pyrata

(1) On the *peine forte et dure*, see Mr. Justice Blackstone's Commentaries, vol. 4. c. 25.

Pyrata commeth of the word πυράτης, which signifieth a rover at sea. Attainder of heresie or *præmunire* worketh no corruption of bloud, nor heresie, forfeiture of lands; but in case of *præmunire*, forfeiture of lands in fee simple, but not of lands in taile, as formerly hath been said (2). [*f*] By some statutes it

[*f*] Statute de Magna moneta, tempore E. 1. 35 E. 1. de Carlisle. 20 E. 3. cap. 4. (Doct. & Stud. 115.)

is

(2) The offence of *PRÆMUNIRE*, is called from the words of the writ preparatory to its prosecution. It is described, by Mr. justice Blackstone, book 4. c. 8. to be, "introducing a foreign power into the land, and creating *imperium* "*in imperio*, by paying that obedience to papal process, which constitutionally "belonged to the king alone." To explain fully this offence, and the laws of recusancy mentioned in this place, by lord Coke, it is necessary, I. to state the laws, which were passed before the Reformation, to restrain what, in the law of England, was termed, papal provision, or the pope's presenting to English benefices,—and papal process, or the pope's interfering in the process of the ecclesiastical courts of England. This will lead, II. to a statement of the laws, which, since the division of the churches at the Reformation, have been passed against those, who, from their remaining in communion with the see of Rome, have received, in the laws of England, the appellation of papists, and persons professing the popish religion. III. After this, will be shown the effect and operation of the laws, which have been passed, in the present reign, to relieve persons of that description. IV. Some general observations will then be offered, to point out the particular laws, to which his majesty's English subjects in communion with the see of Rome are still exposed, but which do not, in any respect, affect English protestant dissenters; and some remarks on the operation of the toleration act, and the act for quieting corporations, so far as they affect Roman catholics,—on the right or obligation of Roman catholics to serve in the militia, and to serve on juries, and on their right to be admitted to factories, and to hold offices exerciseable abroad.

I. *WITH RESPECT TO PAPAL PROVISIONS AND PAPAL PROCESS*:—The 35 Edw. 1. stat. *de asportatis religiosorum*, is said to be the foundation of all the subsequent statutes of præmunire. It recites, that, the abbots, priors and governors, had, at their own pleasure, set diverse impositions upon the monasteries and houses in their subjection; to remedy which, it was enacted, that, in future, religious persons should send nothing to their superiors beyond the sea; and that no impositions whatsoever should be taxed by priors aliens. By the 25 Edw. 3. stat. 6. 27 Edw. 3. stat. 1, c. 1. and 38 Edw. 3. stat. 2. c. 1, 2, 3, 4. it was enacted, that the court of Rome should present or collate to no bishopric or living in England; and that, if any one disturbed any patron in the presentation to a living, by virtue of papal provision, such provisor should pay fine and ransom to the king, at his will, and be imprisoned till he renounced such provision. The same punishment was inflicted on such as should cite the king or any of his subjects to answer in the court of Rome. By the 3 Richard 2. ch. 3. and 7 Richard 2. ch. 12. it was enacted, that no alien should be capable of letting his benefice to farm; and that no alien should be capable of being presented to any ecclesiastical preferment, under the penalty of the statute of provisors. By the stat. 12 Richard 2. c. 15. all liegemen of the king, accepting of a living, by any foreign provision, were put out of the king's protection, and the benefice made void. To which, the 13 Richard 2. stat. 2. c. 2. adds banishment and forfeiture of lands and goods; and by c. 3. of the same statute, it was enacted, that any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, should be imprisoned, forfeit his goods and lands, and moreover suffer pain of life

is said, *sur forfeiture de corps et de avoire*, or *sub forisfactura omnium quæ in potestate suâ obtinet*, or to be at the king's will, body,

life and member. In the writ for the execution of these statutes, the words *præmunire facias*, being used, to command a citation of the party, have denominated, in common speech, not only the writ, but the offence itself of maintaining the papal power, by the name of præmunire. The 16 Richard 2. c. 5. which is the statute generally referred to by all subsequent statutes, is usually called the statute of præmunire. It enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things, which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection; their lands and goods forfeited to the king's use; and they shall be attached by their bodies, to answer to the king and his council, or process of *præmunire facias* shall be made out against them, as in other cases of provisors. By the 2 Henry 4. c. 3. all persons, who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, were also subjected to the penalties of præmunire. This is said to be the last antient statute concerning this offence, till the separation of the church of England from the church of Rome, in the reign of Henry 8. The penalties of præmunire have been since applied to other offences, some of which bear more, some less, and some no relation to this original offence. Its punishment is to be gathered from the foregoing statutes, and is thus shortly summed up by sir Edward Coke, "That, from the conviction, the defendant shall be out "of the king's protection, and his lands and tenements, goods and chattels, "forfeited to the king; and that his body shall remain in prison at the king's "pleasure, ant. 129. b. or, as other authorities have it, during his life." Such is the offence of præmunire, and such its punishment by the law of England. Whenever it is said, that a person, by any act, incurs the penalties of a præmunire, it is meant to express, that he thereby incurs the penalties, which, by the different statutes we have mentioned, are inflicted for the offences therein described. This account of the offence of præmunire, and its punishment, is taken, or rather copied, from sir William Blackstone's 4th Commentary, chap. 8.

II. *WITH RESPECT TO THE LAWS, WHICH, SINCE THE SEPARATION OF THE CHURCH OF ENGLAND FROM THE CHURCH OF ROME, AT THE TIME OF THE REFORMATION, HAVE BEEN PASSED AGAINST THOSE, WHO REMAINED IN COMMUNION WITH THE SEE OF ROME,*—the laws against them may be reduced under five heads:—II. 1st. The first, are *those, which subject them to penalties and punishments for exercising their religious worship*;—under which head, may be ranked, the laws respecting their places of education, and the ministers of their church. By these laws, if any English priest of the church of Rome, born in the dominions of the crown of England, came to England from beyond the seas, or tarried in England three days, without conforming to the church, he was guilty of high treason; and those incurred the guilt of high treason, who were reconciled to the see of Rome, or procured others to be reconciled to it. By these laws also, papists were totally disabled from giving their children any education in their own religion: if they educated their children, at home, for maintaining the school-master, if he did not repair to church, or was not allowed by the bishop of the diocese, they were liable to forfeit 10 *l.* a month, and the school-master was liable to forfeit forty shillings a day; if they sent their children for education to any school of their persuasion abroad, they were liable to forfeit 100 *l.* and the children so sent were disabled from inheriting, purchasing or enjoying any lands, profits, goods, debts, duties, legacies, or sums of money.—Saying mass was punishable by a forfeiture of 200 marks: hearing it, by a forfeiture of 100. See 1 Eliz. ch. 2. 23 Eliz. ch. 1.

27 Eliz.

body, lands, and goods, and the like, these are not extended to the losse of life or member, but to imprisonment, lands and goods.

27 Eliz. ch. 2. 29 Eliz. ch. 6. 35 Eliz. ch. 2. 2 Jac. 1. ch. 4. 3 Jac. 1. ch. 4, 5. 7 Jac. 1. ch. 6. 3 Car. 1. ch. 2. 25 Car. 2. ch. 2. 7 & 8 W. 3. ch. 27. 1 Geo. 1. ch. 13.—II. 2d. Under the second head were those laws which punished the English communicants with the church of Rome *for not conforming to the established church.* These are generally called the statutes of recusancy. It should be observed, that, absence from church, alone, and unaccompanied by any other act, constitutes recusancy, in the true sense of that word. Till the statute of the 35 Eliz. chap. 2. all nonconformists were considered as recusants, and were all equally subject to the penalties of recusancy: that statute was the first penal statute made against popish recusants, by that name, and as distinguished from other recusants. From that statute arose the distinction between protestant and popish recusants; the former were subject to such statutes of recusancy, as preceded that of the 35th of queen Elizabeth, and to some statutes against recusancy, made subsequently to that time; but they were relieved from them all by the act of toleration, in the 1st year of king William's reign. From the 35th Eliz. c. 2. arose also the distinction between papists and persons professing the popish religion, and popish recusants, and popish recusants convict. Notwithstanding the frequent mention in the statutes, of papists and persons professing the popish religion, neither the statutes themselves, nor the cases adjudged upon them, present a clear notion of the acts or circumstances that, in the eye of the law, constituted a *papist, or a person professing the popish religion.* When a person of that description absented himself from church, he filled the legal description of a *popish recusant:* When he was convicted in a court of law of absenting himself from church, he was termed in the law a *popish recusant convict:* to this must be added the *constructive recusancy* hereinafter mentioned to be incurred by a refusal to take the oath of supremacy.—With respect to the statutes against recusancy; by these statutes, popish recusants convict were punishable by the censures of the church, and by a fine of 20*l.* for every month during which they absented themselves from church; they were disabled from holding offices or employments; from keeping arms in their houses; from maintaining actions or suits at law or in equity; from being executors or guardians; from presenting to advowsons; from practising in the law or physic; and from holding offices, civil or military: they were subject to the penalties attending excommunication, were not permitted to travel five miles from home, unless by license, upon pain of forfeiting all their goods; and might not come to court under pain of 100*l.* A married woman, when convicted of recusancy, was liable to forfeit two thirds of her dower or jointure. She could not be executrix or administratrix to her husband, nor have any part of his goods; and, during her marriage, she might be kept in prison, unless her husband redeemed her at the rate of 10*l.* a month, or the third part of his lands; popish recusants convict were, within three months after conviction, either to submit and renounce their religious opinions, or, if required, by four justices, to abjure the realm: and if they did not depart, or if they returned without license, they were guilty of felony, and were to suffer death as felons.—(See the statutes referred to under the former head.)—II. 3. *As to the penalties or disabilities attending the refusal of Roman catholics to take the oath of supremacy, the declaration against transubstantiation, and the declaration against popery:* It must be premised, that, Roman catholics make no objection to take the *oath of allegiance,* 1 G. 1. st. 2. c. 13. or *the oath of abjuration,* 6 Geo. 3. c. 53.—*With respect to the oath of supremacy,*—by the 1st Elizabeth, ch. 1. the persons therein mentioned were made compellable to take the oath of supremacy contained in that act: by the 3d of king James the 1st. ch. 4. another oath was prescribed to be taken, commonly called the oath of allegiance and obedience: these

[g] W. 2. cap. 34. Rot. Parl. 25 E. 1.
1 E. 2. de frang. prisonam. 14 E. 3. cap. 10. Staunf. Pl. Coron. 30, 31. 3 E. 3. Coron. 153. Brooke, tit. Coron. 203. 9 E. 4. 26. (11 Rep. 2. 23 H. 8. 25 H. 8. 38 H. 6. by 18 Eliz. 25 Ed. 3.) (11 Rep. 291. 4 Inst. 123.) 4 Mod. 128. (Show. 353.)

goods. [g] But if an act of parliament saith, *Eeit judgement de vie et member*, or *subeat judicium vitæ vel membrorum*, in that case

oaths were abrogated by the 1st of king William and queen Mary, sess. 1. ch. 8. and a new oath of allegiance and a new oath of supremacy were introduced, and required to be taken in their stead: the statute made in the 2d session of the 1st year of king George the 1st. ch. 13. contains an oath of supremacy, in the same words as the oath of supremacy required to be taken by the 1st of king William and queen Mary. By that oath, persons are made to swear, that "no foreign prince, person, prelate, state or potentate, hath, or ought to "have, any jurisdiction, power, supremacy, pre-eminence or authority, eccle-"siastical or spiritual, within the realm." It was required to be taken by the persons therein named; it might be tendered to any person, by any two justices of the peace; and persons refusing the oath so tendered were adjudged to be popish recusants convict, and to forfeit and to be proceeded against as such. This was the constructive recusancy referred to above. It was not the offence itself of recusancy, which, as we have already observed, consisted merely in the party's absenting himself from church: it was the offence of not taking the oaths of supremacy, and the other oaths prescribed by the act of 1 Geo. 1. the refusal of which, was, by that statute, placed on the same footing as a legal conviction on the statutes of recusancy, and subjected the party refusing to the penalties of those statutes. This was the most severe of all the laws against papists. The punishment of recusancy was penal in the extreme; and the persons objecting to the oath in question, might be subjected to all the penalties of recusancy, merely by their refusing the oath, when tendered to them. It added to the penal nature of these laws, that the oath in question might be tendered, at the mere will of two justices of peace, without any previous information or complaint before a magistrate, or any other person. Thus, by refusing to take the oath of supremacy, when tendered to them, they became liable to all the penalties of recusancy; and the same refusal, by 7 & 8 Wm. 3. ch. 24. and 1 Geo. 1. st. 2. ch. 13. restrained them from practising the law as advocates, barristers, solicitors, attornies, notaries, or proctors, and from voting at elections.—II. 4. *With respect to receiving the sacrament of our Lord's Supper:* By the 13 Charles 2. (commonly called the corporation act), no person can be legally elected to any office, relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the Lord's Supper, according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy, at the same time that he takes the oath of office, or, in default of either of these requisites, such election shall be void.—II. 5. *As to the declaration against transubstantiation:* By the 25 Car. 2. ch. 2. (commonly called the test act), all officers, civil and military, are directed to take the oath, and make the declaration against transubstantiation, in the court of King's Bench or Chancery, the next term, or at the next quarter sessions, or (by subsequent statutes), within six months after their admission, and also, within the same time, to receive the sacrament of the Lord's Supper, according to the usage of the church of England, in some public church, immediately after divine service and sermon; and to deliver into court, a certificate thereof, signed by the minister and churchwarden; and also to prove the same, by two credible witnesses, upon forfeiture of 500*l.* and disability to hold the office.—II. 6. *With respect to the declaration against popery:* The act passed in the 30th year of Car. 2, st. 2. ch. 1. contains the declaration, and prescribes it to be made, by members of either house of parliament, before they take their seats. By it,

[391. b.] case judgement of death shall be given, as in case of felonie, *viz.* that he be ~~x~~ hanged by the necke till he be dead, and consequently his bloud is corrupted (as our author here saith), and shall forfeit as in case of felonie.

There

it, they declare their disbelief of the doctrine of transubstantiation, and their belief that the invocation of saints, and the sacrifice of the mass, are idolatrous.—II. 7. *With respect to the laws affecting their landed property:* How this was affected by the law against recusancy has been already mentioned. By the 11 & 12 W. 3. ch. 4. it was enacted, that a person educated in the popish religion, or professing the same, who did not, in six months after the age of eighteen, take the oaths of allegiance and supremacy, and subscribe the declaration of the 30th Cha. 2. should, in respect of himself only, and not of his heirs or posterity, be disabled to inherit, or take lands by descent, devise, or limitation, in possession, reversion, or remainder: and that during his life, till he took the oaths, and subscribed the declaration against popery, his next of kin, who was a protestant, should enjoy the lands, without accounting for the profits; and should be incapable of purchasing; and that all estates, terms, interests, or profits out of lands, made, done, or suffered to his use, or in trust for him, should be void. By 3 Jac. 1. ch. 5. 1 W. & M. c. 26. 12 Ann. st. 2. c. 14. and 11 Geo. 2. c. 17. papists, or persons professing the popish religion, were disabled from presenting to advowsons, and other ecclesiastical benefices, and to hospitals and other charitable establishments. By annual acts of the legislature, papists, being of the age of 18 years, and not having taken the oaths of allegiance and supremacy, were subjected to the burthen of the double land-tax. By a statute made in the second session of the first year of Geo. 1st. ch. 55. they were required to register their names and estates in the manner, and under the penalties, therein mentioned; and by the 3d Geo. 1. c. 18. continued by several subsequent statutes, an obligation of enrolling their deeds and wills was imposed on them. Such were the principal penal laws against Roman catholics, *immensus aliarum super alias acervatarum legum cumulus* (Liv. 3. 34.) at the time of the accession of the house of Brunswick.

III. *WITH RESPECT TO THE LAWS WHICH WERE PASSED IN HIS LATE MAJESTY'S REIGN FOR THE RELIEF OF ROMAN CATHOLICS.*—III. 1. The only act of any importance, which, till the reign of his late majesty, was passed for their relief, (and that operated but in an indirect manner for *their* benefit,) was *the act of the 3d Geo. 1. c. 18.* On the construction of the 11 & 12 Wm. 3. ch. 4. it had been held, that as it expressly confined the disability of papists to take by descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity: but that the disability respected only the pernancy of the profits, or beneficial property of the lands, of which it deprived them during their non-conformity. Whether that part of the statute, which relates to their taking by purchase, should receive the same construction, was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the act we are speaking of was passed: it enacts, that no sale for a full and valuable consideration, by the owner or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made, to a protestant purchaser, shall be impeached, by reason of any disability of such papist, or of any person under whom he claims, in consequence of the 11 & 12 W. 3. unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser, or before the contract for sale, shall have entered his claim at the quarter sessions, and *bonâ fide* pursued his remedy. The act then recites the clauses

[h] Bract. lib. 4. fol. 248. 48 E. 3. 3.

[h] There is also a court of the constable and marshall, who have conusance of contracts of deeds of armes, and of warre out

13 R. 2. cap. 2. Rot. Parl. 21 R. 2. nu. 19. 1 H. 4. c. 14. 13 H. 4. 4 & 5. 37 H. 6. 21. Rot. Parl. 8 R. 2. nu. 31. Fortesc. cap. 32. Rot. Parl. 2 H. 4. 74. 11 H. 4. 24. 30 H. 6. 6. Staunf. Pl. Cor. 65. Stat. de Assignat. 4 E. 1. Br. Cor. 196. Rot. Parl. 2 H. 6. nu. 9. Rot. Parl. 5 H. 4. nu. 39. Rot. Vasc. 9 H. 4. nu. 14. 8 H. 6. nu. 38. 21 E. 4. 17. b. Catesby. 10 H. 7. per Vavasor. 18 E. 2. Quar. Imp. 175. 6 E. 3. 41. Pasc. 14 E. 3. in Scac. le Count. de Kent's case, p. 39 E. 3. cor. Reg. Rot. 49. le Count. de Lanc. case. Rot. Parl. 28 E. 3. nu. 8. Mortimer's case. Rot. Parl. 28 E. 3. nu. 13. le Countes de Arundel's case.

of

of the 11 & 12 W. 3. disabling papists from purchasing; and afterwards enacts, that these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the statute was in full force for the benefit of a protestant purchaser; and that the proviso operated only to declare, that papists themselves should not derive any benefit from the act, in any purchases they should attempt to make, under the foregoing clauses. This was considered the better opinion, and on the authority of it many purchases of considerable consequence were made. See also 6 Geo. 2. ch. 5. Thus the laws against Roman catholics stood at the time of the accession of his late majesty. During his reign two acts, each of great importance, were passed in their favour.—III. 2. *By that of the 18th of his reign*, ch. 60. it was enacted, that so much of the 11 & 12 W. 3. as related to the prosecution of popish priests and jesuits, and imprisoning for life papists, who keep schools, or to disable papists from taking by descent or purchase, should be repealed, as to all papists or persons professing the popish religion, claiming under titles not thentofore litigated, who within six months after the act passed, or their coming of age, should take the oath thereby prescribed. Upon this act, a case was decided in chancery, on the 18th of December 1783, under the name of Bunting *v.* Williamson. In that case, a bill had been filed, claiming an estate given to a person professing the popish religion, by will, alleging the incapacity occasioned by the act of the 11th and 12th of king William. The testator died many years before, and after his death a suit had been instituted by another person, who claimed as his heir at law, and that suit was depending at the time when the statute of the 18th Geo. 3. c. 60. was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill, some time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the testator's will; and, that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act, and concluded with an averment, that the title had not been before litigated by the plaintiff, or any person under whom he claimed. The plaintiff, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the lords commissioners, Ashhurst and Hotham, were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation; and the plea was allowed.—III. 3. *With respect to the act of the 31st of his late majesty, cap.* 32. That statute may be divided into six parts: The 1st contains the declaration and oath afterwards referred to in the body of the act, and prescribes the method of taking it: The 2d, is a repeal of the statutes of recusancy, in favour of persons taking the oath thereby prescribed: The 3d, is a toleration, under certain regulations, of the religious worship of the Roman catholics, qualifying in like manner, and of their schools for education: The 4th enacts, that, in future no one shall be

summoned

of the realme and also of things touching warre within the realme, which may not be determined or discussed by the common law, and also all appeales of offences done out of the realme, and they proceed according to the civil law: but these things more properly pertaine to another kind of treatise, and therefore I shall speake

summoned to take the oath of supremacy prescribed by the 1st W. and Mary, sect. 1. c. 8. and 1st Geo. 1. sect. 2. cap. 13. or the declaration against transubstantiation required by the 25th Ch. 2.—that the 1st W. and Mary, sect. 1. ch. 9. for removing papists or reputed papists from the cities of London and Westminster shall not extend to Roman catholics taking the appointed oath;—and that no peer of Great Britain or Ireland, taking that oath, shall be liable to be prosecuted for coming into his majesty's presence, or into the court or house where his majesty resides, under the 30th Car. 2. stat. 2. ch. 1: The 5th part of the act, repeals the laws requiring the deeds and wills of Roman catholics to be registered or enrolled: The 6th dispenses persons acting as a counsellor at law, barrister, attorney, clerk, or notary, from taking the oath of supremacy, or the declaration against transubstantiation.

The declaration prescribed by the act is contained in these words: "I, *A. B.* "do hereby declare that I do profess the Roman catholic religion." Till the passing of this act, the persons, who were the subjects of it, were known in the English law by the name of papists, reputed papists, or persons professing the popish religion. By requiring this declaration from them, the law has imposed on them, and probably will in future recognize them by, the name of Roman catholics. Still, when the ancient penal laws against them are to be mentioned with professional accuracy, it may sometimes be found necessary, (and this necessity has been experienced in the course of this annotation,) to mention them under the name applied to them by the abrogated law.

It is observable, that, as the bill was originally framed, and as it stood, when, having passed the commons, it was brought into the house of lords, the first clause in it directed, that the oath contained in the act of the 18th year of the reign of his late majesty should be taken no longer; but that, the oath appointed by the bill, should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the 18th of his late majesty. This clause was altered in the house of lords to the form in which it now stands. It does not express, that the oath contained in it shall entitle the persons taking it to the benefits of the act of the 18th of his late majesty: it only expresses, that, it shall be lawful for catholics to take the oath of the 31st of his late majesty, at the places and times, and in manner therein mentioned. Thus, it was very uncertain, whether persons taking only the oath prescribed by the 31st of his late majesty would be entitled to the benefit of the act of the 18th of his late majesty, so as to be relieved from the penalties and disabilities from which the persons taking the oath prescribed by that act were released by it. The chief of these penalties and disabilities were those inflicted by the 11th and 12th W. 3. which disabled them from taking by descent or purchase. From these penalties and disabilities they were exposed to much real grievance. It seemed, therefore, advisable for every Roman catholic, who wished to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st and the oath prescribed by the 18th of his late majesty. But this uncertainty was remedied by the act of the 43d of his late majesty, chapter 30. which provided that the oath and declaration, contained in the 31st of his late majesty, should give the benefit of the oath contained in the 18th of his late majesty, and thus made the taking of both oaths unnecessary.—III. 4. *As to the double land-tax*, that, being imposed by the annual land-tax act, a repeal of it could not be effected by any prospective act. It is repealed by omitting from the annual land-tax act, the clause imposing it. The land-tax act of the year 1794 contains

speake no more thereof in this place, but only for the satisfaction of the studious reader, to quote some authorities of law touching the jurisdiction of that court, that he may have some taste thereof.

In

also a clause, which, after reciting, that, lands formerly liable to a double assessment, were then possessed by protestants, enacted, that where any place, in consequence of that circumstance, should be rated at more than four shillings in the pound, the commissioners might, on complaint, examine into the truth of the complaint, and certify the same to the barons of the exchequer, before the 29th of the following September, who were to discharge the excess by the following November.

It remains to add, that by the 57th Geo. 3. c. 92. for regulating the administration of oaths, in certain cases, to officers in his majesty's land and sea forces, after reciting " that, by certain acts passed in the reigns of his majesty's royal predecessors, it was provided, that officers in his majesty's royal navy, and officers in his majesty's army, should take certain oaths, and make and subscribe certain declarations, before they should enter upon the offices, or places of trust, to which they might be appointed; and that doubts had been entertained, whether the provisions of the said acts were still in force in that behalf; and that the practice of taking the said oaths, and making and subscribing the said declaration, by officers, previous to their receiving commissions in his majesty's army, had been long disused; and that it was expedient to remove such doubts, and to assimilate the practice of the two services; it was enacted, that after the passing of the act it should be lawful for his majesty's principal secretaries of state, the lord high admiral of the united kingdom of Great Britain and Ireland, or the commissioners for executing the office of lord high admiral, the commander in chief of his majesty's land forces, the master general of the ordnance, and the secretary at war for the time being, respectively, or any other persons thereunto lawfully authorized, to deliver commissions or warrants to any officer or officers in his majesty's royal navy, land forces, or royal marines, without previously requiring such officer or officers to take the said oaths, or make and subscribe the said declaration."

IV. *WITH RESPECT TO THE COMPARATIVE SITUATION OF THE PROTESTANT DISSENTERS AND THE ROMAN CATHOLICS, AS TO THE PENALTIES AND DISABILITIES TO WHICH THEY ARE SUBJECTED BY LAW, IN CONSEQUENCE OF THEIR RELIGIOUS PRINCIPLES*;—it has been already shown, how the law stands on the corporation and test acts.—IV. 1. The statute of the 1st William and Mary, (commonly called the *toleration act*), exempts all dissenters, except papists and such as deny the Trinity, from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court, or at the sessions. But there is nothing in this act, which dispenses, either with the test act or the corporation act, so far as they impose the obligation of receiving the sacrament of our Lord's Supper on persons serving in offices, or elected to serve in corporations; and there is nothing in the act of the 31st of his late majesty, which dispenses catholics from that obligation, in case of their serving in offices, or being admitted into corporations. With respect therefore to the *test act and corporation act*, these are the only acts which subject the protestant dissenters to any penalties or disabilities; to these the Roman catholics are subject equally with the protestant dissenters: there is, therefore, no penalty or disability that affects the protestant dissenters, to which Roman catholics are not subject equally, but there still remain several penalties and disabilities to which Roman catholics are subject, that do not in any respect affect the protestant dissenters. The principal of these are, that by the 30 Car. 2. Roman catholics, in consequence of refusing the oath of supremacy,

In the same manner it is, if a man be attainted of high-treason, the warrantie is also defeated.

" *The blood is corrupted betweene them, &c.*" [*] Aptly is a man said to be attainted, *attinctus*, for that by his attainder of

[*] Staunf. lib. 3. Pl. Cor. 195. b. 27 E. 3. 77.

13 H. 4. 8. Vid. Lit. lib. 1. In the Chap. of Dower. (3 Inst. 240.)

treason

premacy, or the declaration against popery, are disabled from sitting in either house of parliament; by the 7th and 8th of Wm. 3. ch. 27. those who refuse to take the oath of supremacy are disabled from voting at elections; and by several statutes, Roman catholics are disabled from presenting to advowsons. This is peculiar to them, Quakers and even Jews having the full enjoyment of the right of presentation. It is to be observed, that no person can be presented to a living who has not been ordained according to the rites of the church of England. Previously to his ordination he is examined on his faith and morals by his bishop; he takes the oath of allegiance and supremacy, and subscribes the 39 articles; and previously to his admission, he subscribes the three articles respecting the supremacy, the Common Prayer, and the 39 articles; and he makes the declaration of conformity. By the *act of uniformity*, 13 *and* 14 *Car.* 2. c. 4. he is bound to use the Common Prayer and other rites and ceremonies of the church of England.—IV. 2. Upon the *corporation act*, it seems to have been the prevailing opinion, that the election of a person, who did not comply with the requisites of that statute, and all the acts done by him, were void. To prevent the consequences of this, the statute of the *5th Geo.* 1. was passed, intituled, " *An act for quieting and establishing corporations*," by which it was enacted, that, no incapacity, disability, forfeiture, or penalty should be incurred, unless the person were removed, or a prosecution against him commenced, within six months after his election. It was also enacted, that the acts of the person omitting to qualify should not be avoided. Upon this act, an important question arose, whether dissenters, being ineligible to public offices, could be obliged to fine for not serving them. This point came to a direct issue, in the case of Allen Evans, esq. It was finally heard, in the house of lords, on the 4th February 1767, when it was determined in favour of the dissenters. For the relief of those who omit to qualify for serving in offices, or for being elected into corporations, an act of parliament is passed annually, by which, after mentioning the corporation and test acts, and some others, which do not relate to the point under consideration, it is enacted, that persons who, before the passing of the act, have omitted to qualify in the manner prescribed by those acts, and who shall properly qualify before the 25th of the ensuing December, shall be indemnified against all penalties, forfeitures, incapacities, and disabilities, and their elections, and the acts done by them, are declared to be good. There is nothing in this act which excludes catholics from the benefits of it.—IV. 3. *By the militia act*, it is enacted, that no person shall be enrolled in the militia, unless he takes the following oath: " I, *A. B.* do sincerely promise and swear, " that I will be faithful and bear true allegiance to his majesty King George, " his heirs and successors. And I do swear, that I am a protestant, and that " I will faithfully serve in the militia, within the kingdom of Great Britain, for " the defence of the same, during the time for which I am enrolled, unless I " shall be sooner discharged." It seems to deserve consideration, whether, under the existing laws, catholics may not claim to be exempted from serving in the militia, upon the same ground, as, in the cited case of Allen Evans, the protestant dissenters claimed, and were allowed to be exempted from the obligation of serving in offices, viz. That by law they are ineligible, and consequently are not compellable to fine for not serving.—IV. 4. *With respect to the right of Roman catholics to serve on juries*, there does not appear to have ever been any law which subjected them to any such disability, except the statutes generally

treason or felonie his bloud is so stained and corrupted, as, first, his children cannot be heires to him, nor to any other ancestor, and therefore the warrantie cannot binde; for thereby heires only are to be bound.

Secondly,

called the statutes of recusancy. The statute of the 13 Car. 2. commonly called the corporation act, relates to those offices only, which concern the government of cities and corporations. The statute of the 25th Car. 2. commonly called the test act, (since explained by the 9th of Geo. 2.), regards only civil and military offices. Neither of these acts, therefore, abridges catholics of the right in question. With respect to the statutes of recusancy, among other penalties to which these subjected popish recusants convict, one was, that they became liable, upon conviction, to all the consequences of excommunication, and it has been generally understood, that persons excommunicated are disabled from serving on juries. We have more than once observed, that, in the proper sense of the word, not attending the service of the church of England, alone, and unaccompanied by any other circumstance, constitutes recusancy. Of this non-attendance at church, every Roman catholic, necessarily, was guilty, and he might be convicted of it by a very summary process. But till his guilt was established in a judicial manner, the law did not take notice of it; and therefore, unless an actual conviction had taken place, he was not subject to any of the penalties consequent to recusancy. But it has been mentioned, that there was, besides this, a species of constructive recusancy, to which every catholic was liable, by refusing to make the declaration against popery, and to take the oath of supremacy. This had a more direct operation on their ability to serve as jurors. Now as well the declaration against popery, as the oath of supremacy, might be tendered to a catholic in the very court where he presented himself to serve as a juryman. A refusal amounted to conviction; on conviction he became subject to all the penalties of excommunication, and one of those penalties, (at least, by the opinion of the old lawyers), was a disqualification to serve on juries. Thus, it was always in the power of the court, and perhaps of any two magistrates present, to convict, on the spot, a catholic of recusancy, and thereby render, problematical at least, his capacity to serve as juror. Such appears to have been the situation of catholics, in this respect, previously to the act of the 31st of his late majesty. Since the passing of that act, they stand, as to the serving upon juries, in the same predicament as the rest of his majesty's subjects. By that statute, they are freed from the penalties incident either to positive or to constructive recusancy. It is observable, that the 8th section exempts the ministers of Roman catholic congregations from serving on juries; it seems to follow, that, without this clause, they would have been liable to serve, and consequently, that all persons out of the reach of this clause are in the eye of the law subject to the duty, and have, of course, the capacity of serving.—IV. 5. With respect to the *right of Roman catholic merchants to be summoned to the meetings of British factories abroad*, it appears that they have, and always had, a right to be admitted to them. The meetings of the factory in Portugal were regulated by the 8 Geo. 1. c. 17. but that act contains nothing which discriminates Roman catholic from other merchants. All the foreign factories are, therefore, in this respect, in the same predicament. Now, if Roman catholics are excluded from factories by any act, it must be either by the corporation act, or by the test act. But with respect to the corporation act, it is to be observed, that a factory is not a corporation, in the legal acceptance of that word; and even if it were, it would not fall within the operation of the corporation act, as that is confined to cities, corporations, &c. within England and Wales, and the town of Berwick upon Tweed. The operation of the test act is more extensive than the operation of the corporation act; it expressly mentions his majesty's navy, the islands of Jersey and Guernsey, and persons who should be admitted into

any

Secondly, if he were noble or gentle before, he and all his children and posteritie are by this attainder made base and ignoble, in respect of any nobilitie or gentrie which they had by their birth.

Thirdly,

any service or employment in his majesty's or his royal highness's household' within the districts therein mentioned. A factory abroad does not, therefore, fall within the operation of that act. Besides, the privilege of being admitted to the meetings of a foreign factory is not an office, or even a right, of that description which falls within either of those acts. There is reason to suppose, that, in point of fact, Roman catholics have not generally been summoned to attend meetings of factories since the year 1720. But no person, who is acquainted with the code of penal law against Roman catholics, particularly the statutes against recusancy, will be surprised at this circumstance, or draw any argument from it against the right contended for, as the operation and tendency of those statutes were such, as induced Roman catholics to forbear asserting some of their most valuable rights, even such as were of the most indisputable nature, rather than obtrude themselves into public notice. If they wish to enforce their right of admission, or their right of voting, they should give notice of their desire to be summoned, and offer to attend at the meetings; then, if admittance should be refused them, or their votes rejected, the proceedings will be illegal: and not only they, but all other persons subject to the proceedings of the factory, will be justified in refusing to pay their contribution-money, or to comply, in any other manner, with the resolutions or orders of the meeting. Besides, a refusal to admit them, to the meetings, is certainly a personal injury; and wherever a personal injury is done to an English subject abroad, the remedy must be sought in the jurisdiction where the cause of action happens, if it is subject to the king's jurisdiction; if the king has no jurisdiction in that place, this necessarily gives the king's courts a jurisdiction, within which it is brought, by the known fiction of laying the venue in some county of England. This is explained by lord Mansfield, with his usual clearness and ability, in his argument in Mostyn *v.* Fabrigas, Cowp. 170. See also Phillybrown *v.* Ryland, in 1 Stra. 624. 2 Lord Raymond, 1388. and 8 Mod. 354. It is to be observed, that, in the great case of Ashby *v.* White, where an action was brought against an officer for refusing a man's vote at an election, the only ground for questioning the action was, that, there, the house of commons had special jurisdiction. See 6 Mod. 45. 1 Salk. 19. 1 Bro. Parl. Ca. 45. This, it is evident, does not apply to the case now under discussion. What has been said of the right of Roman catholics to insist on being admitted to the meetings of English factories, abroad, and of their means of redress, in case of refusal, applies, with proper qualifications, to every other case, of a similar description, where their right of admission, acting, or voting, is refused them.—IV. 6. *With respect to the right of Roman catholics to hold offices exerciseable abroad:*—It has been observed, that the corporation act extends only to cities, &c. within England and Wales, and the town of Berwick upon Tweed; that the test act mentions only those places, and his majesty's navy, and Jersey and Guernsey; and that the 31st of his late majesty repeals the statutes of recusancy, and relieves from the penalties imposed on Roman catholics refusing the oath of supremacy, and the declaration against popery: it seems therefore to follow, that no law is now in force which disables Roman catholics from holding offices wholly exerciseable abroad, or from serving or holding offices under the East India company, in their foreign possessions. Besides, upon the construction of these laws, and of every other law supposed to affect the Roman catholics, there seems reason to think, that, the same spirit, which induced the legislature to repeal so large a proportion of the penal code against them, will influence the judicature in their construction of the unrepealed part of that code, or of any other statute unfavourable to them, in its apparent tendency or operation, so far as it may be open to a doubtful interpretation.—[Note 346.]

Thirdly, this corruption of bloud is so high, that regularly it cannot be absolutely salved but by authoritie of parliament: all which is implied in the same (&c.) (1).

Sect. 746.

ALSO, if tenant in taile bee disseised, and after make a release to the disseisor with warrantie in fee, and after the tenant in taile is attaint, or outlawed of felony, and hath issue and dieth; in this case the issue in taile may enter upon the disseisor. And the cause is for this, that nothing maketh discontinuance in this case but the warrantie, and warrantie may not descend to the issue in taile, for this, that the bloud is corrupt between him that made the warrantie and the issue in taile (Et la cause est pur ceo, que * rien fait discontinuance en cest case forsque le garrantie, et garrantie ne poit discender al issue en taile, pur ceo, que le sanke est corrupt perenter celuy que fist le garrantie et issue en taile).

Sect. 747.

FOR the warrantie alwayes abideth at the common law, and the common law is such, that when a man is attaint or outlawed of felony, which outlawrie is an attainder in law, that the bloud betweene him and his sonne, and all others which shall bee said his heires, is corrupt, so that nothing by discent may descend to any that may bee said his heire by the common law (Car le garranty touts foits demurt a le common ley, et la common ley est, † ove quant home est attaint ou utlage de felonie, quel utlagarie est un attainder en ley, que le sanke perenter luy et son fits, et touts auters queux serra dits ses heires, est corrupt, issint que ↓ riens per discent poit discender a ascun que poit estre dit son heire per le common ley). *And the wife of such a man that is so attaint, shal never be endowed of the tenements of her husband so attainted. And the cause is, for that men should more eschew to commit felonies* ‡. *But the issue in taile as to the tenements tailed is not in such case barred, because hee is inheritable by force of the statute, and not by the course of the common law* (Mes l'issue en tayle quant a les tenements tailes n'est pas en tiel cas § barre, pur ceo que ‖ est inherite per force de le statute, et nemy per le course de common ley): *and therefore such attainder of his father or of his ancestour in the taile* ¶, *shall not put him out of his right by force of the taile, &c.*

"*THE issue in taile may enter.*" And the reason is, for that by the attainder of the father, it is now in judgement of law but a release without warrantie; for albeit the warrantie at the

(Plowd. 252. a. 3 Inst. 241.)

* nul *added in L. and M. and Roh.*
† tiel *added in L. and M. and Roh.*
↓ nul *added in L. and M. and Roh.*
‡ *&c.* added in L. and M. and Roh.
§ barre *not in L. and M. or Roh.*
‖ il *added in L. and M. and Roh.*
¶ *&c.* added in L. and M. and Roh.

(1) The policy and justice of our laws of forfeiture in this respect are most ably discussed in Mr. Yorke's celebrated Considerations on the Law of Forfeiture.

the time of the release was effectuall, yet it worketh no discontinuance unlesse it descendeth upon the issue in taile; so as if it be defeated, extinct, or determined in the life of the tenant in taile, then no discontinuance is wrough: and so it is if tenant in taile hath issue, and releaseth to the disseisor with warrantie, and after is attainted of felonie, and after obtaineth his pardon and dieth, the issue in taile may enter; [*] for the pardon doth not restore the bloud as to the warrantie, nor maketh the issue in that case inheritable to the warrantie. But if the issue in taile in that case had been attainted of felonie in the life of his father, and obtained his charter of pardon, and then his father had died, the issue cannot enter into the ☞ land in respect of the corruption of bloud upon the attainder of himselfe. [h] And it is a generall rule, that having respect to all those whose bloud was corrupted at the time of the attainder, the pardon doth not remove the corruption of bloud neither upward nor downward. As if there be grandfather, father, and sonne, and the grandfather and father have divers other sonnes, if the father bee attainted of felonie and pardoned, yet doth the bloud remaine corrupted not onely above him and about him, but also to all his children borne at the time of his attainder. But in the case of *Littleton*, if tenant in taile at the time of his attainder had no issue, and after the obtaining of his pardon had issue, that issue should have beene bound by the warrantie; for by the pardon he was as a new creature, *tanquam filius terræ*, whose bloud upwards remaine corrupted; but for the issue had after the pardon, hee is inheritable to his father; and if his father had issue before the pardon, and hath issue also after and dieth, nothing can descend to the youngest, for that the eldest is living and disabled. But if the eldest sonne had died in the life of the father without issue, then the youngest should inherit.

[392. a.]

[*] 27 E. 3. 77. 1 E. 3. 4. 6 E. 3. 55. 9 H. 6. 9. 31 E. 1. Discont. 17. 46 E. 3. Petit. 20. 26 Ass. 2. 49 Ass. 4. 29 Ass. 11. 13 H. 4. 8. 13 H. 7. 17. Pl. Com. in Walsingham's case. 3 E. 2. Discent. Br. 64. Staunf. Pl. Cor. 195, 196. See in the Chapter of Tenant by the Curtesie, touching this matter. (Plowd. 557. b. Ante 8. a.)

[h] Bract. lib. 3. fol. 132, 133. 276. & lib. 5. 374. Britt. fol. 215. b. Flet. lib. 1. cap. 28. (1 Cro. 435. Ant. 8. a.)

"*The warrantie abideth at the common law.*" The collaterall warrantie is not restrained by the statute of *donis conditionalibus*, but a lineall warrantie is restrained by the statute, unlesse there be assets; as formerly at large hath beene said.

Vid. Sect. 711, 712.

"*And the wife of such a man that is so attaint, shal never be endowed, &c.*" It is to be observed, that the judgement against a man for felonie is, that he be hanged by the neck untill he be dead; but *implicativè*, (as hath beene said) he is punished ☞ first in his wife, that she shall lose her dower. Secondly, in his children, that they shall become base and ignoble; as hath beene said. Thirdly, that he shall lose his posteritie, for his bloud is stained and corrupted, that they cannot inherit unto him or any other ancestor. Fourthly, that he shall forfeit all his lands and tenements which he hath in fee, and which he hath in taile, for terme of his life. And fifthly, all his goods and chattels. And thus severe it was at the common law; and the reason hereof was, that men should feare to commit felonies: *Ut pœna ad paucos, metus ad omnes perveniat.* And it is truly said, *Etsi meliores sunt quos ducit amor, tamen plures sunt quos corrigit timor.* And so it is *a fortiori* in case of high treason. But some acts of parliament have altered the common law in some of those points: first, by the statute of *donis conditionalibus*, lands intailed were not forfeited neither for felonie nor

[392. b.]

(8 Rep. 171. Ante, 31. a. 37. a. 41. a.) (Lamb. 275, 276.) (3 Inst. 17. 47. Ant. 41. a.)

nor for treason, but for the life of tenant in taile. This act was made by king *Edward* the first, who (as our bookes [*i*] speake) was the most sage king that ever was: [*k*] and the cause wherefore this statute was made, was to preserve the inheritance in the bloud of them to whom the gift was made, notwithstanding any attainder of felonie or treason. And this act in historie is called *gentilitium municipale*; for that by this act the families of many noblemen and gentlemen were continued and preserved to their posterities. And this law continued in force from the thirteenth yeare of king *Edward* the First, untill the [*l*] twentie-sixth yeare of king *Henrie* the Eighth, when by act of parliament estates in taile are forfeited by attainder of high-treason. But as to felonies (whereof our author here speaketh) the statute of *donis conditionalibus* doth yet remain in force, so as for attainder of felonie, lands or tenements entailed are not forfeited, but only (as hath beene said) during the life of tenant in taile, but the inheritance is preserved to the issues.

[*i*] 5 E. 3. 14. 9 E. 3. 22.
[*k*] 7 H. 4. 32. 19 H. 6. 71. See Lit. lib. 1. cap. Dow. Sect. 55.
(7 Rep. 11.)
[*l*] 26 H. 8. cap. 13. 33 H. 8. c. 20. 5 E. 6. ca. 11.

[*m*] The wife of a man attainted of high treason or petit treason shall not be received to demand dower, unlesse it be in certaine cases specially provided for. But the wife of a person attainted of misprision of treason, murther, or felonie, is dowable since our author wrote, [*n*] by the statute in that case made and provided, which is more favourable to the woman than the common law was.

[*m*] Staunf. Pl. Cor. 195.
[*n*] 1 E. 6. c. 13. 5 E. 6. c. 11. 5 El. ca. 1. & 11. 18 El. ca. 1.

[*o*] If a seigniorie be granted with warrantie, and the tenancie escheat, the seigniorie whereunto the warrantie was annexed is extinct, and consequently the warrantie defeated, and it shall not extend to the land: *et sic in similibus.*

12 H. 4. 3. Vide Sect. 55. (8 Rep. 171.) [*o*] 6 H. 4. 1. 45 E. 3. Vouch. 72. Pl. Com. 292. 16 E. 3. Age, 46. 18 H. 3. Vouch. 281.

If a collaterall ancestor release with warrantie, and enter into religion, now the warrantie doth binde; but if after he be deraigned, now it is defeated.

23 E. 3. Garr. 77. See in the Chapter of Villenage, Sect. 200.

Sect. 748.

ALSO, if tenant in taile infeoffe his uncle, which infeoffes another in fee with warrantie, if after the feoffee by his deed release to his uncle all manner of warrantie, or all manner of covenants realls, or all manner of demands, by such release the warrantie is extinct. And if the warrantie in this case bee pleaded against the heire in taile that bringeth his writ of formedon, *to barre the heire of his action, if the heire have and plead the said release, &c.* (si l'heire avoit * le dit releas et ceo pledast) *he shall defeat the plee in barre, &c. And many other cases and matters there be, whereby a man may defeat a warrantie, &c.*

(1 Rep. 112. b.) *LITTLETON* having spoken in what cases warranties may bee defeated and extinguished by matter in law, now he sheweth how a warrantie may be discharged or defeated by a (5 Rep. 71. a.) matter in deed: and hereupon he putteth an example of a release in three severall manners.

Vide Lib. 8. fol. 153, 154. Altham's case.
First, by a release of all warranties.
Secondly, by a release of all covenants reall.

46 E. 3. 2. 45 E. 3. 23. Vid. before in the Chapter of Releases, Sect. 508.

And

* le dit releas et ceo pledast—et pledast le dit releas, &c. *in L. and M.*

And thirdly, by a release of all demands. (Ant. 291. b.)

[q] If a man make a gift in taile with warrantie, this warrantie is also intailed, and therefore a release made by tenant in taile of the warrantie, shall not barre the issue, no more than his release shall bar the issue to bring an attaint upon a false verdict, or a writ of error upon an erroneous judgement given against the father, nor his gift can barre the issue of the deed that create the estate taile, nor of any other deed necessary for defence of the title. [393. a.] [q] 14 Ass. pl. 2. 3 Eliz. Dyer, 188. 9 E. 4. 52. b. (Plowd. 2. b. Manxel's case. Ant. 319. b. 20. a. 6 Rep. 7)

"*After the feoffee release.*" *Littleton* here putteth his case where one is bound to warrant: put the case [r] then that two make a feoffement in fee, and warrant the land to the feoffee and his heires, and the feoffee release to one of the feoffors the warrantie, yet he shall vouche the other for the moytie. And so it is if one infeoffe two with warrantie, and the one release the warrantie, yet the other shall vouch for his moytie. (5 Rep. 70.) [r] 45 E. 3. 23. (3 Rep. 14.)

"*If the heire have the said release, &c.*" Here it appeareth, that the release being made to the uncle being his ancestor, the deed doth after the decease of the uncle belong to him, and therefore he cannot plead it, unlesse he sheweth it forth.

"*And many other cases and matters there be, whereby a man may defeat a warrantie, &c.*" As namely by a defeasance, as other things executorie may. Also a warrantie may lose his force by taking benefit of the same. In a *præcipe* the tenant voucheth, and at the *sequatur sub suo periculo*, the tenant and the vouchee make default, whereupon the demandant hath judgement against the tenant. And afterwards the demandant brings a *scire facias* against the tenant to have execution; in this case the tenant may have a *warrantia cartæ*. And if in that case a stranger had brought a *præcipe* against the tenant, hee might have vouched againe, for by the judgement given against the tenant, the warranty lost not his force; but if the tenant had judgement to recover in value against the vouchee, hee should never vouche againe by reason of that warrantie, because hee had taken advantage of the warrantie. And it is to be observed, that upon the proces of *summoneas ad warrantizandum*, if the sherife returne the vouchee summoned, and he make default, the tenant shall have a *capias ad valentiam*; but if he returne that the vouchee had nothing, then after the *sicut alias et pluries* a *sequatur sub suo periculo* shall issue; and there if the vouchee make default, the tenant shall not have judgement to recover in value, for he was never summoned; and it appeareth of record that he hath nothing, but in the *capias ad valentiam* it appeareth that he had assets, and he had been summoned before; but in some speciall cases there shall be two recoveries in value upon one warrantie. As if a disseisor give lands to the husband and wife, and to the heires of the husband, the husband alieneth in fee with warrantie and dieth, the wife bringeth a *cui in vitâ*, the tenant vouche and recovereth in value, if after the death of the wife the disseisee bring a *præcipe* against the alienee, he shall vouch and recover in value againe. (Vaugh. 387.) 43 E. 3. 17. Pl. Com. in Browning's case. (Hob. 27.)

[s] So it is where the wife bringeth a writ of dower against the alienee, he shall recover in value, and after her death he shall recover in value againe, upon the same warrantie. [s] 45 E. 3. Voucher, 72.

In

(Hob. 28.) In the same manner it is if a man be seised of a rent by a defeasible title, and releaseth to the tenant of the land all his right in the land, and warranteth the land to him and his heires, if he be impleaded for the rent, he shall vouch and recover in value for the rent; and if after he be impleaded for the land, he shall vouche and recover in value againe for the land: but in these and the like cases, the reason is in respect of the severall estates recovered, but for one and the same estate he shall never recover but once in (Aut. 367. b.) value; and though the land recovered in value be evicted, yet shall he never take benefit of that warrantie after. And as warranties may be defeated in the whole, so they may be defeated as [t] 7 H. 6. 43. 13 Ass. 8. 13 E. 3. Garr. 24, 25. 37. 22 H. 6. 51. 8 H. 7. 6. to part of the benefit that may be taken of the same. [t] As he that hath a warrantie may make a defeasance not to take any benefit by way of voucher: in the like manner that he shall take no advantage by way of *warrantia cartæ*, or by way of rebutter.

☞ Sect. 749. [393. b.]

AND it is to be understood, that in the same manner as the collaterall warrantie may bee defeated by matter in deed or in law; in the same manner may a lineall warrantie be defeated, &c. For if the heire in taile bringeth a writ of* formedon, *and a lineall warrantie of his ancestor inheritable by force of the taile, bee pleaded against him, with this, that assets descended to him of fee simple,† which he hath by the same ancestor that made the warrantie; if the heire that is demandant may adnull and defeat the warrantie, that sufficeth him; for the discent of other tenements of fee simple maketh nothing to barre the heire without the warrantie, &c.*

HERE *Littleton* sheweth, that in the same manner that a collaterall warrantie may be defeated by matter in deed, or by matter in law, so may to all intents and purposes a lineall warrantie, whereof hee putteth an example of a lineall warrantie and assets.

Temps E. 1. Gar. 89. 34 E. 1. ibid. 88. 11 E. 2. ibid. 83. 4 E. 3. 24. 5 E. 3. 14. 40 E. 3. 9. 14 H. 4. 39. 24 H. 8. Taile, Br. 33. 4 Mar. Dier, 139. Lib. 10. fol. 37, 38. in Mary Portington's case. (8 Rep. 51.) (Ant. 374. a. b.) "*And a lineall warrantie, &c. with this that assets descended to him, &c.*" Here it appeareth by *Littleton*, that a lineall warrantie and assets is a good plea in a *formedon* in the discender; wherein it is to be knowen, that if tenant in taile alieneth with warrantie, and leave assets to descend; if the issue in taile doth alien the assets, and die, the issue of that issue shall recover the land, because the lineall warrantie descendeth only to him without assets; for neither the pleading of the warrantie without the assets, nor the assets without the warrantie is any barre in the *formedon* in the discender. But if the issue to whom the warrantie and assets descended had brought a *formedon*, and by judgement had beene barred by reason of the warrantie and assets; in that case, albeit he alieneth the assets, yet the estate taile is barred for ever; (10 Rep. 38. Plowd. 440. a. b. Hob. 40. Moor. 55.) for

* *&c.* not in L. and M. or Roh.

† *which hee hath*, not in L. and M. or Roh.

for a barre in a *formedon* in the discender, which is a writ of the highest nature that an issue in taile can have, is a good barre in any other *formedon* in the discender, brought afterwards upon the same gift.

NOW I have made to thee, my sonne, three bookes.

"*TO thee, my sonne, &c.*" Here our author calleth (as many times in these bookes he hath done) not only his sonne *Richard*, but everie studient of the law to be accounted his son, and worthily; for that seeing our author had the honour to be in his time the father of the law, and all good studients in the law justly account themselves the sonnes of the law (for otherwise they are not worthy of the profession), our author, as a carefull and provident father, as it hath manifestly appeared, gave excellent instructions in these his bookes, both to his owne sonne, and to his adopted sonnes, to make them from age to age the more apt and able to understand the arguments and reasons of the law.

[394. a.]

☞ *Tabula.*

The first Book is of estates which men have in lands and tenements (Le primer Livre est de Estates que homes ount en terres * ou tenements): *that is to say,*

Of tenant in fee simple	†† Cap. 1
Of Tenant in fee taile	2
Of Tenant in † fee taile after possibilitie of issue extinct	3
Of Tenant by the curtesie of England	4
Of Tenant in dower	5
Of Tenant for terme of life	6
Of Tenant for terme of years	7
Of Tenant at will by the common law	8
Of Tenant at will by custome of the mannor	9
‡ *Of Tenant by the verge*	10

The Second Book §.

Of Homage	Cap. 1
Of Fealtie	2
Of Escuage	3

Of

* ou—et, *L. and M. and Roh.*

†† The numbers of the Chapters as above are not enumerated either in L. and M. or Roh.

† *fee—the*, L. and M. and Roh.

‡ *Of tenant by the verge*, not in L. and M. or Roh.

§ *is* added in L. and M. and Roh.

Of Knights Service 4
Of Socage 5
Of Frankalmoigne 6
Of Homage Auncestrel 7
Of Grand Serjeantie 8
Of Petit Serjeantie 9
Of Tenure in Burgage 10
Of Tenure in Villenage 11
Of † Rents 12

And these two little Books I have made to thee for the better understanding of certaine Chapters of the antient Book of Tenures.

"*BETTER understanding, &c.*" And these Institutes have I collected and published to the end that these three Bookes of our author may be the better understood of the studious reader.

Fitz. in his Preface to his N. B.

"*Antient Booke of Tenures.*" This booke may well be accounted antient, for it was composed in the raigne of king *Edward* the Third, (as justice *Fitzherbert* saith) by a grave and discreet man.

The Third Book ‡.

Of Parceners ‖ *according to the course of the common law* Cap. 1 [394. b.]
☞ † *Of Parceners according to the custome* 2
Of Joyntenants 3
Of ¶ *Tenants in common* 4
Of Estates of lands and tenements upon condition 5
Of Discents which toll entries 6
Of Continual Claime 7
Of Releases 8
Of Confirmations 9
Of Attornements 10
Of Discontinuances 11
Of Remitters 12
Of Warranties. § 13

Epilogus.

† *Rents*—iii. *manner of rents*, scilicet, *rent service, rent charge, and rent secke*, L. and M. and Roh.

‡ *is* added in L. and M. and Roh.

‖ *according to the course of the common law*, not in L. and M. and Roh.

† *Of parceners according to the custome*, not in L. and M. or Roh.

¶ *Tenants—tenements*, L. and M. and Roh.

§ *scilicet, warrantie lineall, warrantie collaterall, and warrantie that commence by disseisin*, added in L. and M. and Roh.

* *Epilogus.*

AND know, my son, that I would not have thee beleeve, that all which I have said in these bookes is law, for I will not presume to take this upon me. But of those things that are not law, inquire and learne of my wise masters learned in the law. Notwithstanding albeit that certaine things which are moved and specified in the sayd bookes, are not altogether law, yet such things shall make thee more apt, and able to understand and apprehend the arguments and the reasons of the law, &c. For by the arguments and reasons in the law, a man more sooner shall come to the certaintie and knowledge of the law.

Lex plus laudatur quando ratione probatur.

"*I WILL not presume, &c.*" Here observe the great modestie and mildnesse of our author, which is worthy of imitation; for *Nulla virtus, nulla scientia locum suum et dignitatem conservare potest sine modestiâ.* And herein our author followed the example of *Moses*, who was a judge, and the first writer of law; for he was *mitissimus omnium hominum qui fuit in terris*, as the holy historie testifieth of him.

"*The arguments and reasons in the law, &c.*" *Ratio est anima legis*; for then are we said to know the law, when we apprehend the reason of the law; that is, when we bring the reason of the law so to our owne reason, that wee perfectly understand it as our owne; and then, and never before, we have such an excellent and inseparable propertie and ownership therein, as wee can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other cases. But if by your studie and industrie you make not the reason [395. a.] of the law your owne, it is not possible for you ☞ long to retaine it in your memorie. And wel doth our author couple arguments and reasons together, *Quia argumenta ignota et obscura ad lucem rationis proferunt et reddunt splendida:* and therefore *argumentari et ratiocinari* are many times taken for one. And that our author may not speake any thing without authority, (which in these Institutes we have as we take it manifested) his opinion herein also agreeth with that of the learned and reverend chiefe justice of the court of common pleas, sir *Richard Hankford*, [y] *Home ne scavera de quel mettal un campane est, si ne soit bien bate, ne le ley bien conus sans disputation.* And another saith, [*] *Jeo aye dispute cest matter pur la apprender la ley.* So as our author hath made a most excellent epilogue or conclusion with a grave advice and counsell, together with the reason thereof, which all good students are to know and follow; and with *scire* and *sequi* I will conclude our author's epilogue.

[y] 11 H. 4. 37.

[*] 41 E. 3. 22. Kirton. Vid. Sect. 377.

"*Lex plus laudatur quando ratione probatur.*"

This is the fourth time that our author hath cited verses. When Vide Sect. 384. 443. 550.

* Not in L. and M. or Roh.

When I had finished this worke of the first part of the Institutes, and looked backe and considered the multitude of the conclusions in law, the manifold diversities between cases and points of learning; the varietie almost infinite of authorities, antient, constant and moderne, and withall their amiable and admirable consent in so many successions of ages; the many changes and alterations of the common law, and additions to the same, even since our author wrote, by many acts of parliament, and that the like worke of Institutes had not been attempted by any of our profession whom I might imitate, I thought it safe for me to follow the grave and prudent example of our worthy author, not to take upon me, or presume that the reader should thinke that all that I have said herein to be law: yet this I may safely affirme, that there is nothing herein but may either open some windowes of the law, to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withall to inable him to inquire and learne of the sages, what the law, together with the true reason thereof, in these cases is: or lastly, upon consideration had of our old bookes, lawes, and records, (which are full of venerable dignitie and antiquitie) to finde out where any alteration hath beene, upon what ground the law hath beene since changed; knowing for certaine, that the law is unknowen to him that knoweth not the reason thereof, and that the knowne certaintie of the law is the safetie of all. I had once intended, for the ease of our student, to have made a Table to these Institutes; but when I considered that Tables and Abridgements are most profitable to them that make them, I have left that worke to every studious reader. And for a farewell to our jurisprudent, I wish unto him the gladsome light of jurisprudence, the lovelinesse of temperance, the stabilitie of fortitude, and the soliditie of justice.

FINIS.

For the Index, see the beginning of the First Volume.

NOTE.

THE Editor begs leave to suggest, that, in the Table of the Degrees of Parentage and Consanguinity, after fol. 18. b. the words, *abpatruus magnus*, should be translated, *the great grandfather's uncle, on the father's side*; and that, the words, *propatruus magnus*, should be translated, *the father's great uncle*, or *the grandfather's uncle, on the father's side*; and so, as to the rest.

He also begs leave to recommend to the Reader's consideration, the Table of Consanguinity, and the Table of Descents, in Mr. Watkins' Essay towards the further Elucidation of the Law of Descents,—and the whole of that excellent work.

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